

Copyright, Fair Use and Transformative Critical Appropriation

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Introduction

In this essay we propose an extended interpretation of copyright's fair use doctrine. Building on expanded readings of earlier scholarly work and case law, we suggest that fair use must be understood to make deliberate room for transformative appropriation of copyrighted work whenever the appropriation and transformation are necessary steps toward the realization of significant social criticism.

The fair use doctrine has long been recognized for its singular role as a moderating force against copyright's equally well-recognized capacity to suppress expression. Yet copyright practitioners, scholars and judges have also long tolerated the quixotic nature of fair use, as though it were somehow precious that a doctrine so vital should prove to be accessible only through a process of divination revealed to the initiated, and then only after long years of immersion in the art. The celebrated four-factor test imposed as a mandatory part of an inquiry into fair use by the Copyright Act of 1976 is thought by many to reflect Congressional approval of this exercise in obscurantism. But we think fair use need not be quixotic or obscure. Its main tenets and their application can and should be made readily available in advance to those who encounter the works which are the subject of copyright, and not merely to their lawyers. In truth Congress has enacted nothing to suggest otherwise.

The regime we advance here has antecedents in many quarters. It is akin to the fair use standard proposed by Judge Pierre Laval a decade ago; but unlike Judge Laval's proposal, ours recognizes a straightforward affirmative presumption of fair use in all cases of transformative critical appropriation. Our regime also resembles the doctrinal fair use

² This is a draft of the text only from a work in progress. We are making it available to attendees at the Conference on the Public Domain at the Duke Law School, November 9 - 11, 2001, where it will serve as the framing paper for a panel discussion on "Creativity, Appropriation, Culture and The Public Domain". Additional research and contemplation, as well as supporting notes with citations, acknowledgments, and the like, will require additional time and effort before the work is completed. We will be grateful for any criticism, comments or suggestions by interested readers. In the interim we gratefully acknowledge preliminary readings by Jamie Boyle and Jeff Powell of the Duke Law School Faculty, and preliminary research by Jim White, Liz Perry and Yelena Semonyuk, students at the Law School. We are of course responsible for any errors or mistakes in the draft.

treatment of parody in *Campbell v. Acuff-Rose*; but in our view parody itself, appropriately understood, is merely an example of the wider and more predictable fair use doctrine we now propose. Meanwhile, public criticism has always been among the purposes served by fair use. But our reinterpretation of that doctrine would secure a place in copyright for any criticism in which appropriation and transformation play a necessary role.

In the sense in which we use the term, criticism is to be understood as serious social commentary - that is to say, as commentary (public or private) of the sort that the First Amendment itself has long recognized, prized and protected; and it is the necessity of the appropriation to the social commentary that determines whether fair use is available. Necessity is to be judged from the perspective of the creator of the commentary, rather than the proprietor of the copyright or from some more neutral or public perspective. And the adverse impact of the appropriation upon the antecedent work, though always a desideratum pro forma by virtue of the Act, serves only to reinforce the seriousness of the inquiry into necessity: adverse impact never outweighs necessity under the reading we propose. Finally, it is simply irrelevant to our inquiry into fair use that the appropriative work, if authorized by the proprietor of copyright in the antecedent work, might be recognized as a derivative work. Transformative critical appropriation may or may not result in additional original (copyrightable) expression. Transformative use does not inevitably presuppose either originality or public expression; and in appropriate cases no new copyrightable work need be recognized at all.

Our proposal would substantially limit the present ability of a copyright proprietor to employ infringement theories so as to impede social commentary arising from transformative appropriations of copyrighted work. It would do so by recognizing an affirmative presumption of fair use in the settings we describe, in terms more readily accessible to the creators of appropriative social criticism than is now the case. We believe that these changes would represent a significant improvement in the fair use doctrine itself.

Our proposal assumes added significance in the context of an increasingly troublesome convergence among three wider forces in contemporary public law and culture. These three forces we sketch initially as predicates to the reinterpretation of doctrine that comprises the final portion of our essay:

First, as we observe, the constitution itself is playing a more immediate role in the interpretation of copyright than ever before. Students of copyright recognized decades ago that some tension between the First Amendment and copyright is inevitable. Today, direct conflict is at hand in such cases as *Universal City Studios v. Reimerdes* (*the*

DeCSS litigation) and *Sun Trust v. Houghton-Mifflin Company* (the widely-noted infringement action filed on behalf of the estate of Margaret Mitchell, author of “Gone With The Wind”, against the publisher of the novel “Wind Done Gone”). If collisions like these cannot be avoided on satisfactory terms, copyright inevitably will prove poorer for the encounters. To forestall this prospect, copyright must gracefully accept a new and unaccustomed role as active partner in a more generous system of fair use.

Meanwhile, as works like those of the artist Damian Loeb or the novelist Alice Randall suggest, the contemporary culture of arts and commentary increasingly depends upon direct appropriation as an instrument of critical expression. This is itself a function of postmodern thought and criticism, in which a Romantic understanding of authorship, driven in its origins by Renaissance embodiments of linear expression, has given way to another, harder view of creativity driven instead by the new digital technologies. In this contemporary view, to appropriate is to challenge, to expose, and thus to transcend the conceits and boundaries of the past, thereby gaining insight into what was unacknowledged or opaque. But traditional copyright doctrines are not congenial to appropriation, much of which is held to be simple infringement. If copyright is to come to an accord with the expressive critical culture and technology of the new Millennium, it must also accept the inevitability of a greater degree of appropriation than the comfortable protectionist doctrines fashioned in the last two centuries would allow.

Finally, copyright itself has assumed a new significance in contemporary culture, the effects of which are everywhere evident and already the subject of considerable comment. In this essay we address a single insight that does not appear to have had preemptive attention yet: namely, the remarkable degree to which copyright and neighboring rights have slipped the bonds which previously constrained them so as to intrude now on every hand into the once-private domain of individual creativity. *A&M Records, Inc. v Napster*, with its adverse implications for some 60 million music lovers world-wide (many of them quite young and working on-line from the privacy of college dorm rooms or bedrooms in their parents’ homes) is an obvious example, but others abound: in shrink-wrap licensing imposed directly upon individual consumers; in limitations affecting private research and education; in technological measures meant to control or preclude access to copyrighted work on-line; and in myriad other interactions occasioned by the new technologies, whether on-line or otherwise. In all of these settings, and in numerous others not catalogued here, copyright has crossed a conceptual boundary that once separated the public and private domains. And it is this omnipresent phenomenon of copyright intrusiveness, we think, that gives the convergence we have

noted here its singular significance in our time, while in turn adding force to our proposal for new doctrinal responses from within copyright itself.

I. The First Amendment

Let us be clear about the initial underlying premise of this essay: in a straightforward contest between copyright and the First Amendment, copyright must lose. To be sure, copyright is authorized by the Constitution. Copyright is aimed at securing laudable goals. Copyright has a long history of coexistence with the First Amendment. And yes, that coexistence is capable of continuing well into the new Millennium - at least, as to that, probably yes. But do let us be clear. When a contest cannot be avoided, it is copyright and not the First Amendment that must give way. All of this we think evident. We offer it here merely as common ground, to be followed by a brief but necessary history of their cohabitation, again for the sake of context.

