
WAKE FOREST JOURNAL OF BUSINESS
AND INTELLECTUAL PROPERTY LAW

VOLUME 16

WINTER 2015

NUMBER 2

**AN ECONOMIC ANALYSIS OF MARKET FAILURES IN
COPYRIGHT LAW: IATROGENESIS AND THE FAIR USE
DOCTRINE**

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“Call it what you will, incentives are what get people to work harder.”¹

- Nikita Khrushchev

I. INTRODUCTION

Money makes the world go around—or so they say.² Even Mr. Khrushchev, the famed Communist propagandist, was keen to the fact that incentives drive behavior.³ Despite incongruous ideologies, incentives likewise play a fundamental role in America’s economy and legal system.⁴ In particular, intellectual property law, and for the purposes of this article, copyright law, owes its origin to the Founders’ recognition that certain protections are necessary to stimulate the market’s production of creative works.⁵ Whether or not explicitly articulated, economic considerations have existed for hundreds of years in copyright law,⁶ and continue to permeate modern law today.⁷

Article 1, section 8, clause 8 of the Constitution (the “IP

¹ See *Nikita Khrushchev Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/n/nikitakhr126015.html> (last visited Nov. 8, 2015).

² See *Cabaret*, THEBROADWAYMUSICALS.COM, <http://www.thebroadwaymusicals.com/lyrics/cabaret/moneysong.htm> (last visited Nov. 8, 2015).

³ See *supra* note 1 and accompanying text. See also *Nikita Khrushchev (1894-1971)*, PBS, http://www.pbs.org/redfiles/bios/all_bio_nikita_khrushchev.htm (last visited Nov. 8, 2015) (“Certainly the most colorful Soviet leader, Khrushchev is best remembered for his dramatic, oftentimes boorish gestures and ‘harebrained schemes’ designed to attain maximum propaganda effect . . . [and] his enthusiastic belief that Communism would triumph over capitalism . . .”).

⁴ See generally Ron Harris, *The Encounters of Economic History and Legal History*, 21 LAW & HIST. REV. 297 (2003).

⁵ See U.S. CONST. art. I, § 8, cl. 8. For a more detailed history of the text, purpose, and scope of the intellectual property clause, see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 INTELL. PROP. L. J. 1 (1994).

⁶ See U.S. CONST. art. I, § 8, cl. 8.

⁷ See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325 (1989) (“Intellectual property is a natural field for economic analysis of law, and copyright is an important form of intellectual property.”). See also Simone A. Rose, *The Supreme Court and Patents: Moving Towards a Postmodern Vision of “Progress”?*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1197, 1199 (2013) (“Although many Framers had concerns about the anticompetitive effect of monopolies, in the end, they were persuaded by the Madisonian view that federal intellectual property protection was needed to promote both economic and overall societal ‘progress.’”).

Clause”) empowers Congress “to Promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸ Copyright law’s overarching purpose is thus to stimulate the production of creative works by incentivizing authors’ creative expression.⁹ To that end, copyright holders are granted a limited monopoly in the rights of their works and, absent certain exceptions,¹⁰ may exclusively control the reproduction, distribution, performance, and display of their works.¹¹ Over the years, the duration of this “limited monopoly” has progressively expanded, eventually necessitating congressional reexamination of the underlying purposes of copyright law.¹²

First codified in the 1976 Copyright Act (“1976 Act”), the “fair use” doctrine has been Congress’ most ambitious attempt to abate the monopolistic market failures of copyright law.¹³ In certain circumstances, it allows copyright infringers to assert an affirmative defense to justify what would otherwise constitute unlawful

⁸ U.S. CONST. art. I, § 8, cl. 8.

⁹ See generally Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

¹⁰ See 17 U.S.C. § 107 (2012).

¹¹ See 17 U.S.C. § 106 (2012). These rights include:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) 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;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) 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
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

¹² The Copyright Act of 1790 allowed a maximum twenty-eight years (one fourteen-year term, with the option for one fourteen-year renewal). See Act of May 31, 1790, ch. 15, 1 Stat. 124. It has since been amended in 1802, 1831, 1870, and 1909, with each subsequent version lengthening the copyright period. See Act of Apr. 2, 1802, ch. 36, 2 Stat. 171 (repealed 1831); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870); Act of July 8, 1870, ch. 230, 16 Stat. 198 (repealed 1909); H.R. REP. NO. 60-2222, at 7 (1909). The Current Copyright Act, passed in 1976, extends copyright protection for the life of the author plus seventy years. See H.R. REP. NO. 94-1476, at 66 (1976). For more on monopolies and copyright law, see *infra* note 97 and accompanying text.

¹³ See Frank P. Darr, *Testing an Economic Theory of Copyright: Historical Materials and Fair Use*, 32 B.C. L. REV. 1027, 1033 (1991).

appropriation of copyrighted material.¹⁴ As a market failure solution, economic analysis supports the contention that fair use successfully mitigates certain monopolistic inefficiencies of copyright law.¹⁵ Unfortunately, however, inconsistent application of the doctrine has yielded significant *ex ante* uncertainty for litigants¹⁶ and generated a market failure of its own: namely—chilled expression.¹⁷ *Ex ante* uncertainty engenders endemic risk aversion¹⁸ and results in the underutilization of the doctrine by individuals.¹⁹ As a result, copyright law’s goal of promoting social progress²⁰ through the dissemination of knowledge is undermined.²¹

For these reasons, this article likens the market failures created by the fair use doctrine to iatrogenic pathologies in medicine. Derived from the Greek word *iatros* (meaning “physician” or “healer”), the term “iatrogenesis” means “brought forth by the healer.”²² In the medical context, it describes a secondary problem or pathology caused by the treatment of a primary illness.²³ Iatrogenesis can encompass a wide array of issues from a mundane scar, to a minor adverse drug reaction,

¹⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (“Since fair use is an affirmative defense”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (“The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.”).

¹⁵ See Darr, *supra* note 13, at 1033–34.

¹⁶ Some courts, despite express statutory language to the contrary, have failed to find fair use in the paradigmatic examples listed in section 107. See, e.g., *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (research); *L.A. News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992) (news reporting); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (scholarship), *cert. denied*, 484 U.S. 890 (1987); *Hi-Tech Video Prods. v. Capital Cities/ABC, Inc.*, 804 F. Supp. 950 (W.D. Mich. 1992) (news reporting), *rev'd on other grounds*, 58 F.3d 1093 (6th Cir. 1995).

¹⁷ See Michael Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1119 (2007).

¹⁸ See generally Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271 (2008).

¹⁹ See *id.* at 1275.

²⁰ See U.S. CONST. art. I, § 8, cl. 8.

²¹ See Cotter, *supra* note 18, at 1273.

²² The term “iatrogenic” is one borrowed from the medical field. In medicine, an iatrogenic problem or pathology is one that is caused by the treatment of a primary disease or ailment. See MERRIAM-WEBSTER’S DICTIONARY (defining an “iatrogenic” process as one: “induced inadvertently by a physician or surgeon or by medical treatment or diagnostic procedures.”). Iatrogenesis in the medical context can be the result anything from an adverse drug reaction (e.g. a rash) to a fatal surgery as a result of a doctor’s negligence. Likewise, in the context of copyright law, fair use—a market failure solution—creates market failures of its own.

²³ See *id.*

to fatal malpractice.²⁴ By analogy, copyright law's "primary illness" is market failure brought on by the increasingly monopolistic overprotection of authors' rights. As a "treatment," fair use successfully mitigates certain inefficiencies of copyright law. However, in the process, it unintentionally gives rise to the very problem it seeks to ameliorate—market failure.

This article aims to briefly explore the economic underpinnings of copyright law's largest exception—the fair use doctrine—and explain how courts' inconsistent application of the doctrine contravenes its purpose as a corrective tool by propagating iatrogenic market failure. Part II provides a historical backdrop and a brief synopsis of copyright law and the fair use doctrine.²⁵ Part III²⁶ provides an overview of copyright law's relevant economic principles and delves more specifically into the various economic theories used to explain the fair use doctrine.²⁷ The article concludes by noting the incompleteness of economic analysis as a tool for predicting fair use outcomes and proposes a three-step solution—the combined goal of which is to diminish litigants' *ex ante* uncertainty and curtail the doctrine's recent trend of chilling creative expression.²⁸ Step one involves amending Section 107 to include a statutory safe-harbor for certain types of use. Step two requires, at the very least, clarification of the current balancing test for cases that fall outside the scope of step one. Finally, step three advocates for the implementation of a mandatory appeals circuit that would eliminate much of the current uncertainty derived from the doctrine's competing interpretations in various circuits.

²⁴ See SANDRA CROUCH, CAROL CHAPELHOW & MICHAEL CROUCH, *MEDICINES MANAGEMENT: A NURSING PERSPECTIVE* 102–03 (Routledge 2013).

²⁵ See *infra* Part II.

²⁶ Part III highlights the economic principles relevant to analysis of the fair use doctrine in relation to this article, but by no means accomplishes an all-encompassing economic analysis of copyright law. For more on copyright law in general, see Landes & Posner, *supra* note 7. For a more encompassing analysis of the economics of the fair use doctrine, see 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).

²⁷ See *infra* Part III.

²⁸ See *infra* Part IV.

II. BACKGROUND

A. Historical Background

Copyright law finds its genesis in England's 1710 Statute of Anne.²⁹ In the United States, copyright protection can be traced back to the Constitution,³⁰ and creative expression has been statutorily protected, in various forms, since 1790.³¹ The Founders first articulated the underlying public benefit rationale of copyright law—"[t]o promote the Progress of Science and useful Arts."³² Since that time, copyright statutes have sought to further the general goal of establishing incentives for authors to produce creative works.³³ Undergirding the constitutional grant of copyright protection is an economic rationale³⁴ premised on the notion that "[p]rogress" (i.e. the free flow of information to society) is best promoted when authors have strong incentives to produce creative works.³⁵ The IP Clause incentivizes creativity by "securing for limited Times to Authors . . . the exclusive Right to their respective Writings."³⁶ Put simply, copyright law protects authors' rights, thereby incentivizing the production of creative works, which ultimately benefits the public at large.³⁷

²⁹ See Act for the Encouragement of Learning (Statute of Anne), 8 ANN., C. 19 (1710) (Gr. Brit.).

