FAIR USE ACROSS TIME

Justin Hughes*

This Article proposes that, as a copyright work ages, the scope of fair use, especially as to derivative works and uses, should expand. This is because the "market" for a copyrighted work has a temporal dimension; the copyrighted work has a market of a fixed number of years. In considering the fourth element of § 107 fair use, courts have discussed two kinds of situations in which the market for a plaintiff's work can be adversely affected: (1) situations where a particular defendant's action adversely affected the plaintiff's market, and (2) situations where the defendant's action, if it became "widespread," would adversely affect the plaintiff's market. But in the second situation, when the alleged infringement occurs becomes important. The later the alleged infringement occurs in the copyright term, the less "widespread" the practice could become in relation to the total market that the copyrighted work will enjoy over its term of protection. Further support for the idea that fair use should become broader in the last period of the copyright term comes from the basic investment structure of copyrighted works. The Article then discusses some potential problems and complications for this "fair use across time" analysis.

* Visiting Professor of Law, UCLA School of Law (2001–2002); Hosier Distinguished Chair, DePaul College of Law (2002–2003); Assistant Professor of Law, Cardozo School of Law, Yeshiva University. The author thanks William Fisher, Mark Lemley, Lynn LoPucki, David Nimmer, Kal Raustiala, Stewart Sterk, Eugene Volokh, John Wiley, and participants in a faculty workshop at George Mason University for comments on these ideas and on drafts of this Article. The Article was further improved with research assistance from Shelley Cobos, Taylor Ball, Stuart Riemer, and Brien Wassner. The remaining errors are the intellectual property of the author.

INTRODUCTION

Codified in 1976, but tracing its roots in American law back to at least the 1840s,[1] copyright's fair use test is about as far from a bright-line rule as statutory law should wander. To judge whether a party's otherwise infringing activity is a "fair use," 17 U.S.C. § 107 provides that courts are to consider four factors:

> "(1) the purpose and character of the use . . .
> "(2) the nature of the copyrighted work;
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> "(4) the effect of the use upon the potential market for or value of the copyrighted work . . . ."[2]

The four statutory factors do not carry absolute assigned weights and cannot simply be tallied. The factors are not exhaustive, but it is a testament to the caution of judges and to the malleability of the factors that courts have rarely, if ever, found the need to stray beyond the four-corner test.[3]

The fourth factor focuses a court on the economics of the situation and, not surprisingly, has gained a certain preeminence. From 1985 to 1994, courts followed the U.S. Supreme Court's direction that this "factor is undoubtedly the single most important element of fair use."[4] Although the

1. In *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), Joseph Story summarized earlier copyright cases in a distillation of "fair use" that sustained the judge-made doctrine until its 1976 codification: "[L]ook 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." *Id.* at 348. There were also considerably earlier cases in England permitting "fair abridgements" under the Statute of Anne. *See* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–17 (2d ed. 1995).

2. 17 U.S.C. § 107 (2000).

3. *See, e.g.*, Twin Peaks Prod. v. Publ'ns Int'l, 996 F.2d 1366, 1377 (2d Cir. 1993) ("While the four statutory factors are non-exclusive, we do not believe that the various other factors discussed by the parties merit discussion . . . ."); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125–26 (1990) ("The more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that divert the inquiry from the goals of copyright."). In *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), the U.S. Supreme Court expanded "(2) the nature of the copyrighted work" to include "the unpublished nature of a work," *id.* at 554, and understood the first factor, "the 'character' of the use," to include "the propriety of the defendant's conduct." *Id.* at 562. In a seminal article on fair use, Professor William Fisher concluded that this reasoning added new factors. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1674–82, 1704 & n.215 (1988). But one can read *Harper & Row* as showing the malleability of the four factors in the hands of a skilled jurist, not the need to add to them.

4. *Harper & Row*, 471 U.S. at 566. The Nimmer treatise came to reflect this view and, by 1990, the Supreme Court could cite the Nimmer treatise for the proposition that "[t]he fourth

Court backed away from this position in its 1994 *Campbell v. Acuff-Rose Music* decision,[5] there is still much to commend the fourth factor as first among equals.[6] At the extreme are those who view the fair use exception as justifiable only when there is no market to exploit. In this principled, albeit cramped, view, fair use should free a person from liability only when the economically rational copyright holder would not sue anyway.[7] Even at the other extreme, among those who would permit a wide range of fair uses on noneconomic, normative grounds,[8] there is recognition that permitting too much adverse economic impact under fair use would undermine copyright's incentive structure.[9] At least as far back as Joseph Story's 1841 formulation, the fair use doctrine "has always precluded a use that 'supercede[s] the use of the original.'"[10]

---

factor is the 'most important, and indeed, central fair use factor.'" Stewart v. Abend, 495 U.S. 207, 238 (1990) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-182 (1978)).