It does seem odd - a little, at first - how few cases there are on this subject, not to mention how scarce the writing from longer ago than thirty years. In part this is surely a measure of how distant copyright once seemed, and in contrast how much it has come to intrude into private lives in recent years.

Before the 1976 General Copyright Revision, it was entirely plausible to imagine a line between copyright and private lives. Alan Latman, the eminent copyright scholar and practitioner, whom Register of Copyrights Abraham Kaminstein commissioned in 1958 to prepare a Copyright Office Study on Fair Use, faithfully recorded the long-standing view of those who believed that "private use is completely outside the scope and intent of restriction by copyright" - a view, the always scrupulous Latman added, that could neither be confirmed nor dismissed by the case law. And the Supreme Court of the United States, in a series of cases beginning in 1968 and continuing well into the next decade, observed repeatedly, with respect to the question of multiple performances in radio or cable television retransmissions of copyrighted broadcasts, that there could be no performance at all on "the listener's or viewer's side of the line".

In these circumstances there may have been little reason to probe the relative strengths of copyright and the First Amendment, much less to assess the outcome of a direct collision between them.

Circumstances have since changed, as we all know. The development of cheap, personal copying some thirty-five years ago and the subsequent displacement of analog

technologies by their digital counterparts and successors, accompanied by the expansion of the internet as a personal communications tool - and meanwhile increasingly the fear (understandable, if sometimes exaggerated) on the part of the copyright industries that this unending stream of innovative new technologies would result in the undoing of estates in copyright - all of these changing circumstances have led to a new proximity between individual lives and copyright that has brought into equally new and sharp relief the potential for dramatic conflict between copyright and the First Amendment. Recent cases, like *UMG Recordings, Inc. v. MP3.Com*, or *Napster* and *Reimerdes*, as well as legislation like the Digital Millennium Copyright Act of 1998, have rung up the curtain on the first act of this drama and made it real.

And yet the conflict has always been there, crude and inchoate, like Yeats' *Rough Beast*.

To his credit, Professor Melville Bernard Nimmer sensed its presence some three decades ago. In an essay which was to a considerable degree the conceptual antecedent to our own on this preliminary point, Nimmer observed that the First Amendment ultimately must prevail if conflict could not be avoided. An amendment could not be considered the mere equal of a contradictory provision in the original Constitution. To be sure, an enduring reconciliation might be sought according to one balance or another; but failing in that quest one had no choice but to allow the First Amendment precedence. Paul Goldstein and Robert Denicola followed closely with essays of their own, each essentially to the same effect.

Yet there the matter rested for another decade and a little more, languishing all but unnoticed, while around us on every hand the previously discrete doctrines of intellectual property, including but by no means limited to copyright, leapt their boundaries and, joining forces in a common assault, thrust deep into the once unclaimed territories of both the public and the private domain. And then, slowly at first but with gathering momentum, the intellectual climate began to respond. Two counter-forces coalesced, circa 1985: on the one hand, a growing awareness of the public domain as a subject deserving of affirmative recognition in itself; and on the other, at last, a renewed attention to the First Amendment, beginning more or less where Nimmer and the others had left it years before, but with added insights and nuances now, from authors whose professional scholarly grounding in critical theory brought fresh vigor and determination to their work.

Though the idea of a public domain did not originate with intellectual property, still it is fair to say that the concept has gained particular ground in that field within the last two decades. Responding to essays that urged a more deliberate recognition of the public domain by courts and Congress, subsequent authors have written from considerably

broader perspectives, gaining in the process a central place for the idea of a commons in both the doctrinal and cultural theories of intellectual property. We shall make no effort here to fashion an intellectual history of the public domain, or commons, movement; it is our purpose merely to suggest that the movement has been instrumental in the emergence of a concomitant concern for the First Amendment.

Two ideas central to the contemporary theory of an intellectual property commons recur in the later writing from this movement: first, that the distinction between private and public spheres has been exaggerated, and perhaps misplaced, in modern liberal thought, with undue attention to individual rights and adverse consequences for collective welfare, the result of which is an increasing need for recognition of a public domain far more graded and complex than earlier writers had suggested; and second, that faced by mounting successes on the part of intellectual property rights holders in securing increased protection at the expense of the commons altogether, those who now advocate on its behalf may ultimately find it necessary to turn for help to the provisions of the Constitution. It is hardly surprising, therefore, that even as the debate about the nature of a suitable commons has advanced, those engaged in the debate have interested themselves in the First Amendment as well.

Here, however, they join judges and scholars whose primary interest and training are not centered in the cultural implications of intellectual property, and whose thinking about the First Amendment may seem to impose new threats of its own. Indeed, historically, First Amendment jurisprudence itself, with its rights-centered orientation toward individual autonomy in fashioning expression, may in some circumstances lend itself to a threat to the development of what some see as a suitable commons.

Meanwhile, there are complexities in First Amendment jurisprudence to take account of, never mind the outcomes they may lead to. Professor Nimmer foresaw them in his article of thirty years ago. Questions of balance presupposed by the First Amendment are difficult in any context, he noted; in the context of a field of law such as copyright, that equally presupposes a right to suppress unauthorized expression, those questions can assume Talmudic proportions. For Nimmer, ultimately, an appropriate definitional balance could be drawn along a line already recognized as bedrock principle in the law of copyright - namely, along the line that defines the distinction between unprotected idea (the province of the First Amendment, he suggested) and protected expression (the traditional province of copyright)

In Nimmer's judgment at the time he wrote, the idea-expression dichotomy made adequate provision for such tensions as there might be between the two systems - between copyright, on the one hand, and the First Amendment on the other. This was convenient

for copyright, of course. For later scholars, however, the convenience in this definitional balance has appeared facile. Whether or not it was justified when Nimmer wrote, a balance defined by the idea-expression dichotomy has long since seemed to lose its utility in the face of changes in the balances within copyright itself - in the balances, that is to say, between the burgeoning interests of rights proprietors and the increasingly insistent interests of those whose access to the public domain has been correspondingly curtailed.

Contemporary scholarship must deal with contemporary realities. And these realities are now multiple: to the continuing concern in copyright for the rights of authors, composers, photographers, artists and other individual creators of copyrightable work, there must be added new concerns arising from the new technologies; and ultimately, always, there is the internet, which may or may not presage the great revolution in the culture of communications predicted by those most interested in it, but which in the least case scenario is complex in ways not anticipated by anyone thirty years ago. Contemporary scholarship, then, almost always addresses the tension between copyright and the First Amendment in terms of multiple balances, judged in each instance according to some discrete aggregation of problematic issues in copyright, and fashioned in each instance so as to secure whatever provision for a commons the author favors.