³⁰ See U.S. CONST. art. I, § 8, cl. 8.

³¹ See The Copyright Act of 1790, ch. 15, 1 Stat. 124.

³² U.S. CONST. art. I, § 8, cl. 8.

³³ See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that . . . [it] is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"). See also Gordon, *supra* note 26, at 1602. For a more detailed overview of the history of copyright statutes, see BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 25 (The Lawbook Exchange, Ltd., 2008); 2 ALAN LATMAN, COPYRIGHT FOR THE EIGHTIES 1–10 (Michie Co. 1981).

³⁴ See Steven B. Thau, *Copyright, Privacy, and Fair Use*, 24 HOFSTRA L. REV. 179, 180 (1995) ("When writing about copyright law, scholars and judges frequently focus on its ability to create economic incentives for creativity.").

³⁵ *Id.*

³⁶ U.S. CONST. art. I, § 8, cl. 8.

³⁷ See 17 U.S.C. § 106 (2012); Thau, *supra* note 34, at 197. For a more detailed discussion, see *infra* note 112 and accompanying text; *infra* Part III.

B. Copyright Protection

Copyright law protects “original works of authorship”³⁸ the moment they are “fixed in any tangible medium of expression.”³⁹ The *sine qua non* of protectable expression is originality.⁴⁰ The bar is low, requiring only independent creation⁴¹ and a “minimal creative spark,”⁴² irrespective of how crude, obvious, or humble it may be.⁴³ The Supreme Court has held that originality, not effort, is afforded protection.⁴⁴ In *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁴⁵ the Supreme Court clarified that copyright protection would not extend to factual compilations lacking originality, irrespective of the effort expended in creation.⁴⁶ Feist thus reaffirmed that facts are not copyrightable⁴⁷ and cemented creativity as originality’s bedrock prerequisite.⁴⁸ Once a work falls within the realm of protectable expression, the 1976 Act requires registration⁴⁹ with the Copyright

³⁸ 17 U.S.C. § 102(a) (2012).

³⁹ *Id.* The term “author” has been defined as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). The term “writings” is not limited to printed material and has been broadly construed to include other intellectually creative products, such as recordings or artistic performances. *See, e.g.*, 17 U.S.C. § 101 (2012) (“A work is ‘fixed’ in any tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”); *Goldstein v. California*, 412 U.S. 546 (1973).

⁴⁰ *See Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“Originality remains the *sine qua non* of copyright.”). *See also Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 534 U.S. 1126 (2002); *Murray Hill Publ’ns, Inc. v. ABC Commc’ns., Inc.*, 264 F.3d 622 (6th Cir. 2001); *RT Computer Graphics, Inc. v. U.S.*, 44 Fed. Cl. 747 (1999); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454 (11th Cir. 1994).

⁴¹ *Feist*, 499 U.S. at 346 (“[O]riginality requires independent creation plus a modicum of creativity”); *id.* at 353 (“[T]he only defense to infringement was independent creation”).

⁴² *Id.* at 363.

⁴³ *Id.* at 345 (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT § 2.01(C)(1)) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be.”) (internal quotation marks omitted).

⁴⁴ *Feist*, 499 U.S. at 364.

⁴⁵ 499 U.S. 340.

⁴⁶ *See id.* at 347.

⁴⁷ *Id.* *See also* Tracy A. Meade, Note, *Ex-Post Feist: Applications of a Landmark Copyright Decision*, 2 J. INTELL. PROP. L. 245 (1994).

⁴⁸ *Feist*, 499 U.S. at 345.

⁴⁹ Registration becomes exceedingly important in copyright lawsuits because an
continued . . .

Office in order to judicially enforce copyright protection for U.S. works.⁵⁰

C. Copyright Infringement

Section 501(b)⁵¹ of the 1976 Act entitles legal or beneficial copyright holders to sue for infringement when any one of Section 106's statutorily granted rights is violated.⁵² The plaintiff in an infringement suit bears the burden of proof, and at the outset, must prove ownership of a valid copyright.⁵³ A prima facie infringement case requires proof that the alleged infringing material is substantially similar to the copyrighted work, and was not independently created by the second author.⁵⁴ A strict liability offense,⁵⁵ which lacks an intent requirement,⁵⁶ infringement may occur either directly⁵⁷ or indirectly.⁵⁸ Copying in fair uses cases, however, is often a forgone conclusion because defendants may only raise the affirmative defense after

infringement claim cannot go forward unless the plaintiff can establish ownership of a valid copyright. *See* Robert R. Jones Assocs., Inc. v. Nino Homes, 858 F.2d 274, 276–77 (6th Cir. 1988) (“In order to establish copyright infringement, the owner of a valid copyright must prove that the defendant or the person who composed the allegedly-infringing work copied the copyrighted material.”). *See also* Ferguson v. Nat'l Broad. Co., 584 F.2d 111, 113 (5th Cir. 1978).

⁵⁰ *See* 17 U.S.C. § 101 (2012) (providing that the term “registration” means “registration of a claim in the original or the renewed and extended term of copyright”). To register a copyright, an author is required to register with the Copyright Office. This requires depositing an application and fee with the Copyright Office. *See id.* § 409. Beginning January 1, 1978, registration of a copyright grants owners protection for the life of the author plus 70 years. *See id.* 302(a). In the case of joint works, the copyright extends 70 years after the death of the last surviving author. *See id.* § 302(b). In the case of anonymous works, pseudonymous works, or works made for hire, the copyright extends for 95 years from the date of publication or 120 years from the date of creation, whichever is shorter. *Id.* § 302(c).

⁵¹ 17 U.S.C. § 501(b) (2012).

⁵² *See supra* notes 10–12 and accompanying text.

⁵³ *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 290 (3d ed. 2010).

⁵⁴ Some copyright scholars have referred to this as “copying in fact.” *Id.* at 291.

⁵⁵ *See, e.g.,* King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 852 (M.D. Tenn. 2006) (“Liability for copyright infringement does not turn on the infringer's mental state because a general claim for copyright infringement is fundamentally one founded on strict liability.”) (internal quotation marks and citation omitted).

⁵⁶ *Id.*

⁵⁷ *See, e.g.,* Religious Tech. Cent. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

⁵⁸ *See, e.g.,* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 133 (2d Cir. 2008).

infringement of a valid copyright has been established or admitted.⁵⁹

D. Copyright Limitations – The Fair Use Doctrine

The 1976 Act codified a series of limitations⁶⁰ to reign in the increasingly monopolistic nature of copyright law.⁶¹ Fair use—copyright law’s largest limitation—seeks to strike a balance between an author’s right to remuneration and the public’s interest in accessing works.⁶² In certain circumstances,⁶³ fair use allows individuals to use portions of a copyrighted work without the author’s approval and without compensating the copyright holder.⁶⁴

In an attempt to guide courts in making fair use determinations, the 1976 Act codified the common law fair use doctrine⁶⁵ in 17 U.S.C. § 107 by laying out four “guiding” factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for and value of the copyrighted work.⁶⁶

Section 107’s four-factor analysis is a necessarily fact-specific inquiry—one which, in large part, mirrors Justice Story’s original formulation in *Folsom v. Marsh* in 1841.⁶⁷

⁵⁹ See generally COHEN, *supra* note 53.

⁶⁰ 17 U.S.C. §§ 107-22 (2012). While a number of these limitations were present in previous versions of the Copyright Act, the 1976 Act was the first instance in which the fair use doctrine was statutorily codified. See An Act for the General Revision of the Copyright Law, title 17 of the United States Code, and for other purposes, Pub. L. No. 94-553, Title 17, § 107, 90 Stat. 2541 (1976).

⁶¹ See generally Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L.J. 143, 163 (1993).

⁶² See Gordon, *supra* note 26, at 1602.

⁶³ See *supra* note 11 and accompanying text.

⁶⁴ See Landes & Posner, *supra* note 7, at 357.

⁶⁵ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁶⁶ 17 U.S.C. §§ 107(1)–(4) (2012).

⁶⁷ See *Folsom*, 9 F. Cas. at 344–45. (“[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use

Much of the fair use's uncertainty, and, consequently, its inefficiency, results from the doctrine's lack of uniform application. Section 107's legislative history indicates that fair use's codification was intended to create a "more uniform and predictable body of case law."⁶⁸ However, "[t]hose familiar with copyright law are well acquainted with the difficulties courts face in providing guidance under [Section] 107."⁶⁹ The four factors are non-exhaustive,⁷⁰ and neither Congress nor the courts have provided useful guidance regarding future application of this "equitable rule of reason."⁷¹ Congress ultimately left application of the four factors to the discretion of the courts,⁷² and many, including the Supreme Court, have struggled to consistently

will be deemed in law a piracy."). *See also id.* at 348. ("In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."). Of note, Justice Story never used the phrase "fair use." The term was not coined for another twenty-eight years. *See Lawrence v. Dana*, 15 F. Cas. 26, 44 (C.C.D. Mass. 1869).

⁶⁸ *See Anderson & Brown, supra* note 61, at 146.

⁶⁹ *See Carroll, supra* note 17, at 1094.

⁷⁰ The 1976 Act states that: "[i]n determining whether the use . . . is a fair use the factors to be considered shall include" those factors listed in the text. 17 U.S.C. § 107 (2012). Furthermore, the term "including" is "illustrative and not limitative." *Id.* § 101. *See also* H.R. REP. NO. 1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 ("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

⁷¹ *See* H.R. REP. NO. 1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 ("[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."). *See also* *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 552 (1984) ("[F]air use analysis must always be tailored to the individual case."); HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944) ("[P]rivilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner.").