5. 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."); *id.* at 590 n.21, 591 ("The importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors."). At least one federal appellate court has recognized this as "abandoning the idea that any factor enjoys primacy." Am. Geophysical Union v. Texaco, Inc., 37 F.3d 881, 894 (2d Cir. 1994).

6. *See, e.g.*, Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S. 1, 13 (1997) ("Fair use analysis . . . tends to concentrate on the potential market impact of the copying."); Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, 23 EUR. INTELL. PROP. REP. 409, 415 (2001) ("The harm-to-the-market factor is often said to be the most important of the fair use factors."). This has been true throughout the history of the fair use doctrine. In 1961, in the discussions and negotiations leading to the 1976 Copyright Act, the Register of Copyrights noted that the four "criteria are interrelated and their relative significance may vary, but the fourth one—the competitive character of the use—is often the most decisive." HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REPORT, PART 1, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24–25 (Comm. Print 1961) [hereinafter COPYRIGHT LAW REVISION, PART 1].

7. Alternatively, the doctrine might be triggered in conditions of market failure. *See generally* 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); Timothy J. Brennan, Harper & Row v. The Nation, Inc.: *Copyrightability and Fair Use*, 33 J. COPYRIGHT SOC'Y U.S.A. 368, 375–84 (1986).

8. *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341–44 (1996).

9. Julie E. Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock Out" Programs*, 68 S. CAL. L. REV. 1091, 1134 (1995) (recognizing that "fair use should privilege enabling uses only to the extent that it does not thereby undermine the other objectives of the copyright law so greatly that it produces a net disincentive to create and disseminate new works"); Gordon, *supra* note 7, 1618 (noting that courts should allow fair use "where no disincentive would be created by allowing defendant free use"); Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After* Betamax, 97 HARV. L. REV. 1395, 1412 (1984) ("The challenge of fitting parody into fair use doctrine lies in distinguishing fair from unfair disincentive.").

10. Harper & Row v. Nation Enterprises, 471 U.S. 539, 550 (1985) (quoting Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901)); *accord* S. REP. NO. 94-473, at 65 (1975).

Courts and commentators have spilt much ink over the fourth factor, particularly over how to define a work's licensing and derivative work markets. Most of the comment and controversy involves the breadth of the work's legally cognizable market. This short Article sketches out a completely different issue: the depth of the work's legally cognizable market across time.

I hope to convince the reader that a subtler, economically sounder fair use analysis takes account of when the unauthorized use occurs in the copyright term. Under this analysis, fewer unauthorized uses should be fair uses in the first years or decades of a copyright term, and more and more unauthorized uses should be deemed fair as a work grows older. Above all, "fair use across time" as described here helps fulfill copyright's overarching objective to provide adequate incentives for the creation and dissemination of works while ensuring public access and use of those works.

Part I sets out the basic theory of fair use across time, both in its simplest form and with some refinement to reflect the present value of money. Part II elaborates on ramifications, criticisms, and responses to fair use across time. One of the most important ramifications is that fair use across time tempers the effects of copyright term extensions. If the term of copyright protection for an existing work is repeatedly extended (keeping that work from falling into the public domain), fair use across time at least continues to expand permitted uses for the work as the work ages. As to criticisms of fair use across time, one of the most important is that it introduces yet another complexity into an already complex balancing test. For reasons described below, I hope to show that fair use across time actually makes fair use a bit more transparent for someone trying to decide, ex ante, whether their unauthorized use would be deemed fair under § 107.