Intellectual ferment of this intensity has begun to confer a sense of reality and presence upon what had been a more abstract set of concerns. Thirty years ago, copyright might be challenged on First Amendment grounds; but challenges of this sort were routinely turned aside with no more (at most) than an acknowledgement that in another case, confronted by a more urgent need in the presence of more exigent circumstances, courts might consider the constitutional issue. Fifteen years ago, the First Amendment might be addressed directly, but still turned aside in favor of a copyright system itself seen as possessing an important capacity to contribute toward a system of free expression. Today, in contrast, the First Amendment is at work in cases in which copyright presumptions once well established and widely accepted no longer command unquestioning assent.

Two cases, drawn from among a dozen now pending, will illustrate this movement and suggest the breadth of the transformation it is working in the field of copyright.

One is *UniversalCityStudios v. Reimerdes*, the so-called *DeCSS* case, a case presenting the first real challenge to the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 (DMCA), in which the First Amendment issues are aimed squarely at the heart of the copyright industries' structural response to the evolution of the digital technologies. Meanwhile, in another quadrant of the copyright spectrum, there is *Sun Trust v. Houghton-Mifflin Company*, the so-called "Wind Done Gone"

case, in which the immediate issues are doctrinal in nature merely, but in which, even so, major structural changes in the copyright system already are implicit in an interim decision by the Eleventh Circuit against a preliminary injunction - a decision grounded squarely (and, for the first time, solely) in the First Amendment.

Which of these two cases represents the more significant challenge to convention we need not decide. The lesson here is that copyright no longer enjoys the luxury of ignoring the First Amendment. Whether the constitution is raised as a weapon against the new legislative structure under which the copyright industries hope to meet perceived threats encoded in the digital era, or as a shield against the continuing application of copyright's most cherished remedies, the point is the same: the sheltered place copyright once enjoyed under the constitution has gone.

These thoughts, however, could quickly carry us beyond our purpose in this essay. Here we mean merely to advance the first of three converging reasons why copyright doctrines designed to avoid collisions with the First Amendment must be given a generous reading in these times. To be sure, the game is already well afoot; safe harbors may in the end prove unavailing. In our judgment, nonetheless, an effort to recognize in copyright's existing fair use doctrine a reinterpretation calculated to make expanded room for criticism through transformative appropriations is simply a sensible gesture toward the new constitutional reality that is at hand.

II. Appropriation

Meanwhile there is the question of appropriation and its new relationship to the continuing viability of the copyright regime.

We do not say that appropriation is new, whether in art or in other forms of critical expression. It is another commonplace among copyright practitioners, judges and scholars that few works (if any) spring into existence except on the backs of works that have gone before them. Appropriation, imitation and the like assume a deliberate role in the transmission of culture, and in the play of creativity itself. This has always been true, as it is true today.

But appropriation has assumed additional significance in our time, a significance which has grown in response to the unprecedented appearance of the digital technologies. The new technologies have invited appropriation even as they have enabled it; opportunity has begotten response. Contemporary expression reflects a degree of appropriation not

only greater in sheer volume than ever before, but also often notably different in kind. Quantity, content, form and function: all are affected, in multiple ways.

Viewed from a critical perspective, this phenomenon, among others, is an acknowledged artifact of postmodern culture. We see it reflected in Alice Randall's novel "Wind Done Gone", a work which almost certainly would not have been published by a reputable house like Houghton-Mifflin a mere twenty years ago, but whose appearance in our time does not seem odd. No less do the paintings of Damian Loeb invite attention here. Loeb, whose canvases often feature references to and appropriations from works already in the popular culture (including copyrighted photographs and motion pictures), has achieved a notable success, this at least in part as a result of the acceptability of his works among patrons who see in them reflections of contemporary reality that precede and go beyond more conventional paradigms of representation and originality.

Again, we do acknowledge that there have always been such works among the arts. Bryan DePalma's films and Andy Warhol's earlier pop paintings anticipate our own moment, as do works of fiction by E. L. Doctorow, Truman Capote, Don DeLillo or James Ellroy. But the intensity of the cultural interaction between creativity and appropriation now is substantially greater than, and different from, our experience with earlier exercises in fiction, faction, film homage or evolving schools of art. In some part this contemporary intensity is an incidental reflection of our own increasing experience with the media (and particularly the new media born of the digital technologies) - and of course with the growing omnipresence of the internet. The new technologies must be understood as precursor and consequence alike of larger movements within contemporary culture.

But more is at work here even than the incidental interplay between technology and culture, or the evolving impact of one upon the other. What has changed is the relationship between appropriation and the law.

For millions of individuals (the users of Xerox copying machines, for example, and the clients of Napster) the practice of appropriation is simply an everyday occurrence, and one that raised little or no conscious acknowledgment of copyright at the outset. As we have noted, however, copyright proprietors, alarmed by this new phenomenon, have intervened with efforts to curtail it. Given the direction in which the popular appetite for appropriation has been moving, however, the effect of this intervention, though no doubt unintended, has seemed at times (particularly in the past decade) to be regressive and counterintuitive, and indeed has often appeared to take the form of increased limitations on the very scope and nature of what may be addressed privately as well as expressed publicly.

The result has been a new and perverse challenge to the traditional role played by appropriation. Where once appropriation was chiefly an incidental (if inevitable) aspect of creativity, sometimes indirectly circumscribed by critical judgment, now it is also the deliberate and aggressive response of a creativity directly frustrated by rules and conditions imposed through a system of formal law - a system of law, moreover, increasingly omnipresent and yet so arcane as to be inaccessible to those whose expression it constrains. In effect, appropriation has assumed not merely a prominent place in postmodern expression, but a new role as guardian adjunct to creativity as well - in the latter instance a role suggestive of affirmative civil disobedience, amounting to opposition and dissent directed against copyright itself. The difference is this: DePalma and Warhol, Doctorow, Capote and DeLillo, and others like them, have all imagined that they worked within generally accepted legal (if not critical) norms; Loeb and Alice Randall do not. There is fresh significance in the fact that Loeb's most recent New York exhibition (The Mary Boone Gallery, March, 2001) was entitled "Public Domain". It is consistent with the contemporary postmodern experience of appropriation to see the practice as having its origins in a de facto commons quite unlike the de jure public domain long familiar to students of intellectual property. When Loeb incorporates scenes from earlier works into his own he does not come to that practice as supplicant, trespasser or sly squatter, but rather as a matter of riparian entitlement. This is an understanding of the public domain that transcends the accustomed limitations of copyright and intellectual property, one that does not acknowledge a forbidding moral obligation toward the sensibilities of prior artists, much less an exclusive adverse legal entitlement in whatever claims may otherwise arise from the status of their antecedent works as property.

Loeb and Randall may be seen as acting above the law. Meanwhile, a growing number of artists engage in creative expression which is intentionally fashioned so as to challenge the law. Here again examples abound, but we will content ourselves with one.