⁷² *See Harper & Row*, 471 U.S. at 560 ("The factors enumerated in the section are not meant to be exclusive: '[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.'") (quoting H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679)). *See also* *Ty Inc. v. Publ'ns. Int'l Ltd.*, 292 F.3d 512, 522 (7th Cir. 2002) ("The important point is simply that, as the Supreme Court made clear . . . the four factors are a checklist of things to be considered rather than a formula for decision."); Gordon, *supra* note 26, at 1602-03; William F. Patry & Richard Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1645 (2004) ("All section 107 really amounts to in practical terms is confirmation that the courts are entitled to allow in the name of fair use a certain undefined amount of unauthorized copying from copyrighted works. This may seem an unsatisfactory solution to the problem of defining fair use, and indeed the uncertain contours of the defense raise serious problems . . .").

apply the doctrine.⁷³ Adding to the confusion, various circuits have placed differing weight on different factors, creating inconsistent results and exacerbating litigants' *ex ante* uncertainty.⁷⁴ Naturally, fair use has earned its characterization as "the most troublesome [doctrine] in the whole law of copyright."⁷⁵

III. ANALYSIS

A. The Economics of Copyright Law and the Fair Use Doctrine

Economics is a social science that seeks to explain *how* various factors affect the production and consumption of goods.⁷⁶ An economic theory of copyright law thus seeks to function as an explanatory tool of how judges and courts interpret the 1976 Act.⁷⁷ For this reason, economic analysis of copyright law is a "positive theory attempting to describe how results are reached, rather than a normative theory suggesting the goals copyright should seek to achieve."⁷⁸ Accordingly, for the purposes of this article, an economic theory of copyright law attempts to explain how the fair use doctrine seeks to promote the efficient allocation of resources.⁷⁹ In particular, micro and macroeconomic theory work in tandem to explain how the fair use doctrine steps in to correct market failures created by copyright law's increasingly monopolistic grants to authors.⁸⁰

An economic analysis of copyright law necessarily begins with an examination of incentives. An efficient copyright system seeks to maximize social welfare by balancing the private interests of copyright holders with the public's interest in accessing knowledge.⁸¹ In

⁷³ Recent Supreme Court decisions, decided by a 5-4 split, have seen various justices emphasize different factors in the majority and dissent. *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding defendant not liable for infringement because the public was making fair use copies of the plaintiff's television programs), *with* Harper & Row, 471 U.S. at 540 (finding the defendant liable for infringement even though news reporting is one of the uses given specific mention in the preamble to § 107).

⁷⁴ See Anderson & Brown, *supra* note 61, at 146.

⁷⁵ See Universal City Studios, 659 F.2d at 969 (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939), *cert. granted*, 457 U.S. 1116 (1982) (No. 81-1687)).

⁷⁶ See generally N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS (7th ed. 2015).

⁷⁷ See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 21 (3d ed. 1986); Landes & Posner, *supra* note 7, at 325.

⁷⁸ Darr, *supra* note 13, at 1033.

⁷⁹ Or in this case—creative works. See Landes & Posner, *supra* note 7, at 326.

⁸⁰ See *infra* Part III.B-C.

⁸¹ See Landes & Posner, *supra* note 7, at 326.

economics jargon, copyrightable material has long been viewed as a non-excludable “public good,” meaning that it can be “enjoyed by an unlimited number of people without being ‘used up.’”⁸² Public goods differ from “private goods,” in that public goods are non-excludable—meaning they can be repeatedly and infinitely used without diminishing others’ ability to do the same.⁸³ For example, Shakespeare’s *Hamlet*,⁸⁴ a public good, can be “consumed” (i.e. read) over and over without excluding or diminishing others’ ability to likewise read and enjoy the play. However, consumption of a private good (e.g. a cheeseburger) is finite and hence excludable.⁸⁵ For this reason, the economic rationale of copyright law “arises from the assumption that the variable cost of producing a book is the same for the author and any infringer.”⁸⁶

⁸² Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 22–23 (1997) (internal quotations omitted).

⁸³ See *id.* at 23. See also *infra* note 86 and accompanying text.

⁸⁴ For the purposes of this simplistic example, I will ignore the fact that in the United States, Shakespeare’s *Hamlet* is in the “public domain” and hence, no longer subject to copyright protection or limitations. However, for those interested in one of Shakespeare’s enduring literary masterpieces, see WILLIAM SHAKESPEARE, *HAMLET* (Barbara A. Mowat & Paul Werstine eds., Simon & Schuster, Inc. 2012) (1603).

⁸⁵ For more on the subject of public goods, see Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. OF ECON. & STAT. 387–89 (1954). Of note, for the purposes of this article, I only separate “public” and “private” goods insofar as it aids the understanding of the economics of copyright law and fair use. I am not unmindful of the distinction between “pure public goods,” which are non-rival and non-excludable, and “pure private goods” which are rival and excludable. Furthermore, any introduction of the concept of “mixed goods” or “common goods” is beyond the scope of this article, and would only serve to over-complicate a minor point.

⁸⁶ Darr, *supra* note 13, at 1034. See also Landes & Posner, *supra* note 7, at 326–27 (“The cost of producing a book or other copyrightable work . . . has two components. The first is the cost of creating the work . . . The second component of the cost of producing a work increases with the number of copies produced, for it is the cost of printing, binding, and distributing individual copies. The cost of expression does not enter into the making of copies because, once the work is created, the author’s efforts can be incorporated into another copy virtually without cost.”).

If authors are unable to recover their fixed costs of production, they will not produce.⁸⁷ To remedy this market failure, Section 106 of the 1976 Act grants authors limited monopolistic protection in an enumerated “bundle of rights.”⁸⁸ Subsequent amendments to the Copyright Act have lengthened the term of protection and increased this monopoly power.⁸⁹ Economic theory suggests that unfettered monopoly power distorts the price of goods by allowing an author, as the sole supplier of a good, to manipulate an otherwise competitive market by pricing his work above the marginal cost of production (the “monopoly price”).⁹⁰ Two consequences naturally follow. First, the author will reap a healthy profit;⁹¹ second, consumers who value the good at or above the market price,⁹² but below the monopoly price,⁹³ will not purchase it.⁹⁴ The latter effect creates allocative inefficiency in the form of “deadweight loss”⁹⁵ and results in a socially undesirable underproduction of goods.⁹⁶

⁸⁷ See Landes & Posner, *supra* note 7, at 327.

⁸⁸ See 17 U.S.C. § 106 (2012). See also notes 9–13 and accompanying text.

⁸⁹ The first Copyright Act provided a maximum twenty-eight-year period (two fourteen year renewable periods). It has since been amended in 1802, 1831, 1870, and 1909. Each subsequent version increased the length of an author’s copyright period. See Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (repealed 1831); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870); Act of July 8, 1870, ch. 230, 16 Stat. 178 (repealed 1909); H.R. REP. NO. 60-2222, 60th Cong., 2d Sess. 7 (1909).

⁹⁰ See *infra* Figure 1, at P1. For more on monopolies and the economic effect of monopolistic pricing, see THOMAS KARIER, *BEYOND COMPETITION: ECONOMICS OF MERGERS AND MONOPOLY POWER* (1993).

⁹¹ See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700–01 (1988).

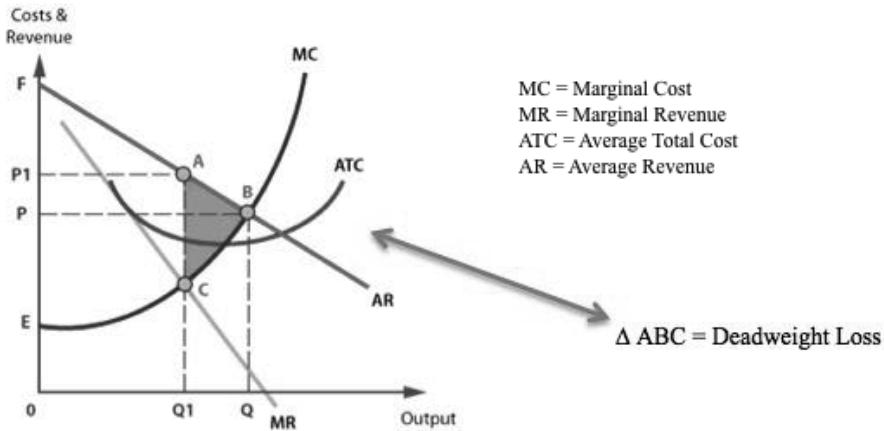
⁹² See *infra* Figure 1, at point C.

⁹³ See *infra* Figure 1, at point B.

⁹⁴ See Fisher, *supra* note 91, at 1700–02.

⁹⁵ For more on deadweight loss in copyright law, see *infra* Figure 1. See also *infra* note 97 and accompanying text. For a more detailed analysis of deadweight loss in general, see generally Jerry A. Hausman, *Exact Consumer’s Surplus and Deadweight Loss*, 71 AM. ECON. REV. 662 (1981).

⁹⁶ Δ ABC represents society’s deadweight loss. See *infra* Figure 1. See also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 256 (3d ed. 1986) (treating “the transfer of wealth from consumers to producers brought about by increasing the price from the competitive to the monopoly level . . . as a wash”); Richard Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 807–15 (1975); F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 450–54 (2d ed. 1980); Fisher, *supra* note 91, at 1701–02.