I. A MARKET IN TIME

In standard § 107 analysis, a court looks at the market effects of the allegedly infringing activity under one of two approaches. In an infringement action, the plaintiff must prove "either that the particular [unauthorized] use is harmful, or that if [the use] should become widespread, it would adversely affect the . . . market for the copyrighted work."[11] A solid example of the first type of harm—market harm from the defendant's particular use—would be the damage sustained by Harper & Row in 1984 when *The Nation*

11. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001); Rubin v. Brooks/Cole Publ'g Co., 836 F. Supp. 909, 920 (D. Mass. 1993). Courts have used this bifurcated analysis with regard to noncommercial uses by the defendant, but the analysis as used here applies more generally because a commercial use fits the first consideration: whether "the particular use is harmful."

published excerpts from former U.S. President Gerald Ford's memoirs prior to their serialization in *Time* magazine: "*Time*'s cancellation of its projected serialization and its refusal to pay [Harper & Row] were the direct effect of the infringement . . . . Rarely will a case of copyright infringement present such clear-cut evidence of actual damage."[12] Similarly, in *Stewart v. Abend*,[13] decided in 1990, the U.S. Supreme Court had to go no further than the defendant's activities to find a disruptive effect on demand for the copyrighted work: "The record supports the . . . conclusion that re-release of the film impinged on the ability to market new versions of the [copyrighted] story."[14]

The second approach also was summarized by the Supreme Court in the Harper & Row case: "[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"[15] Perhaps the clearest example of Supreme Court case law involving an unauthorized use with such cumulative potential to adversely affect the copyright holder's market was the *Sony Corp. of America v. Universal City Studios*[16] litigation over home video recorders. The activities of any one user of a home video recorder will have de minimis effects on the demand for any audiovisual work. At the time of the litigation, the practice in question was relatively nascent. Yet over time, the cumulative effect of such uses, as they became widespread, could be great.[17]

Similarly, in *American Geophysical Union v. Texaco*,[18] the parties "made a significant stipulation, providing that the fair use trial would focus exclusively on the photocopying of particular journal articles by one Texaco researcher" chosen at random.[19] Surely this kind of stipulation was more readily acceptable to the plaintiffs because the court would not only extrapolate the one person's activities to all of Texaco's researchers, but also consider the effects on the plaintiffs if this sort of photocopying became widespread outside of the defendant's use.

---

12. *Harper & Row*, 471 U.S. at 567.

13. 495 U.S. 207 (1990).

14. *Id.* at 238.

15. *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp. of Am.*, 464 U.S. at 451); Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1387–88 (6th Cir. 1996) (en banc). The legislative history of the 1976 Copyright Act makes it clear that the U.S. Congress intended for this kind of systematic damage to be considered. According to the Senate Report, "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." S. REP. NO. 94-473, at 65 (1975).

16. 464 U.S. 417 (1984).

17. In *Sony*, a majority of the Court concluded that the nature of time-shifting (recording of free broadcast television shows to view at a time different from the broadcast time) was a fair use, *Sony Corp. of Am.*, 464 U.S. at 442; there was no analysis as to whether widespread "library" copying would adversely affect the markets for the copyrighted works at issue.

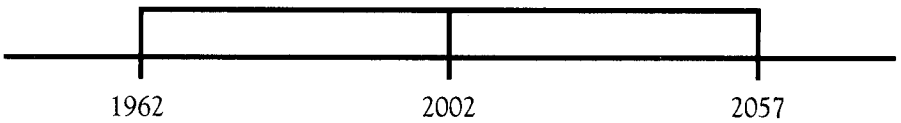
18. 37 F.3d 881 (2d Cir. 1994).

19. *Id.* at 883.

The first inquiry, aimed at the harm produced by a particular unauthorized use, proceeds from an atemporal view of the market: The effect of the defendant's activity might be so pronounced that there is no need to attempt to understand the market. In the second inquiry, aimed at potentially widespread unauthorized uses, the inception of the market is treated implicitly as the time of the litigation or, more properly, the time the infringement commenced.

But in many cases, neither of these approaches makes the most sense. A work's market is established either when the work is completed or when the work is first published. Consider a major film released in 1962—it could be Blake Edwards's *Days of Wine and Roses* or Terence Young's *Dr. No* or David Lean's *Lawrence of Arabia*.[20] Imagine that a defendant begins engaging in some infringement of the film's copyright in 2002. The correct market in this case is an economic accounting of the film's (past/present/potential) return across time. In other words, the market, greatly simplified, should look like this:

GRAPH ONE



The details of the above graph will be considered below, but the basic point is that the market is longitudinal. It occurs over time.