Negativland, a Bay Area music group, set new standards for work of this sort with its CD release a few years ago, entitled "U2", in which the group initially challenged the Irish rock band of that name and one or two other icons of the music industry as well, moved to do so initially perhaps as a good natured, even innocent, spoof involving appropriations, slant rhymes and goofs. But when multiple lawsuits followed (on copyright and trademark infringement grounds, as well as the odd count of libel, invasion of privacy and the like), Negativland responded first with vigor, and then with mounting ferocity, ultimately launching an assault upon reason and the law oddly reminiscent of the Marx Brothers in "Duck Soup". The eventual outcome of this litigation was, in theory, seizure,

impoundment and the eventual destruction of the offending CDs. In fact they are still available underground (though they cost more now), as are the documents generated in the litigation itself, the latter neatly bundled together with commentary from interested observers, all offered for sale by Negativland in a volume entitled "Fair Use: The Story of the Letter U and the Numeral 2", with commentary by Francis Gary Powers, Jr., the son of the man who flew the U2 spy plane shot down over Russia in 1956 - but then perhaps you see where this is headed: toward inspired nihilism, after the fashion of Wavy Gravy, but with somewhat greater linearity. And there is a video as well, a documentary of sorts that manages to republish every libel and every infringement from multiple perspectives, so that there is no mistaking the intent here, which is anything but acquiescence in the rule of law.

In short, appropriation flourishes. The copyright industries concede privately that it cannot be eliminated in individual cases, unless a massive effort at brainwashing should persuade an entire generation of primary school children to accept the main tenets of copyright into their personal belief systems, and then to hold them there and act upon them, along with such other items of prescribed doctrine as flossing and transubstantiation. No doubt there are copyright missionaries willing to spend themselves in such an effort, but in our view theirs is an undertaking bereft of promise. The weight and drift of an entire culture are set against them.

Which raises, then, this question: if the shape of the future is to be read, as we believe, not in *Reimerdes* or *Napster*, but rather in the work of Randall, Loeb and Negativland, then why should we bother to raise this alarm here? Why not merely wait for the inevitable to come to pass? If we are correct, copyright will either give way or eventually founder on the shoals of resistance.

But we do not say that copyright is in every aspect an unwelcome system of law. Suitably constrained, it may still retain some capacity to encourage the production of new and valuable works of authorship. Surely accommodation is preferable to destruction. The proposal we endorse here is meant to advance the former while avoiding its alternative.

III. The Private Domain

Finally, in these preliminary observations, we address one of the more important challenges to creativity in our time, namely, the unprecedented intrusion by copyright into private lives - an intrusion driven by intent and omnipresence alike. We may be too

late. As we write, Broadway's newest, hottest, hippest opening is "Urinetown: The Musical", which envisions a contemporary alliance between Congress and private industry aimed at regulating micturation, with legislation to authorize the seizure and conversion of all commodes into toll booths, and a theme song aimed at educating and persuading the public as to the necessity of these actions: "It's A Privilege To Pee". Alas, the premise of the musical is only too plausible in our time. We recognize the potential futility in protesting intrusions into a merely optional activity like creative thinking. We may well find ourselves swimming, as it were, upstream.

Still, as we observed in our earlier treatment of the First Amendment, copyright has not always sought or shared intimate connections with us. Alan Latman noted in 1958 that copyright might sensibly be said to have nothing at all to do with private appropriation for personal use. A decade later the Supreme Court decided the first of four decisions (involving performance) against the claims of copyright proprietors, in each instance on the Court's understanding that there was a "private side of the line" into which questions of copyright simply did not reach. That Congress and the copyright industries subsequently intended in some sense to extend the law across that private line is now widely credited. Most copyright specialists suppose that the reproduction right in section 106(1) of the 1976 General Revision reaches personal copying for private use (whether or not it did so at the time Latman wrote), finding in the concept of reproduction nothing to distinguish between private and public action. In fact, such assumptions are not clearly sustained either by the text of the Act or by its legislative history. But we need not resolve such delicious technical issues as this to understand the larger point, which is that in the opinion of many who participated most fully in drafting the 1976 Revision, including virtually every representative of the copyright industries, the new law was intended to extend the reach of copyright well beyond the boundaries that had obtained under the 1909 Act.

Meanwhile, no one doubts that copyright is omnipresent as never before. Individuals daily encounter the effects of the new law (both direct and indirect), in circumstances unimaginable under the older copyright regime. More such incursions - but let us call them extensions for the sake of avoiding charges of polemicism - are perennially among the legislative agendas in both houses of Congress. If enacted, these laws would confront and circumscribe the daily activities of virtually every sentient American citizen beyond the age of diapers.

And yet even these extensions are not the chief issues that confront us. What is most troublesome, in our opinion, among all the myriad complexities of copyright in our time, is that the very wellsprings of creativity may now be the more readily altered or

affected by copyright, as a consequence of the changes introduced since Latman wrote: altered or affected by presuppositions and assumptions encoded and indulged by Congress at the instance of the industries, presuppositions and assumptions of which virtually no one not trained to law and the arts is generally aware in any sophisticated way - and as to which, even among those few who are informed and ill at ease, the will and the means to resist are often weakened by habits of professional discipline or deference, not to say distraction and fatigue.

It is beyond our purpose here to detail the impact of copyright upon the fledgling enterprises of creative thought and action. But this much we have time and room to say: whether we are born *tabula rasa*, or knowing some great thing, it is in either instance our culture that shapes us as we begin to think at large, as it is our culture again that influences us in our earliest creative play. No doubt we must accept as a condition of our membership in society that some limitations will be imposed upon us when we venture abroad. That these limits will weigh upon us privately and be encoded in the fashion of copyright is not a given, however; and there are reasons to resist privately so many of what Foucault envisioned as society's inevitable constraints against "the fearful proliferation of meaning" as are deliberate and direct in law.

Until thirty years ago the weight of copyright fell across the shoulders of a child only indirectly, and then in ways that still gave meaning to the notions of encouragement that justified the law. Today, copyright descends as a shadow, darkening the multiple landscapes of meaning and possibility alike.

We must learn to remember that creativity can express itself in ways that are inconsistent with, if not directly opposed to the notions reflected in copyright. Napster will serve as an example. The high school student who downloads music may or may not be engaged in an infringing activity under copyright. But the private act of selecting, coordinating and arranging music is unarguably creative. By the standards of the 1976 Act itself, such downloading undoubtedly can amount to authorship - or could do so were it licensed. This is not the end of our inquiry, however. Authorship is the singular concern of copyright, but merely a facet of creativity. No one would have supposed otherwise in the past. If this distinction seems obscure today, then here is evidence of the degree to which copyright threatens to distort our understanding of the processes of creative expression through its intrusion into our private lives.

The Constitution envisioned encouragement for the progress of science and the useful arts. This may always have been a mistake in the case of copyright: encouragement by government may well have carried too great a price even in the infancy of the Republic. Whatever may be said as to that, one cannot escape doubt as to whether a provision

oriented toward the creation of an intellectual economy continues to make sense in a digital millennium. The burden imposed upon private creativity, from which ultimately the intellectual economy springs, may simply be too great. Even if public practices of appropriation eventually weaken the grip of copyright upon private lives, the costs meanwhile cannot merely be discounted. We cannot know whether any of the expression we have come to count on in the past will continue to be generated in a future touched by our peculiar struggle with copyright. Our confidence in experience does not answer here; the past may not be prologue. We can advance nothing to sustain us in our judgment that the weight of copyright, extended as it has been in our time into the most intimate aspects of our lives, can be borne without adverse consequence by those whose creative outpourings are yet to come.