FIGURE 1: MONOPOLISTIC PRICING AND DEADWEIGHT LOSS⁹⁷

Accordingly, “for the optimal number of works to be produced, an economically rational law must provide the means for new material to be produced as well as provide protection to existing materials.”⁹⁸

Courts, commentators, and scholars have espoused two economic rationales explaining the fair use doctrine:⁹⁹ one rooted in microeconomic theory¹⁰⁰ and the other in macroeconomic theory.¹⁰¹

⁹⁷ Figure 1 shows the market inefficiencies that result from monopolistic pricing. The Y-axis (“Costs and Revenues”) represents Price (P) (i.e. the total compensation the author receives, described here as “Costs and Revenues”). The X-axis represents Output or Quantity (Q). In a competitive market, supply and demand converge at an equilibrium Price (P) and Quantity (Q). For a simplistic supply and demand model, see *infra* Figure 2.

Figure 1 illustrates the effect of monopolistic pricing. To display the effect of pure monopolistic pricing, the above graphic is illustrative, where:

- (1) MC = Marginal Cost
- (2) MR = Marginal Revenue
- (3) ATC = Average Total Cost
- (4) AR = Average Revenue

Typically, firms (or individuals) maximize profits when their marginal costs equal their marginal revenues (MC=MR). Absent a monopoly, this occurs at (P, Q) [or point B in Figure 1]. However, because monopolies distort market effects, average revenue (AR) in monopoly firms exceeds average total cost (ATC) (i.e. AR > ATC). Accordingly, Point C in Figure 1 distorts the point at which MC=MR. As a result, the supplier (or author in the case of copyright) is able to reap “supernormal” or monopoly profits. For more on monopoly profits, see KARIER, *supra* note 90 and accompanying text. The result of monopolistic pricing, as demonstrated above, is a reduced quantity of goods (Q1) and a higher price (P1). Additionally, society experiences deadweight loss results (shown in ΔABC).

⁹⁸ Darr, *supra* note 13, at 1034.

⁹⁹ Thau, *supra* note 34, at 193.

¹⁰⁰ *Id.* See also *infra* Part III.B.

¹⁰¹ Thau, *supra* note 34, at 193. See also *infra* Part III.C.

Microeconomic theory justifications focus on how transaction costs and externalities affect individual decision-making and create market failures.¹⁰² Macroeconomic theorists view fair use as a utilitarian mechanism for promoting the IP Clause's goal of maximizing social welfare through the dissemination of knowledge—often, however, at the expense of individual profit.¹⁰³ Individually, both theories have their limits,¹⁰⁴ and while neither wholly solves the issue of *ex ante* uncertainty, together they may offer some insight for prospective litigants and provide judges an analytical framework that may better effectuate consistent and efficient market outcomes for all parties involved.

B. Microeconomic Theory and the Fair Use Doctrine

Microeconomics studies how competing incentives affect individual decision-making in the marketplace, and examines the concomitant effect on the supply and demand of goods.¹⁰⁵ Microeconomic theory posits that resources will be most efficiently allocated when rational, utility-maximizing individuals are left to their own devices in the marketplace.¹⁰⁶ In theory, absent market failure or outside intervention, individual decision-making will allow supply and demand to converge at a market equilibrium price and yield a socially optimal allocation of goods and services.¹⁰⁷

¹⁰² See generally Gordon, *supra* note 26; Landes & Posner, *supra* note 7.

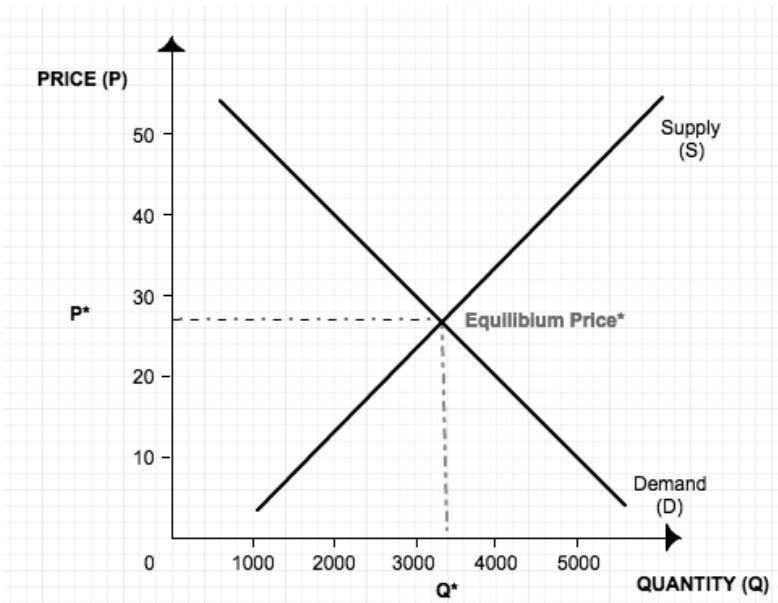
¹⁰³ See generally Peter N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990).

¹⁰⁴ See *infra* Parts III-V.

¹⁰⁵ See generally WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS (5th ed. 1992).

¹⁰⁶ See Aryeh S. Friedman, *Law and the Innovative Process: Preliminary Reflections*, 1986 COLUM. BUS. L. REV. 1, 19, n.67 (1986).

¹⁰⁷ Figure 2 provides a simplistic graphical illustration of equilibrium pricing and output from a microeconomic standpoint. See generally NICHOLSON, *supra* note 105.

FIGURE 2: OPTIMAL PRODUCTION OF CREATIVE WORKS ¹⁰⁸

Market failures interfere with the optimal allocation of goods.¹⁰⁹ In copyright law, this occurs when “a copyright owner and potential user [can] not reliably engage in a socially valuable market exchange.”¹¹⁰ Market failures in copyright law primarily occur in two forms. First, high transaction costs prevent otherwise desirable transactions¹¹¹ from occurring when the expected cost of negotiating a license exceeds the parties’ anticipated benefit of the bargain.¹¹² Second, when parties fail to account for the social benefit of their bargain, society bears a negative externality in the form of deadweight loss.¹¹³ In either situation, the fair

¹⁰⁸ In Figure 2, supply (S) and demand (D) converge at an efficient market equilibrium price. Absent market failure, the supply curve intersects with the demand curve, yielding an optimal price and output of a copyrighted work (P^* , Q^*). At equilibrium, Q^* represents the total number of works authors will produce, and P^* represents the price paid by society for the work. It is important to note that P^* does not represent the price received by an author for a single work, rather P^* represents the price garnered from all sales (including books, movie rights, or any other licensing/royalty fees that may be applicable). *Id.* For more on the social benefits of requiring payment for ancillary uses, see Robin A. Moore, *Fair Use and Innovation Policy*, 82 N.Y.U. L. REV. 944, 952–57 (2007).

¹⁰⁹ See NICHOLSON, *supra* note 105. Of note, market failures interfere with the optimal allocation of *both* goods and services. However, for the purposes of this article, it suffices to focus on the former.

¹¹⁰ Moore, *supra* note 108, at 946.

¹¹¹ See *id.* See also *infra* Part III.B.1.

¹¹² See Moore, *supra* note 108, at 946. See also *infra* Part III.B.1.

¹¹³ An “externality” is any cost or benefit that affects a party who did not choose
continued . . .

use doctrine steps in, and, at least theoretically, corrects the market failure created by copyright law's overprotection of authors.¹¹⁴ The extent to which it effectively does so will be examined below.¹¹⁵

1. *Landes and Posner's transaction cost approach*

In 1989, Professor William Landes and Judge Richard Posner undertook the first comprehensive economic analysis of copyright law.¹¹⁶ They begin with the contention that “[s]triking the balance between access and incentives is the central problem in copyright law.”¹¹⁷ Their fair use analysis focuses primarily on the doctrine's corrective function in situations where resources are inefficiently allocated as a result of burdensome transaction costs.¹¹⁸ In economics, a “transaction cost” is a cost that is incurred as a result of the time, effort, or expense required to negotiate a deal.¹¹⁹ Landes and Posner note that market failures breed inefficiency when the transaction costs associated with enforcement of a copyright exceed the would-be benefits of a lawsuit.¹²⁰ Accordingly, they posit that lawsuits should not occur when the copyright holder's cost of enforcement exceeds the potential benefits of a suit or settlement.¹²¹

An illustrative example of their theory follows.¹²² Suppose an author (“A”) wants to quote a portion of another author's (“B”) copyrighted work.¹²³ If a hypothetical licensing negotiation was to

to incur that cost or benefit. See NICHOLSON, *supra* note 105, at 746. (“An *externality* occurs whenever the activities of one economic agent affect the activities of another agent in ways that are not taken into account by the operation of the market.”) (emphasis in original). See also STEFANO ZAMAGNI, MICROECONOMIC THEORY: AN INTRODUCTION 538 (Anthony Fletcher trans., Basil Blackwell 1987) (“Externalities are those (favourable or unfavourable) effects on the consumption or production of one economic agent (an individual or firm) on the production and/or consumption of another economic agent for which no price is paid or received.”). For a more detailed discussion of externalities in copyright law, and examples in the fair use context, see *infra* Part III.B.1; *infra* Figure 3.

¹¹⁴ See generally Gordon, *supra* note 26; Landes & Posner, *supra* note 7.

¹¹⁵ See *infra* Part III.B.1–2.

¹¹⁶ See Landes & Posner, *supra* note 7.

¹¹⁷ *Id.* at 326.

¹¹⁸ See *id.* at 327–30.

¹¹⁹ See BLACK'S LAW DICTIONARY (10th ed. 2014) (defining transaction cost as: “a cost connected with a process transaction, such as a broker's commission, the time and effort expended to arrange a deal, or the cost involved in litigating a dispute.”).

¹²⁰ See Landes & Posner, *supra* note 7, at 357–58.

¹²¹ See *id.*

¹²² This example largely mirrors the one found in Landes and Posner's work, with slight variations. See Landes & Posner, *supra* note 7, at 357–58.