But copyright's incursions into the territory of the soul can be resisted on grounds more intimate still. We have made of copyright a virtual religion, so much so that one cannot escape the sense that it is the Establishment Clause that should occupy our attention in this setting. A decent respect for the private and uncharted recesses of the human psyche, unaugmented by any other consideration, counsels caution, for it is in this place that our creativity is rooted and nourished, and from this place that our gifts to others later spring. It is just here, then, that we sensibly resist deliberate effort by governments to establish our systems of belief.

Copyright can continue to play a useful role in our public lives. Nothing in what we have said supposes otherwise. In doing so, however, copyright should make room for transformative critical appropriation without concern for its eventual translation into public expression. The proposal we underwrite here is designed in part to insure that room for such endeavors is fully protected.

IV. Transformative Critical Appropriation

And now, at last, we address the question with which we began: is it plausible to imagine a reading of the fair use doctrine that would presumptively privilege transformative critical appropriations, and do so on terms that would make the privilege accessible not merely to lawyers but to those artists (and others) whose works depend on the secure availability of such a privilege? Calls for an expanded reading of the fair use doctrine along lines like these have appeared in response to Judge Leval's essay on transformative use in the *Harvard Law Review*, and have assumed greater urgency since the Court's more recent decision in *Campbell v. Acuff-Rose*. No court has yet so held. Perhaps none is likely to do so in the very near term. (The Eleventh Circuit has an important opportunity

in *Sun Trust Bank v. Houghton-Mifflin*. It remains to be seen whether that court will seize the day.) But is it plausible to imagine such a reading in our time without undermining the entire edifice of copyright? We think it is.

The parameters of a suitable privilege are not difficult to outline. One could debate the details endlessly, but let us imagine a privilege generous enough to accommodate all of the appropriative works mentioned in this essay: the referential novels of an Alice Randall; the visual art of Damian Loeb; sampling by Marc Hosler and Negativland, not to mention a host of other new musicians. Let us go beyond these works to include video appropriations in collage form, as well as performance art. Then, to be sure that we have excluded no one, let us make it clear that “transformation” does not require the sort of “new work–old work” marriage envisioned by Judge Leval, nor the merely fragmented literal appropriations (*ala Nimmerpere*) proposed by Hosler on behalf of Negativland, but extends rather (as suggested in a useful article by Lloyd Weinreb ten years ago, and for that matter as approved by the Court in *Universal Studios v. Sony* still earlier) to even those entire takings that relocate an appropriated work in transformative settings. Let us understand still further that criticism is to have a reading no less generous: in this context it means everything that section 107 of the Copyright Act could plausibly be said to mean in apposition when it refers to “comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”, as well as everything that “criticism” itself means, which again is to be understood in the broadest sense of that term – the sense of the term that includes any observation on any matter of general interest or concern, whether the observation is explicit or implicit, direct or indirect, published or unpublished, and whether or not aimed at the antecedent work or elsewhere. And finally, let us understand that though the fair use privilege we are sketching here is drawn from section 107, still its measurements as to works deserving of publication are to be taken against analogs to be found among the first amendment cases whose direct application we meanwhile actually seek to avoid, including the libel and obscenity cases which have established the parameters of thought, speech and the press in the last four decades.

Again to underscore the position we are contemplating here: the law does not now provide for a fair use privilege this comprehensive or this secure; but it should do so, and in our opinion it could do so without undue injury to the incentives copyright is justifiably intended to afford; and finally, no less to the point, it could do so without violating the plain meaning of the Copyright Act. Cases and learned commentaries are of course another matter; many of these would have to be revisited, and revised or discarded. This would no doubt bring some embarrassment to their authors; but thus suitably

chastened they would also no doubt be better, wiser judges and scholars in the future, and so would have much to be grateful for in consequence of this transition, as would we all.

And are these dreams of madness merely? Hardly. The main outlines of the privilege we propose are already fully in place.

There is nothing mad about envisioning a presumption in the case of fair use. After *Campbell v. Acuff-Rose*, parody at least is presumptively privileged. Others have observed as much, and indeed, no alternative reading of that case is plausible. To be sure, Justice Souter may have attempted somewhat to undo what he had done there, observing in the opinion he authored that “fair use is not to be simplified with bright-line rules”. But this is an observation susceptible to a perfectly congenial interpretation, one not at all in the way of the presumption we are envisioning here. We do not suggest that a fair use defense, or for that matter fair use analysis, be treated as though it were a matter of fiat; judges in the end will have to examine doubtful cases individually when they arise to determine whether the privilege (or its presumption) is justified in the circumstances there presented. Perhaps this is all that Justice Souter had in mind. If not, however, then alas for him, for there is no escaping the larger implications in the *Two Live Crew* decision, the result of which, taking those implications in their entirety, is to privilege parodies on a presumptive basis, like it or no. Not even Justice Souter can hope to have it otherwise, having given us the opinion he did. Like the rest of us, he cannot knit a vest with sleeves.

But parody is a variety merely of the species we have suggested here. And parody is analyzed in *Campbell* on grounds that some will say are not to be seen in other forms of appropriation, so that the presumption after *Campbell* is limited accordingly.

In *Campbell*, the Court formally undertook (as courts invariably have done since the enactment of section 107) an analysis grounded in four mandatory statutory factors, none of them prescriptive, and the lot of them taken together uninformative. (We will set them out in their entirety in a footnote one day, but we draw the line at cluttering the text.) Their uselessness has been noted by others, not a few times, as have been the unsuccessful attempts by courts to use them. Yet courts consider them because they must; Judge Leval has even gone so far as to say that the four factors are all that can be considered under section 107, this despite language in the section itself clearly indicating that the four factors are to be contemplated in addition to whatever other circumstances or considerations appear relevant - language, in short, that makes Leval's position on this point untenable.

The four factors are obviously unhelpful in analyzing parody, which always presupposes (more rigidly so in copyright analysis, perhaps, than elsewhere) that the parodic work is aimed at the work parodied. The implication in this for copyright is that

parodies, unlike other works, cannot count on being licensed: the antecedent work must expect to be attacked, and perhaps even to be damaged by the parody. This means in turn that the fourth factor in fair use - whether or not the appropriation is adverse to the interests of the copyrighted work, and if so by how much - cannot meaningfully be considered. It was thus, confronted in *Campbell* by a deserving category of work in which appropriation is inevitable, that the Court held in effect that if parodies are to be given the benefit of fair use at all a presumption to that effect must follow, mandatory factors to the contrary or not.

But this brings us full circle to the objection with which we started, which is that conceptualizing fair use in terms of parody can carry us only so far. And we must also understand the implications in this objection clearly: a privilege for parodies alone reaches no more than a fraction of the settings (a small fraction at that) in which transformative appropriations may take place, yet in which, to paraphrase Justice Souter in *Campbell*, the law may sensibly wish to protect the second work. How, then, are we to respond when the singular attributes of a particular form of appropriation do not conveniently fit within the framework of parody analysis *a la Campbell*?

One way is to see the analysis in *Campbell* as an example of the larger econocentric analysis proposed by Wendy Gordon some twenty years ago. Fair use, she suggested, should be seen as copyright's response to market failure. As a more disciplined alternative to the raggedy efforts by courts to make sense of section 107, Gordon's suggestion had much to offer. If deliberately embraced today, this approach could extend the reach of *Campbell*, as well as restate the essence of its holding so as to give it meaning beyond the confining nature of parody itself.

Damian Loeb, for example, has been sued by the commercial photographer Lauren Greenfield, who objects to Loeb's appropriation of a photograph she took some years ago and its subsequent incorporation by Loeb into a new visual work of his own. Greenfield has refused to settle the case to date, and appears unlikely to be willing now (if ever she was) to license the use that Loeb has made of her work - though there is nothing at all in what Loeb has created that can plausibly be said to have done actual damage to Greenfield's work, or to have limited its appeal to such market as it may have had. In this case, instead, it is the prior artist's sensibilities that appear to be in issue. Section 107 makes no affirmative provision for any recognition of such concerns, however, and since the enactment of the *Salinger* amendment, may in fact contain an implication to the contrary. Market failure may be seen in this setting, then, if only *nunc pro tunc*.

Just so in the case of Houghton-Mifflin, Alice Randall and "Wind Done Gone" as well: there is no reasonable possibility that the Margaret Mitchell estate would have

licensed the use Randall made of the earlier work, "Gone With The Wind". (The Mitchell estate has routinely denied permission to use its work in settings involving miscegenation, for example, a practice which figures prominently in the Randall manuscript.) To be sure, Randall's work may amount to parody, in which case presumably it will be (or ought to be) held privileged on that ground alone. In fact, numerous affidavits by estimable literary critics to the effect that the work is parody appear of record in the case. Houghton-Mifflin has also argued, meanwhile, that Randall's work simply does not appropriate substantial (actionable) copyrightable material from Mitchell's work, in which case of course the much older understanding of fair use as "a taking *de minimis*" would lead to dismissal of the action. But if in the end there is no parody, and yet a substantial taking, then the refusal by the Mitchell estate to license the work would presumably take center stage, so that here too the market failure analysis suggested by Wendy Gordon might come into play.

Like parody, however, econocentric analysis is helpful, at best, in only a limited array of cases. In other cases, the analysis fits badly or not at all. Sometimes the creator of a deserving second work cannot come to the marketplace because any price is too great to pay. Sometimes the transaction costs are overwhelming. Sometimes the very existence of the market is unknown. In each of these instances, perhaps, a clever economist might force a fit between theory and practice. But sometimes the very concept of a market is itself misplaced. Sometimes, though an antecedent work is available, and at a price and on terms that one reasonable person or another might find unobjectionable, still the price and terms may be the subject of resistance on principled grounds, so that in effect the continued interposition of the copyright regime amounts to a state-sanctioned approval of one political agenda as against another, an approval wrought through the suppression of dissident speech and writings. And sometimes, far more simply, a pearl is beyond price. Sometimes it is inappropriate, even garish, to think in terms of a market. Sometimes, in short, the market does not fail. Sometimes the market is irrelevant.

What is needed to measure fair use is a standard more useful than the mandatory factors, more inclusive than parody, more embracing than the marketplace. What is needed, indeed, is a measure more humane and fair than these.

In an essay ten years ago, Lloyd Weinreb (influenced in part by suggestions in earlier work by Terry Fisher, and troubled meanwhile by things said by Judge Leval) suggested that fair use cannot be confined by convenient econocentric analysis, not even by analysis as well presented as Wendy Gordon's. Nor can it be made to fit within the framework of the mandatory four factors, as Judge Leval had suggested. "Fair is fair," Weinreb concluded, and is neither more nor less than that:

The reference to fairness in the doctrine of fair use imparts to the copyright scheme a bounded normative element that is desirable in itself. It gives effect to the community's established practices and understandings and allows the location of copyright within the framework of property generally. Adjudication according to a standard of fairness calls for the exercise of great judicial skill, or art. But it is not for that reason to be regretted. It is, in any case, what the Copyright Act prescribes.

Weinreb's suggestion that fair use must ultimately rest in "a community's established practices and understandings" could do much to rescue us from the uncertainties and intellectual impoverishment of conventional section 107 analysis, and would carry us beyond the confines of parody and market harm analysis as well. Certainly his approach would add a humane element to the inquiry after fair use. But even his very helpful suggestion may not go far enough. Like most students of copyright who have considered fair use, he appears to see in its determination an attempt to locate the parameters of copyright "within the framework of property generally." With very considerable respect for the power in his essay, however, one must insist that this is not quite "what the Copyright Act prescribes".

(We enter now upon ground long since occupied by the work of a singular scholar, Professor L. Ray Patterson, whose voice echoes in our ear even as we write. We cannot hope to do justice to his *oeuvre* in this preliminary sketch. We do acknowledge that what we are about to suggest must surely have been anticipated in his own writings, probably more than once, and no doubt years ago.)

The point is this: that section 107 is not primarily about copyright, or about locating the place of copyright within a system of property, but has rather to do with the recognition of the public domain and its preservation from the threat of encroachment by copyright. Section 107 and fair use are not to be understood as subordinate to the exclusive rights of a proprietor under section 106. To the contrary, the plain language of the Act, construed according to perfectly conventional canons, makes it evident that, as between proprietary rights and fair use, the latter stands in the superior position. [INSERT LANGUAGE] The full dimensions of section 106 rights can be determined only after section 107 has been first served. In this respect, section 107 stands in sharp contrast to so much of property theory generally as may propose (quite wrongly, in our judgment) that property rights are presumptively superior to rights grounded in public entitlements. [cite Underkuffler as to this last point]]

Against the background of this discussion one can see that courts have erred repeatedly in construing section 107. It is of course wrong to imagine that an analysis of fair use should or can be confined to the four factors prescribed by section 107. But more than this, it is error to suppose that section 107 is confined to analysis fundamentally econocentric in nature, however well articulated. Fair use is not merely (or even primarily) about the marketplace for copyrighted works; it is about what Weinreb calls “a community’s established practices and understandings.” The question always is, first: what does fair use require? Only then is it time to consider the effect of fair use upon copyright, as the four factors require. And even then, consideration does not mean subordination. It is error - always error; simple error - to imagine that fair use must be bent to the service of copyright. Quite the other way around, under the language and the history of section 107 alike, it is copyright that must step aside in favor of fair use. From the perspective of fair use, then, copyright’s place within the framework of property at large is a distinctly secondary, and indirect, concern.