¹²³ See *id.*

occur, assume that “A” would be willing to pay \$1,000 for use of the text, and “B” would be willing to accept.¹²⁴ Up to this point, market forces and individual preferences dictate the occurrence or non-occurrence of the transaction.¹²⁵ Next, however, assume that consummation of the transaction requires “A” and “B” to retain counsel, which creates an additional \$5,000 expense. Here, because the transaction costs are well in excess of the bargain’s potential benefit, each party’s expected return vanishes and an otherwise agreeable transaction fails to materialize.¹²⁶

In this situation, the fair use doctrine steps in to correct the market failure by allowing “A” to use small portions of “B’s” work for academic purposes.¹²⁷

Landes and Posner’s transaction-cost theory correctly identifies the fair use doctrine’s corrective function in an economic model where high transaction costs would prevent otherwise efficient licensing agreements.¹²⁸ Their cost-benefit analysis, which seeks to explain the fair use doctrine solely as a redress to be narrowly applied in certain high-transaction cost situations, however, is not without its critics.¹²⁹ One critic focuses on the practical limitations of Landes and Posner’s theory by arguing:

The fact that fair use is successfully invoked in a large number of suits in which the transaction cost rationale simply does not apply—e.g., where the defendant can easily identify the would-be plaintiff *ex ante* and would be willing to negotiate a license—indicates that courts view fair use as more than merely a means of avoiding costly negotiating.¹³⁰

In essence, certain commentators believe that in practice, Landes and Posner’s transaction-cost theory falls significantly short of offering a complete explanation for judicial outcomes.¹³¹

¹²⁴ *See id.*

¹²⁵ Here, the “equilibrium price” equals \$1,000. *See supra* Figure 2; *supra* note 109 and accompanying text.

¹²⁶ *See supra* Figure 2; *supra* note 109 and accompanying text.

¹²⁷ *See supra* text accompanying note 115. *See generally* Gordon, *supra* note 26, at 1615 (explaining market failure as one element of a three part test for determining fair use.); Landes & Posner, *supra* note 7, at 357 (“A fair use privilege creates a clear benefit to A but does not harm B.”).

¹²⁸ *See* Landes & Posner, *supra* note 7, at 357–58.

¹²⁹ *See* Thau, *supra* note 34, at 195–97.

¹³⁰ *Id.* at 195–96.

¹³¹ The author of this article shares this belief with these other commentators, e.g., Thau, *supra* note 34, at 195.

One observer astutely notes that in the context of high transaction costs, fair use operates “primarily on the mind of the copyright infringer.”¹³² In the context of high transaction costs and low value licenses, the logic of this assertion is undeniable. Even in the absence of Section 107, no rational copyright holder will choose to sue when the cost of bringing suit far outweighs the potential for reward.¹³³ This will invariably happen in situations similar to the above example.¹³⁴ In practice, “A” will go ahead and infringe, knowing that “B’s” cost-prohibitive lawsuit will likely never materialize.¹³⁵ As a result, in the context of high-transaction cost scenarios, fair use may only serve a limited role—to assuage the conscience of an otherwise reticent infringer.

2. *Gordon’s market failure approach*

More than thirty years ago, in response to the Supreme Court’s pending decision in *Sony Corp. of America v. Universal City Studios, Inc.*,¹³⁶ (“*Sony*” or the “*Betamax*” case) Professor Wendy Gordon provided the first comprehensive economic analysis of the fair use doctrine.¹³⁷ Gordon argued that fair use is justifiable only when three conditions are met:¹³⁸ first, a market failure must prevent the prospective parties from efficiently negotiating a license;¹³⁹ second, the transfer of rights from the copyright holder to the would-be user must produce a “socially desirable” result;¹⁴⁰ and finally, the transfer must not negatively impact an author’s incentive to create new works.¹⁴¹

¹³² *Id.*

¹³³ *See id.* (“If courts took seriously Landes and Posner’s suggestion to limit fair use to cases in which the benefit of the use accruing to an alleged infringer is outweighed by the costs of enforcement borne by the copyright owner, we would hardly expect to see any cases in which the fair use defense is successfully raised. The plaintiffs in those cases would lack the economic incentive to sue, and if a suit did occur, a defendant would be wiser to settle rather than raise an expensive defense like fair use.”).

¹³⁴ *See supra* notes 90–95 and accompanying text.

¹³⁵ *See id.*

¹³⁶ 464 U.S. 417 (1984).

¹³⁷ *See Gordon, supra* note 26, at 1602.

¹³⁸ *See id.* at 1614 (“Fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner.”).

¹³⁹ *See id.* at 1614–15.

¹⁴⁰ *See id.* at 1615 (“If market failure is present, the court should determine if the use is more valuable in the defendant’s hands or in the hands of the copyright owner.”).

¹⁴¹ *See id.* at 1614–22.

Parts two and three of Gordon's work¹⁴² largely reflect traditional fair use analysis.¹⁴³ Her "primary contribution to fair use scholarship"¹⁴⁴ lies in her assertion that market failure should precede application of the fair use doctrine.¹⁴⁵ She points to three categories in which market failures arise in copyright law: transaction costs, externalities, and antidissemination incentives.¹⁴⁶ Her transaction costs analysis, in substantive part, mirrors that of Landes and Posner.¹⁴⁷ Gordon's externality analysis, in the microeconomic context,¹⁴⁸ focuses on situations in which externalities are not factored into individual decision-making¹⁴⁹ and examines the concomitant macroeconomic consequences.¹⁵⁰

In copyright law, externalities exist when licensing negotiations fail to account for the social benefit of a transaction.¹⁵¹ The following simplistic example is illustrative.¹⁵² Assume a similar situation to the one above: an author or academic scholar wishes to quote a portion of a copyrighted work in an upcoming book.¹⁵³ The scholar values use of

¹⁴² See *supra* note 101 and accompanying text.

¹⁴³ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Time Inc. v. Bernard Geis Assocs.* 293 F. Supp. 130, 143 (S.D.N.Y. 1968). See also Thau, *supra* note 34, at 197–99 (expounding upon the public benefits explanation of the fair use doctrine).

¹⁴⁴ Thau, *supra* note 34, at 194.

¹⁴⁵ See Gordon, *supra* note 26, at 1614–15 ("Because courts in the copyright area ordinarily assume that reliance on the market will serve social purposes, an economic judgment that transfer of a use to defendant will bring a net social benefit should not alone be sufficient to negate the tort of infringement."); *id.* at 1615 ("An economic justification for depriving a copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way. Only where the desired transfer of resource use is unlikely to take place spontaneously, or where special circumstances such as market flaws impair the market's ordinary ability to serve as a measure of how resources should be allocated, is there an economic need for allowing nonconsensual transfer.").

¹⁴⁶ See Gordon, *supra* note 26, at 1627–35.

¹⁴⁷ In regards to transaction costs, Gordon succinctly notes: "[when] transaction costs exceed anticipated benefits . . . no transactions will occur." See Gordon, *supra* note 26, at 1628. For Landes and Posner's transaction-cost analysis, see *supra* Part III.B.1.

¹⁴⁸ For more on externalities, see *supra* note 92; *supra* Part III.B.2.

¹⁴⁹ See *supra* Part III.B.1.

¹⁵⁰ See Gordon, *supra* note 26, at 1630–32.

¹⁵¹ See *id.*

¹⁵² This example similarly tracks the examples given by Landes & Posner. See Landes & Posner, *supra* note 7, at 346 (using a similar example of an author who wishes to quote another author's work to illustrate the need for fair use to rectify externality-related market failures). See also Moore, *supra* note 108, at 952 (similarly borrowing Landes and Posner's transaction costs example).

¹⁵³ For simplicity's sake, this example ignores the potential conflict between *de minimis* use and fair use.

the work at \$1,000. However, the copyright holder is unwilling to negotiate any price below \$5,000. At this point, there is no market failure. The parties will simply refuse to come to a bargain because the author's expected benefit of use (i.e. the price he is willing to pay, here \$1,000) is less than the cost demanded by the copyright holder (\$5,000). Given the same facts, next assume that the author's publication of the book, with the included copyrighted excerpt, would benefit society by creating a "positive externality" in the amount of \$10,000.¹⁵⁴ Here, externalities create allocative inefficiency and society experiences a deadweight loss when the transaction fails to materialize.¹⁵⁵ Even though society would benefit \$6,000 if the transaction occurred ($[\$10,000 + \$1,000] - \$5,000 = \$6,000$),¹⁵⁶ it will not come to fruition, despite now being efficient, because the externality will not be factored into the parties' calculus.¹⁵⁷ The fair use doctrine, which allows authors "A" and "B" to eschew negotiations in this context, steps in to correct the market failure.¹⁵⁸

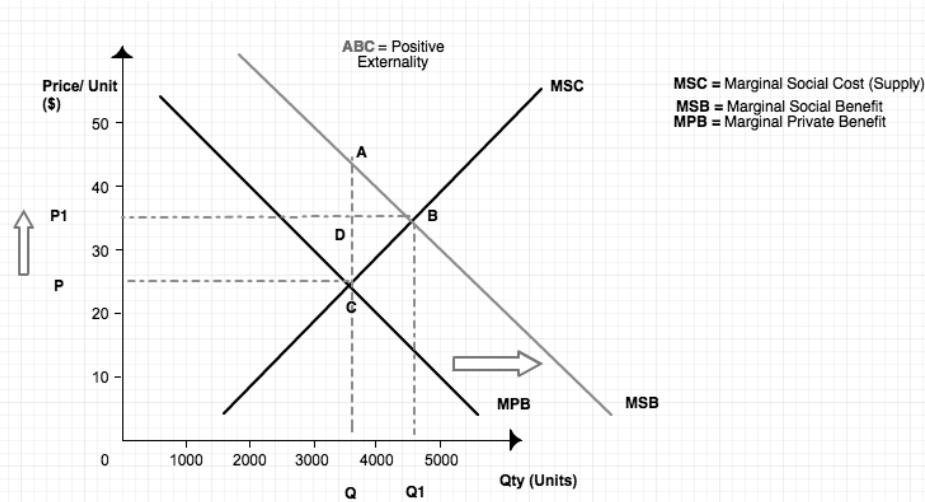
¹⁵⁴ See *infra* Figure 4. See also Cotter, *supra* note 18 (describing a "positive externality" as one in which "the net social value of the use exceeds the value to the copyright owner of preventing the use").

¹⁵⁵ See Hausman, *supra* note 95, at 662–76.

¹⁵⁶ This figure is calculated by subtracting the net cost of completing the transaction (the \$5,000 not paid to the copyright holder) from the net benefit accrued as a result of the transaction (\$1,000 [benefit to the author] + \$10,000 [benefit to society at large]).

¹⁵⁷ See Gordon, *supra* note 26, at 1630 ("The costs and benefits of the parties contracting for the uses often differ from the social costs and benefits at stake, so that transactions leading to an increase in social benefit may not occur.").

¹⁵⁸ See Moore, *supra* note 108, at 952.

FIGURE 3: FAIR USE: ENABLING POSITIVE EXTERNALITIES¹⁵⁹

Ostensibly, a socially desirable bargain has been struck. As output increases from Q to Q_1 , society reaps the benefit of the positive externality, albeit at the expense of the copyright holder.¹⁶⁰ The individual preferences of microeconomic theory thus yield to a utilitarian public benefit model.¹⁶¹

¹⁵⁹At the outset, it is important to note that Figure 3 illustrates the effect of a positive externality. The preceding academia example dealt with a scenario where a positive externality was *not* realized. *See supra* notes 158–65 and accompanying text. On the contrary, Figure 3 is illustrative of a situation where the full social benefit of a positive externality is reached. To begin, like Figure 1, the Y-axis represents Price (i.e. the cost of a copyrighted work), and the X-axis represents Quantity (or units of goods supplied). The following terms are defined:

- (1) MSB = Marginal Social Benefit [which is societal demand + MPB];
- (2) MPB = Marginal Private Benefit [individual demand]; and
- (3) MSC = Marginal Social Cost [supply].

Absent the fair use doctrine, parties would negotiate when $MPB = MSC$, or, put differently, when private individual demand equals supply. This yields a price and output at (P, Q) [point C on the graph]. However, when the Marginal Social Benefit (MSB) (i.e. society’s gain as a result of access to the free flow of information + MPB) is taken into account, the demand curve for creative works shifts right, changing the market equilibrium price. The new market equilibrium (P_1, Q_1) reflects how the fair use doctrine allows society to gain a “a positive externality.” As a result, price and output both increase, and society benefits from a “positive externality” (shown in ΔABC). In the process, the “free flow of information” to society (i.e. output) increases, albeit sometimes at the expense of the individual.

¹⁶⁰ *See Gordon, supra* note 26, at 1631.

¹⁶¹ *See U.S. CONST. art. I, § 8, cl. 8. See also supra* Part III.B. *See also infra* Part.III.C.

C. Macroeconomic Theory and the Fair Use Doctrine

While microeconomics is the study individual decision-making, macroeconomics examines the economy as a whole.¹⁶² In its most basic form, macroeconomic theory seeks to optimize output and maximize social welfare.¹⁶³ With respect to copyright law, macroeconomic theory justifies monopolistic protection of an author's work only insofar as the public-at-large benefits.¹⁶⁴ Professor Leval explains:

[C]opyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists . . . in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.¹⁶⁵

1. Fair use and macroeconomic theory

Fundamental to the utilitarian theory of copyright law is a belief that incentivizing authors' creative expression avoids the inevitable underproduction of works that would result from a no-recourse system.¹⁶⁶ As a result, copyright law recognizes that granting authors remunerative rewards is necessary to stimulate expression.¹⁶⁷ However, too much of a good thing¹⁶⁸ can be just that—too much. The trite idiom thus has an apropos place in the context of fair use. Left unchecked, monopolistic grants to authors have the potential to be counter-productive by creating economic inefficiencies of their own—namely, overprotection.¹⁶⁹ To avoid overprotection, an iatrogenic inefficiency in its own right, lawmakers have limited the term of

¹⁶² See generally RICHARD T., MACROECONOMICS: THEORIES AND POLICIES (9th ed. 2009).

¹⁶³ See U.S. CONST. art. I, § 8, cl. 8. See also Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 541–42 (1990). Of note, this article ignores the difference between Pareto efficiency and wealth maximization as macroeconomic theories justifying copyright law. For simplicity's sake, we note that society is better off in a "macro" sense when the Article 1, Section 8, Clause 8's goal of promoting progress is furthered.

¹⁶⁴ See Thau, *supra* note 34, at 194.

¹⁶⁵ See Leval, *supra* note 103, at 1109.

¹⁶⁶ See Fisher, *supra* note 91, at 1700.

¹⁶⁷ See Darr, *supra* note 13, at 1034 ("Copyright, by prohibiting unauthorized copying, solves the problem of marginal cost copies destroying the incentive to write.").

¹⁶⁸ E.g., the overprotection of authors' rights.

¹⁶⁹ See Fisher, *supra* note 91, at 1700.

copyright protection, narrowed the realm of protectable material to the actual expression of ideas,¹⁷⁰ and allowed a number of exceptions that permit lawful copying in certain circumstances.¹⁷¹

Copyright law implicitly recognizes the principle of *nihil sub sole novum*: “there is nothing new under the sun.”¹⁷² Creative expression necessarily draws from, and builds upon, the work of previous authors.¹⁷³ Affording too much protection to one author may stifle subsequent works by future authors.¹⁷⁴ Accordingly, copyright law must strike a balance that provides a means for encouraging the production of new material as well as protecting existing material.¹⁷⁵

Fair use seeks to maximize social welfare by “encouraging the dissemination of copyrighted works.”¹⁷⁶ A utilitarian public-benefit explanation of fair use permits infringement only when society’s benefit exceeds the harm borne by individual copyright holders.¹⁷⁷ Conceptually, this cost-benefit analysis may be simple. However, as technology progresses, the array of copyrightable material expands, and the cost-benefit analysis becomes increasingly complex. Specifically, it is difficult to reconcile Section 107’s current four-factor balancing test with a purely utilitarian explanation of fair use.¹⁷⁸ The doctrine’s paradigmatic examples (i.e., scholarship, news reporting, criticism, and parody)¹⁷⁹ are not difficult to justify from a public benefit standpoint.¹⁸⁰ Allowing access to academic scholarship undoubtedly benefits society’s wealth of knowledge while costing individual authors little.¹⁸¹ Here, the public benefit model fits. Unfortunately, fair use cannot

¹⁷⁰ For a more detailed explanation of the idea/expression dichotomy, see Landes & Posner, *supra* note 7, at 347–53.

¹⁷¹ See 17 U.S.C. §§ 107–122 (2012). See also Fischer, *supra* note 91, at 1703 (“The task of a lawmaker who wishes to maximize efficiency, therefore, is to determine, with respect to each type of intellectual product, the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses.”). For a more detailed economic analysis of intellectual property lawmaking, see Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1827–28 (1984).

¹⁷² *Ecclesiastes* 1:9 (King James).

¹⁷³ See Landes & Posner, *supra* note 7, at 332.

¹⁷⁴ See Darr, *supra* note 13, at 1034 (“All works contain elements that are copied from some other text. If protection is too extensive, authors will have to engage in expensive searches, risk liability, or pay royalties to write.”).

¹⁷⁵ See *id.*

¹⁷⁶ Thau, *supra* note 34, at 197.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 198.

¹⁷⁹ See 17 U.S.C. § 107 (2012).

¹⁸⁰ See *id.* See also *supra* notes 167–75 and accompanying text.

¹⁸¹ See 17 U.S.C. § 107 (2012).

readily be explained solely by reference to Section 107's four factors.¹⁸²

Only one of Section 107's four factors directs courts towards a utilitarian conception of fair use.¹⁸³ The first,¹⁸⁴ third,¹⁸⁵ and fourth¹⁸⁶ factors overwhelmingly favor the interests of private litigants over society at large. Section 107's first factor—"the purpose and character of the use"¹⁸⁷—may purport to function as a utilitarian justification for fair use; however, courts' frequent emphasis on the "commercial nature" of the alleged infringement often analyzes not whether the public was harmed, but whether the defendant individually profited from the infringement.¹⁸⁸ Similarly, the third factor "focuses on the interests of the private litigants"¹⁸⁹ by comparing the amount of work taken by the defendant in relation to the copyrighted work as a whole.¹⁹⁰ The fourth factor,¹⁹¹ which is often given the most weight by courts,¹⁹² again focuses on the interests of the private litigants by looking at the potential impact on the market for the copyright holder's work.¹⁹³ Only Section 107's second factor, which examines the "the nature of

¹⁸² See *id.*

¹⁸³ See Thau, *supra* note 34, at 197.

¹⁸⁴ 17 U.S.C. § 107(1) (2012).

¹⁸⁵ *Id.* § 107(3).

¹⁸⁶ *Id.* § 107(4).

¹⁸⁷ *Id.* § 107(2).

¹⁸⁸ See, e.g., *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1175 (N.D. Ill. 1997) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price") (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)). *Cf.* Thau, *supra* note 34, at 197 n.103 ("Courts' emphasis on the commercial nature of the work in their analyses of the first factor is likely to diminish following *Campbell*, in which the Court emphasized that the commercial nature of a work is only one factor to be weighed in the balance. *Campbell's* ability to refocus courts on more public benefit-oriented aspects of the fair use inquiry is not certain; however, because it can be read as emphasizing the public benefits of parody and criticism, and thus limited accordingly.") (internal citations omitted).