The Court has not escaped error in its own analyses of fair use. In at least two settings, however, it seems to have glimpsed the insights urged here. In *Sony* [complete cite], the Court’s opinion anticipated (indeed, prompted) the suggestions later advanced by Weinreb. There the practice of privately taping copyrighted telecasts for later viewing (“time shifting”, a practice well established by the time the case was finally decided) gained the Court’s sanction on grounds that can be reconciled in retrospect with a more generous reading of section 107 than the Court itself may have supposed it was engaged in offering at the time. And in *Campbell* as well, the Court’s opinion can be seen as grounded in the community’s acceptance of parody as a form of work deserving of protection.

In neither of these cases, to be sure, did the Court adopt a standard of review as broad and uncluttered as the one advocated here. Nor do the opinions point the way toward such a standard in language that unmistakably marks off the ground in the way that we (and others) propose. But the effect of the decisions - one can fairly say, their necessary underpinning - is to recognize that fair use is not inevitably a reflection of the four factors, or of market analysis, or even of parody, but is driven rather by what Justice Souter called “a strong public interest in the publication of the secondary work.” This language is not limited to parody. Though the way is clear for parody after *Campbell*, we think it fair to join others in suggesting that the door is at least ajar for other forms of transformative critical appropriations as well.

Let us suppose, then, that transformative critical appropriations can be justified on the basis of a presumptive fair use privilege of the sort outlined earlier. And let us suppose that the privilege is justified whenever the appropriation can fairly be said to command a

strong public interest in its appearance as a secondary work. Let us suppose that the question of public interest is to be inquired into as a matter of law. Let us suppose further that this inquiry will be pursued primarily from the perspective of the public and the creator of the second work, with only secondary concern for objections from the copyright proprietor. In what circumstances, then, if ever, is the presumption in favor of publication of the appropriative work offset by other, countervailing considerations?

Two standard objections, well rooted in the post-'78 cases, but deserving extirpation under the revisionist analysis we propose, are these: first, that the appropriation amounts to an exercise of an antecedent proprietor's exclusive rights under section 106; and second, that the appropriation threatens harm to the value of the proprietor's antecedent work. Neither objection is sufficient on its face. Fair use presupposes infringement; but for the privilege it would be actionable; the privilege makes it otherwise. Meanwhile, harm to the antecedent work (though never to be laughed at; and though the determination of its gravity be one objective of the obligatory inquiry mandated by section 107) is no less to be expected when fair use applies. As in *Sony* (arguably) or in *Campbell* (indisputably), the determination first is whether fair use is justified. If so, objections on behalf of the antecedent work gain no ground merely because there is (or, but for fair use, would be) infringement, nor merely on account of harm. This is, we acknowledge again, heavily counterintuitive in terms of much existing case law - but then, we also insist, much existing case law also appears to be (not to put too fine a gloss on the matter) embarrassingly wrong.

At least one commentator, Jeremy Kudon, the author of a thoughtful student note published in the *Boston University Law Review* last year, has suggested that extending the holding of presumption in *Campbell* to settings beyond parody (a result he favors, but finds problematic on more than one ground) inevitably must involve an analysis of functional equivalency between the antecedent work and the appropriative work. If the latter essentially undertakes to supply the function of the former, fair use may be withheld. (Kudon's analysis focuses on the derivative works right, a reflection of his assumption that transformative use also presupposes the kind of marriage of old and new suggested by Judge Leval. But his principal objection would survive even if Leval's limitation were otherwise rejected.) Kudon evidently presupposes, as we do not, that section 106 rights are paramount, as against section 107. This is a presupposition consistent with the case law, but it is at least partially inconsistent with the analysis we propose here.

When, then, does concern for an antecedent work compel us to withhold fair use, or to modify the privilege in its scope or reach?

If we presuppose the necessary critical transformation in the second work, then rarely, if ever, should fair use be withheld merely on account of functional equivalency between the two works. It may be that a secondary work proposes to add nothing at all to the critical offices already performed by an antecedent work; and in that case perhaps it would be appropriate to inquire further into the justification for fair use. While such a scenario can be envisioned in theory, it is exceedingly unlikely to be encountered in practice, absent the boldest forms of appropriation through the simplest forms of copying, followed by publication to persons already identically addressed by the proprietor of the antecedent work. And even in that case, an identical critical perspective in the second work, fairly judged to have prompted the appropriation (whether or not independently), would justify the fair use privilege nonetheless. Should Lauren Greenfield take up painting, for example, the fact that she may produce works of the sort that Damian Loeb produces does not mean that Loeb's independent conceptions would not continue to be privileged. Indeed, it is entirely possible, under the analysis we propose, that Loeb and Greenfield might each identically counter-appropriate the other's expression, so as to produce works indistinguishable from each other, each claiming fair use in his or her respective appropriation. Weird as this may seem in the imagining, it is but a corollary to Hand's own contemplation in dictum as to the unobjectionable replicability of Keats' "Ode To A Grecian Urn": copyright always presupposes the possibility of works identical in expression, yet independently conceived.

From the perspective of functional equivalency, it appears under this analysis that fair use would be withheld only when no critical function in the second work could be seen at all. Straightforward piracy would continue to be forbidden, of course, and might even be regulated more closely in the absence of any lingering concern for fair use. But piracy could not effectively be urged in a transaction merely because the second work, if licensed, would amount to a derivative work. Under this analysis, to the contrary, the question of derivative work status is of no greater consequence than would follow were the second work a simple copy. If critical transformation begets fair use, then the exclusive rights must gracefully step aside *pro tanto*.

This is not a modest proposal. Of course it would extend the reach of fair use to appropriations by Loeb, Randall, Negativland, and many others whose "secondary works are deserving of publication". But it would do more than that. To imagine the potential reach of the analysis we are suggesting, consider the case of a film (or CD) shelved by its producer-owner, but released in defiance by its director (or by the recording group) in order to insure that the message reflected in the work not be suppressed. An act like this would contravene settled copyright doctrine. But settled doctrine has always been

problematic on just the ground that it may lead to suppression of works deserving of publication. Fair use, revised as we envision it here, and then extended, eventually could address and change the outcome even in cases of this sort, at least from the perspective of copyright itself. (We do not have time or space in this essay to consider contract or unfair competition issues that might then arise.)

What we have said thus far makes the question of harm, now that we finally arrive at that question, all the more compelling. Under conventional analysis, harm to the antecedent work (though only the fourth factor) has been treated as though it were meant to be a primary or controlling consideration in a determination as to fair use. *Campbell* subordinates the fourth factor, essentially on the ground that to consider it is either impossible altogether or contrary to the presumed importance of the secondary work. The significance in this holding lies in its recognition that, even when given formal consideration (as concededly it must be under the statutory scheme), harm still need not be decisive - need not even play, in the end, an important role at all in the determination of fair use - not when the importance of the (transformative critical) secondary work itself is paramount. In the approach we advocate here, in short, harm remains a consideration, pro forma, but comes into its own only after the threshold question (whether the secondary work is presumptively privileged by fair use) has been addressed and resolved. Again, we repeat, for emphasis: harm is not a decisive factor in determining the availability of the fair use privilege when the secondary work involves transformative critical appropriation, nor does the Act require that it be.

But section 107 does require that harm to (or adverse impact upon) the antecedent work be considered in any determination of fair use. How do we comply with this requirement in settings involving transformative critical appropriations, as to which fair use may be presumed?

As a preliminary matter we must recognize that under conventional analysis a determination of fair use often results in a winner-take-all outcome. *Campbell* is that kind of case. A presumption arises. Fair use applies. The appropriation is privileged. Injunctive relief is unavailable. Damages need not be paid. Profits need not be surrendered. In economic terms, in short, no direct accommodation to the interests of the antecedent proprietor need be made at all. Nor need there be any formal acknowledgment of the appropriation, so that the sensibilities of the antecedent proprietor need not be reckoned in the balance either. Such harm, if any, as may result in consequence of the taking goes altogether unredressed.

And occasionally this does seem wrong - if not wrong in *Campbell* itself or in cases near it on the totality of their facts, at least wrong in other settings not far removed.

To say that the threat of harm is secondary to a proper determination of fair use is not to say that its presence in a case should mean nothing at all. Fair use is an equitable doctrine, Weinreb reminds us; equity should play a role in its outcome. Fair is fair. So let us consider several scenarios in which harm can be confined to its lesser role initially, but can actually play a greater (fairer) role than is presently the case when the final bill in equity is tallied.

(Here again we do not expect that we are first to tread this ground. The ideas seem obvious enough. We can identify some earlier sources. The likelihood is that others have expressed them as well. We will welcome advice or claims as to any antecedent provenance.)

First, we are obliged to divorce ourselves from our usual thinking about damages and profits in infringement cases: by definition, fair use is not an infringement. The question, rather, is how to offset the harm (or adverse consequences) arising from an appropriation that fair use excuses because of “bounded normative elements expressing a community’s established practices and understandings”. Our aim is to do equity, to be fair. And here the statutory mandate to consider fair use on a case-by-case basis makes considerable sense.

There is no question of enjoining the transformative critical appropriation, and no question of punishment, either, for the very idea of punishment is unwarranted; and this is so though harm from the appropriation is possible, even likely, even to be presupposed. Suppression and damages do not sensibly figure in this scenario, then, and cannot sensibly be required. But there may still be reason in some cases to contemplate some provision for sharing with the proprietor of rights in the antecedent work an equitable portion of such profits, if any, as may be reaped from an appropriation. A caution here, however: This is not a matter of unjust enrichment, at least not in the non-doctrinal sense of the term, for in truth there is nothing unjust in this scenario. This is rather (once again as Weinreb himself might suggest) a matter of simple fairness.

But sharing when? And how much?

In many cases no profits will be realized by the appropriator. No concern need arise as to sharing, obviously, though we will suggest that an acknowledgment of the provenance of the antecedent work is another matter.

In cases like *Campbell*, meanwhile, perhaps no provision for sharing need be made either. The antecedent work in that case (the immensely popular song, “Pretty Woman”) has fully recouped its author’s investment in its creation, many times over. No real disincentive to productivity can be thought likely to result from a no-load recognition

of fair use in such a setting. And the transaction costs involved in working out a sharing arrangement as to the profits subsequently earned by Two Live Crew through their scurrilous version would be considerable, the more so if litigation is to be the mechanism. The Court is right to contemplate sending the plaintiffs away with nothing. We need not lament this outcome. In fairness, cognizable harm in a setting like this one approaches zero. The principle that follows is something like this: where transformative critical appropriation leads presumptively to fair use, the proprietor of a fully mature antecedent work need not share in any proceeds realized from the appropriation. The Margaret Mitchell estate need not apply.

But younger works (understand that this is a term of art, not necessarily bounded or defined merely by time) present another dimension. If the antecedent work has not yet had occasion to recoup, it may be fair to call upon the creator of a subsequent, transformatively critical appropriative work to share in proceeds from that work. There need be no conventional copyright justification in this; we need not jump through doctrinal hoops. The thought here is simply that if the copyrighted work has not managed to return its investment to its creator, there is nothing inequitable - but let us say, rather, that there appears to be something equitable - in broadening fair use so as to return to the copyrighted work some measure of the later work's success. And convention would be served by such a principle, meanwhile, if only indirectly. The incentive to produce works would be preserved, and preserved in settings where, at present, the fair use doctrine actually does not do so. The principle also reflects a measure of the thinking in the work of such scholars as Dennis Karjala and Malla Pollack, who have argued for years that the protection accorded under copyright should be measured and bounded by suitable provision for recoupment, and some reasonable return beyond that, though not by any concern for windfall profits.

The preceding two paragraphs have offered a tentative response (all that time and space allow) to the question, "When?", but not to the question, "How much?"; and of the two, the latter seems somewhat the more difficult. (Here a note to economists: Sharpen your pencils. You have work to do.) We are attempting in this essay to envision a fair use environment in which adversarial relations between antecedent copyrighted works and unauthorized subsequent works featuring transformative critical appropriations can be set aside in the quest for a more generous provision for expression on every hand. The creator of the appropriative work requires forbearance from copyright. It is not wrong to ask for something equivalent in return. And the measure for sharing that seems most fully equitable to us as we write is this: Let the shares reflect the expectations among joint authors. Treat the scenario as if an author of a joint work had set about to create a

derivative work. Account and share accordingly in such profits, if any, as may follow. Permit the parties to contract otherwise (as in the compulsory license settings created by section 115). And remember always that the analogs suggested here are merely that. There is no true joint work in this setting. The second work may or may not achieve copyright status in its own right. (That will depend on whether the creator of the second work offers additional copyrightable subject matter. But the second work will not be a derivative work in any case, absent a suitable license.) And neither does the provision for fair use we are suggesting here amount to a straightforward compulsory license, as some observers have suggested should be recognized. For the expectation of sharing will arise only in those settings in which the antecedent work has not yet recouped and the appropriative work produces profits.

Which brings us to our final thought: would it not be equitable to require an acknowledgment of the creative provenance of an antecedent work by the creator of a second work? Among the moral rights, the right to acknowledgment has always seemed singularly just. It costs nothing in economic terms. It can mean much to those whose work has been appropriated. One writer, recalling the earliest experiences with sampling, observed that most musicians whose work was sampled were content with an acknowledgment. That is no longer necessarily the case today, but the point is no less valid for the fact that the music industry may have succeeded in altering the consciousness of artists. Fair use at present does not formally require an acknowledgment. We think such a requirement should play an ordinary role in cases of transformative critical appropriation.

Conclusion

Copyright has drifted into troubled waters. The First Amendment threatens it; critical practices grounded in appropriation confound it; the needs of private creativity confront it with demands as yet unheeded and unmet. Against the weight of these converging forces, society's "practices and understandings" require new responses. The fair use doctrine must be revisited and remade.

Fair use should be grounded unapologetically in straightforward principles of communal fairness and decency, and accorded the true parity with exclusive rights that section 107 allows. A new and comprehensive privilege for transformative critical appropriations, a privilege at once presumptive and accessible, would surely follow.

Whether fashioned in the manner here suggested or otherwise conceived, such a privilege could do much to restore copyright to a place of honor and respect among us.