¹⁸⁹ See Thau, *supra* note 34, at 198.

¹⁹⁰ 17 U.S.C. § 107(3) (2012).

¹⁹¹ *Id.* § 107(4).

¹⁹² See *Stewart v. Abend*, 495 U.S. 207, 236–38 (1990); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985); *Nat'l Rifle Ass'n of America v. Handgun Control Fed'n of Ohio*, 15 F.3d 559 (6th Cir. 1994); *Twin Peaks Prods., Inc. v. Publ'ns. Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993). *But cf.* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (indicating that the factors are to be given approximately equal weight). However, the fourth factor has become a mainstay of lower courts' fair use analyses. See, e.g., *Twin Peaks Prods., Inc. v. Publ'ns. Int'l*, 996 F.2d 1366, 1377 (2d Cir. 1993); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992).

¹⁹³ See Thau, *supra* note 34, at 197–99.

the work,”¹⁹⁴ accords with a macroeconomic model that seeks to maximize social welfare. Rooted in the Constitution’s objective of promoting progress¹⁹⁵ through the accumulation of knowledge, courts have been less likely to afford copyright protection to factual works than fictional works.¹⁹⁶ In contrast, courts have frequently justified findings of fair use “in cases involving so-called ‘productive’ or ‘transformative’ uses, in which the defendant’s work incorporates the plaintiff’s in a way that creates a new and different work.”¹⁹⁷ Commentators have pointed out,¹⁹⁸ however, that the idea/expression dichotomy already functions to protect only the expression of ideas, not the ideas themselves.¹⁹⁹ Accordingly, in light of the idea/expression dichotomy and courts’ frequent focus on a work’s “transformative” nature, justifying fair use as a means of stimulating the dissemination of factual works to society has appropriately been criticized.²⁰⁰

¹⁹⁴ 17 U.S.C. § 107(2) (2012).

¹⁹⁵ See U.S. CONST. art. I, § 8, cl. 8.

¹⁹⁶ See *id.* See also *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 496–97 (1984) (Blackmun, J., dissenting) (“[I]nformational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.”); PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 305 (3d ed. 2013); Thau, *supra* note 34, at 197 (“Since society benefits from the free flow of information, and because fair use encourages the dissemination of copyrighted works, fair use adds to the aggregate public good if the value to the public of a use outweighs the individual harm it creates.”).

¹⁹⁷ See *Campbell*, 510 U.S. at 589 (noting that so-called “transformative” uses of a work are less likely to economically harm the original author than exact copying); *Sony*, 464 U.S. at 478–79; *Maxtone-Graham v. Burtchael*, 803 F.2d 1253, 1259 (2d Cir. 1986); Thau, *supra* note 34, at 197. Judge Leval’s fair use analysis centers around whether or not a work is “transformative,” which he asserts diminishes the fourth factor. See Leval, *supra* note 103, at 1111. See also *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013). *Cf. Sony*, 464 U.S. at 455–56 n.40 (“The distinction between ‘productive’ and ‘unproductive’ uses may be helpful in calibrating the [fair use] balance, but it cannot be wholly determinative.”); *Id.* (“The statutory language does not identify any dichotomy between productive and nonproductive time-shifting, but does require consideration of the economic consequences of copying.”).

¹⁹⁸ See Thau, *supra* note 34, at 198 (noting that facts are “already recognized in copyright law through the idea/expression distinction”).

¹⁹⁹ See Amaury Cruz, *What’s the Big Idea Behind the Idea-Expression Dichotomy?-Modern Ramifications of the Tree of Porphyry in Copyright Law*, 18 FLA. ST. U. L. REV. 221, 221 (“AN AXIOM of copyright law is that only the expression of ideas, not the ideas themselves, are copyrightable.”). See also Thau, *supra* note 34, at 198–99.

²⁰⁰ See Thau, *supra* note 34, at 198–99.

D. Ex Ante Uncertainty

Copyright scholars and treatise authors are in agreement that fair use creates significant *ex ante* uncertainty.²⁰¹ By permitting an affirmative defense to copyright infringement, the fair use doctrine seeks to curtail the market failures created by copyright law's overbroad protection of authors' rights.²⁰² However, courts have failed to consistently apply the four factors in factually similar cases, and various circuits have made little progress in reaching a consensus as to how the doctrine should be applied.²⁰³ Moreover, the Supreme Court has offered little prospective guidance,²⁰⁴ and in the absence of judicial predictability, litigants' *ex ante* uncertainty abounds.²⁰⁵ Significant litigation costs and statutory

²⁰¹ See 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.2, at 12:34 (3d ed. 2005); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(A)(1)(b) (citing *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998)); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995). See also David Nimmer, "Fairness of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 280 (2003) ("[H]ad Congress legislated a dartboard rather than the particular four fair use factors . . . it appears that the upshot would be the same.").

²⁰² See generally Carroll, *supra* note 17.

²⁰³ Compare *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (finding fair use in a parody case because works were "directed at different markets"), with *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (failing to find fair use in a similar parody case because the court viewed the author and the parodist as "competitors").

²⁰⁴ See *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 552 (1985) ("[F]air use analysis must always be tailored to the individual case."); H.R. REP. NO. 94-1476, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679 ("[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."); HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) ("[P]rivilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."); Carroll, *supra* note 17, at 1094 ("A fair user's uncertainty about the scope of her rights stems not only from the fair use doctrine's case specificity but also from its codification in a nonexclusive four-factor test set forth in § 107 of the Copyright Act.").

²⁰⁵ See Anderson & Brown, *supra* note 61, at 173–74; Carroll, *supra* note 17, at 1095 (claiming that the doctrine is a cause of "significant *ex ante* uncertainty"); Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J. L. & ARTS 571, 574, 577–80, n.51 (2008) (describing fair use as "notoriously difficult to predict"). See also 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1 (3d ed. 2005) ("No copyright doctrine is less determinate than fair use."); Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and Users' Rights*, 56 J. COPYRIGHT SOC'Y U.S.A. 485, 497 (2009) ("[T]he fair use doctrine provides us with very little direction in making legal or ethical decisions."); Nimmer, *supra* note 201, at 263. But see Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541

damages further compound the problem. As a result of this uncertainty, potential fair users are deterred from engaging in desired uses, and society fails to capture the full benefit of the doctrine.²⁰⁶

IV. PROPOSED SOLUTION

Michael Carroll describes four potential options for eliminating the economic inefficiencies brought about by the fair use doctrine:

- (1) reduce the costs of obtaining a fair use determination *ex ante* under the current legal standard;
- (2) reduce the *ex post* penalties for misjudging fair use in good faith;
- (3) sharpen the fuzzy edges of the doctrine by establishing clearly delineated safe harbors or by making the entire doctrine more rule-like; or
- (4) implement a combination of these measures.²⁰⁷

This article opts for a fifth option—to repeal and replace Section 107. For nearly forty years, the 1976 Act has generated uncertainty. During that time, scholars have attempted to delineate the doctrine’s unclear boundaries through qualitative²⁰⁸ and quantitative²⁰⁹ economic analysis. Numerous frameworks have been proposed to analyze and predict fair use outcomes,²¹⁰ yet courts’ indeterminate application of the

(2009) (“[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns.”).

²⁰⁶ See Carroll, *supra* note 17, at 1096.

²⁰⁷ *Id.* at 1123.

²⁰⁸ See, e.g., Carroll, *supra* note 17; Fischer, *supra* note 91; Landes & Posner, *supra* note 7; Moore, *supra* note 108.

²⁰⁹ See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Samuelson, *supra* note 205.

²¹⁰ E.g. COLLEGE ART ASSOCIATION, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS (Feb. 2015), available at <http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf>. The College Art Association (“CAA”) promotes and advocates for visual arts and visual artists. See *id.* Their February 2015 Report surveyed 12,000 CAA members and personally interviewed 100 members to “identify points of consensus concerning best practices in use of [fair use] materials.” See *id.* at 3. The CAA seeks to set forth an approach to fair use that adapts to both “familiar and emergent” fair issues. *Id.* at 6. The CAA lays out “principles” to help make fair use determinations in five situations: (1) analytic writing; (2) teaching about art; (3) making art; (4) museum use; and (5) online access to related collections in memory institutions. See *id.* at 9–12. The principles are extensive, but ultimately only provides guidance for visual arts community in the “most common [fair use] situations.” *Id.* at 8.

doctrine persists.²¹¹ In drafting a new fair use statute, Congress would be wise to draw upon the aforementioned economic principles as well as the experience of other nations.

This article proffers a three-step approach. First, a statutory safe harbor should be included for certain types of use. Analogous to the United States' fair use doctrine, many continental European countries²¹² employ a doctrine of "free utilization" or "free use," which specifically exempts certain uses from infringement, including private, non-commercial use; parody; news reporting; and educational/research uses.²¹³ Wisely, these countries curtail *ex ante* uncertainty by rarely departing from the statutorily enumerated exemptions, and only do so when confronted with emerging technologies not envisioned by their respective legislatures.²¹⁴ To avoid chilled expression resulting from fair use's current uncertainty, the United States should likewise enumerate specific statutory exemptions to serve as safe harbors. Exempting the aforementioned uses would not contravene the IP Clause's goal of promoting progress. On the contrary, from a macroeconomic and microeconomic perspective, the utilitarian benefit of allowing fair use in each case far outweighs the costs to individual authors.²¹⁵ Additionally, this approach would have the benefit of, at least in part, converging the United States' fair use doctrine with more commonly accepted international practices.²¹⁶

²¹¹ See Leval, *supra* note 103, at 1106–07 ("Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.").

²¹² *E.g.*, France, Belgium, Italy, Spain, Switzerland, and Sweden. See COHEN, *supra* note 53, at 531.

²¹³ See *id.* See also Holger Postel, *The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law*, 5 CHL.-KENT. J. INTELL. PROP. 142 (2006).

²¹⁴ See COHEN, *supra* note 53, at 531.

²¹⁵ This is especially true in the case of private, non-commercial use, and educational/research uses, both of which have significant social value and little detrimental effect on the individual market for an authors' works. News reporting, while hardly a "non-commercial" use, can be justified due to its monumental social importance. Finally, exempting parody follows as a matter of common-sense conformity with existing copyright law, because, in reality, authors rarely "authorize" parodists.

²¹⁶ See COHEN, *supra* note 53, at 530–34.

Second, any determination of fair use that falls outside the enumerated exceptions should rework Section 107's current balancing test to provide more certainty, including categorically abolishing Section 107's first factor.²¹⁷ The first factor's ambiguity has served little purpose other than to muddle the doctrine's intended effect²¹⁸ by creating a "value-laden hierarchy"²¹⁹ of judicially determined meritorious uses.²²⁰ Additionally, factors two, three, and four²²¹ should be merged into a single balancing test, which accounts for the competing economic considerations discussed in this article.²²² Judicial outcomes in fair uses cases have all too often focused on either: (1) the IP Clause's macroeconomic concerns (i.e. the promotion of progress);²²³ or (2) the impact on the individual market.²²⁴ The resulting *ex ante* uncertainty and attendant chilled expression have been detrimental to an efficient copyright system. Accordingly, Congress should draft a balancing test that accounts for both macro and microeconomic concerns, with an eye towards the IP Clause's goal of promoting the former.²²⁵

Finally, this article suggests taking the lead of patent law by establishing a mandatory federal circuit of appeals with exclusive jurisdiction over copyright cases.²²⁶ Fair use's uncertainty, in large part, stems from inconsistent application of the doctrine by different

²¹⁷ See 17 U.S.C. § 107(1) (2012) ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . .").

²¹⁸ See Thau, *supra* note 34, at 198.

²¹⁹ Darr, *supra* note 13, at 1048.

²²⁰ The words "purpose" and "nature" may potentially be broadly construed to cover a vast array of uses. See 17 U.S.C. § 107(1) (2012). Furthermore, 107(1)'s second clause uses the disjunctive "or," which draws a distinction between "commercial" and "non-profit educational purposes," but fails to account for non-education non-profit uses. *Id.*

²²¹ See *id.* § 107(2)-(4).

²²² See *supra* Part III.

²²³ U.S. CONST. art. I, § 8, cl. 8.

²²⁴ See *supra* Part III.B.

²²⁵ The Intellectual Property Clause's goal is to promote the progress of science and the arts by protecting authors' writings. See U.S. CONST. art. I, § 1, cl. 8. The end goal is the free flow of information to society, not the unfettered protection of authors' rights. Article 13 of the TRIPS Agreement is instructive: "Members shall confine limitations or exceptions to exclusive rights to special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." See Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 81 (Dec. 15, 1993), available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

²²⁶ See generally Wendy Levenson Dean, *Let's Make a Deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit*, 6 J. MARSHALL L. REV. INTELL. PROP. L. 365 (2007).

circuits.²²⁷ Creating a mandatory circuit of appeals would, hopefully, diminish the number of fair use lawsuits by curtailing litigants' ability to forum shop. This suggestion is not unmindful of the fact that certain commentators doubt the effectiveness of this solution in patent law.²²⁸ However, the distinctions between patent and copyright are numerous,²²⁹ not the least of which is copyright law's limited protection of authors, as opposed to the absolute grants given to patent holders.²³⁰

In sum, the three-step approach proffered in this article seeks to curtail chilled expression and promote an efficient copyright system by limiting litigants' uncertainty. Replacing Section 107 with a more definitive fair use statute that includes categorical exemptions and a refined balancing test should provide *ex ante* clarity. Additionally, creating a mandatory appeals circuit should provide further clarity by eliminating divergent fair use standards. Together—as demonstrated in Figure 4²³¹—these proposals should diminish authors' risk aversion, thereby promoting the production of creative works and increasing society's access to information. Ultimately, the IP Clause's goal of promoting progress in a modernist society will be furthered.

²²⁷ See Anderson & Brown, *supra* note 61, at 146.

²²⁸ Compare Hon. Diane P. Wood, *Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. (2013), with Paul R. Gugliuzza, *Saving the Federal Circuit*, 13 CHI.-KENT INTELL. PROP. 350 (2014).

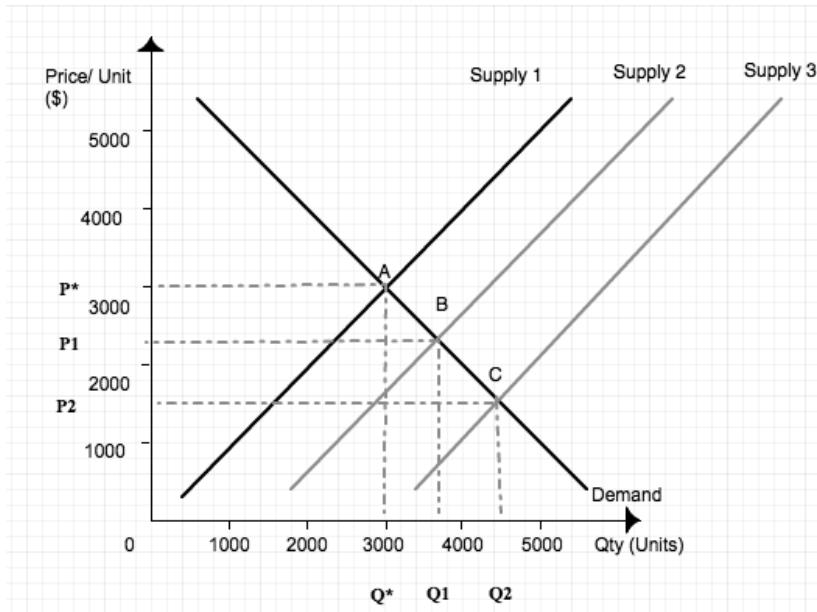
²²⁹ For more on this point, see Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689 (2006).

²³⁰ For a more thorough discussion of the economic shortcomings of the existing patent law system, see Simone Rose, *Further Reflections Distinguishing the Fountainhead of Knowledge: A Call to Transition to the "Innovative Policy" Narrative in Patent Law*, 66 SMU L. REV. 609 *passim* (2013).

²³¹ See *infra* Figure 4; Rose, *supra* note 230 and accompanying text.

FIGURE 4: EFFECT OF PROPOSED SOLUTION: SUPPLY, PRICE, AND OUTPUT

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²³² The ultimate goal of the IP Clause is to “promote . . . [p]rogress” through the dissemination of knowledge. See U.S. CONST. art. I, § 8, cl. 8. Not unmindful of the substantial capital investments (a.k.a., “fixed costs” in economic terms) this proposed solution would foist upon policymakers, it is the opinion of this author that the long-run benefits of reforming the fair use doctrine will outweigh the substantial short-run costs. The above solutions seek to do exactly this, and in the process create an economically efficient solution. Figure 4 shows three separate supply curves—each of which is applicable to Part IV’s proposed solution. In theory, as *ex ante* uncertainty dissipates, the supply curve for creative expression shifts right (Supply 1 → Supply 2 → Supply 3). As a result, the point of equilibrium shifts from A → B → C, and in the process, price decreases (from P^* to P_1 to P_2) and output increases (from Q^* to Q_1 to Q_2). Finally, it is important to note that this analysis will vary based on the elasticity of demand (E_D) (a measure used in economics to show responsiveness of the quantity demanded [QD] of a particular good or service—here a creative work—in relation to price) will have invariably impact on the graphical representations shown in Figures 1, 2, and 3. For example, a JD Salinger novel, which has a relatively inelastic demand (i.e. a steep demand curve)—meaning that due to the unavailability of substitutes—price increase has little effect on the quantity demanded of the book. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987). Conversely, “creative works” which are “elastic” in nature, have flat demand curves (e.g. for a straight to DVD movie) diminish a copyright holder’s quasi-monopolistic profit manipulation.

V. CONCLUSION

Economic analysis has long been the popular vehicle by which the fair use doctrine has been explained and applied. Both micro and macroeconomic explanations are useful tools for delineating various aspects of a doctrine that has been historically mired in conflicting justifications, accused of preferential post-hoc rationalizations, and, to a large extent, been undermined by its inability to uniformly predict judicial outcomes. Unfortunately, fair use's economic explanations, both individually and together, fail to provide sufficient *ex ante* certainty for potential users of copyrighted work. This problem has been exacerbated recently as “[w]ide distribution of digital technologies has greatly increased copyright law's domain while also giving rise to a significantly larger pool of potential fair users attracted to the remarkable reproductive and adaptive power of these new technologies.”²³³

This article has endeavored to explain the competing economic explanations of the fair use doctrine and elucidate its major flaw—its iatrogenic nature. In many cases, fair use serves its intended purpose by limiting market failures created by copyright law's monopolistic grants. However, in other cases, it creates uncertainties and market failures of its own—thereby causing the very problem it seeks to correct. Thau²³⁴ may liken this iatrogenesis to a surgeon who severs an artery during a routine surgery, while Landes and Posner²³⁵ would likely see it as an unsightly scar, and hence a regrettable necessity of curing a much larger problem. Whichever theory more accurately mirrors reality, history indicates that judicial clarification of the uncertainty is not likely. The task is thus one for Congress. There may be no simple solution, but one thing is abundantly clear: in the absence of this article's proposed reform, or at least some measure akin to it, *ex ante* uncertainty will continue to create market failure, and ultimately, the Founders' goal of promoting progress will continue to be undermined.

²³³ See Carroll, *supra* note 17, at 1093.

²³⁴ See Thau, *supra* note 34, at 197–98.

²³⁵ See Landes & Posner, *supra* note 7, at 333, 357–63.