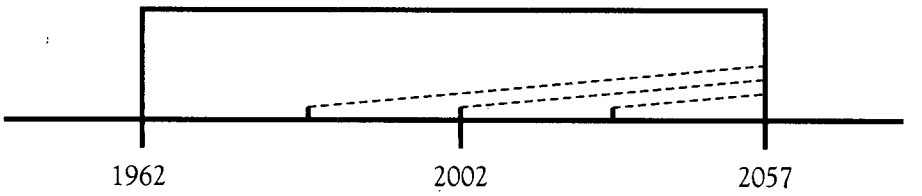
Because of the market's temporality, the fair use doctrine should consider the age of the work that has been infringed. Because an infringement occurs sometime during the lifetime of the copyright, the time that the infringing use occurs should be a consideration in determining "the effect of the use upon the . . . value of the copyrighted work" over the term of the copyright.

The cross-temporal nature of the market for a copyrighted work is important in those cases in which the court believes that the unauthorized use only harms the market if the use (or, more properly, similar use by multiple parties) becomes widespread. In such cases, the timing of the unauthorized use becomes very important to determine overall market effect. As traditionally formulated, the concern is that even a small unauthorized use, if unchecked (or blessed as fair use), casts a shadow of subsequent uncompen-

20. DAYS OF WINE AND ROSES (Warner Bros. 1962); DR. NO (United Artists Corp. 1962); LAWRENCE OF ARABIA (Columbia/Tristart Studios 1962).

sated uses over the work's market. But the size of the shadow depends on when the unauthorized use occurs in the copyright term:

GRAPH TWO



Tolerating a small unauthorized use in 2002 of a 1962 film cannot have any widespread impact on the market that the film enjoyed for the first forty years of the ninety-five-year copyright. Tolerating the same infringement of the film in 2022 has even less possible impact on the overall market. In an inquiry directed at potential widespread use, a late-term infringement is simply more likely to be fair when considering the fourth factor of the § 107 framework.

Viewing the market across time has one important effect: When a work is new, unauthorized uses are less likely to be fair uses; when a work approaches the end of its copyright term, unauthorized uses are increasingly likely to be fair. The temporality of the market thus provides an economic ground for public domain claims to grow as the work ages. Fair use increases as a function of economics, without any other concerns weighing into the equation.

Adjusting the analysis under the fourth factor in this way better fulfills what copyright and fair use are trying to do: create properly calibrated economic incentives for the creation of new artistic works. As the Nimmer treatise notes, "Fair use, when properly applied, is limited to copying by others that does not materially impair the marketability of the work that is copied."[21] As a work ages, it simply becomes more difficult to impair the overall marketability of the work.[22]

Note that this effect results regardless of whether the copyright term itself is properly calibrated—whether the term is too short, too long, or just right. Whatever the term's duration, a type of unauthorized use that becomes widespread later in the life of the copyright will have less total market impact.

But Graphs One and Two do have two simplifications that usually will be wrong. The straight bar graphs assume, first, that the value of dollars is

21. 1 NIMMER & NIMMER, *supra* note 4, § 1.10[D], at 1-92.

22. One might also follow this approach via § 107(2)'s direction to consider "the nature of the copyrighted work." 17 U.S.C. § 107(2) (2000).

the same in each year of the copyright term and, second, that the demand for the work remains constant. The second issue is discussed in Part II; the first issue is basic enough to the idea of a market across time that it must be discussed here.

To make fair use across time work properly, we must adjust for the value of the market at the time the decision was made to create or distribute the work. Although inflation is not a true measure of the past value of money, it provides some idea of the scope of the issue. For example, if one measures only unadjusted box office gross, all of the top twenty grossing U.S. films were released from 1975 or after and only two were made in the 1970s—*Star Wars* (1977) and *Jaws* (1975).[23] In fact, it looks like Hollywood did not learn how to make a profitable movie until the very end of the twentieth century. If one looks at the same statistics adjusted for inflation, the highest and tenth-highest grossing films come from the 1930s—*Gone with the Wind* (1939) and *Snow White and the Seven Dwarfs* (1937), respectively.[24] Also, the list loses such late-twentieth-century classics as *Men in Black* (1997), *How the Grinch Stole Christmas* (2000), and *Home Alone* (1990).[25]

With copyright terms now approaching or exceeding a century, revenues generated by a well-known film or song toward the end of the copyright term may, on their face, look far greater than revenues generated when the work was first successfully introduced. For example, at the end of 2000 and the beginning of 2001, the "Beatles 1"[26] greatest hits collection occupied the top of the Billboard charts for at least seven weeks.[27] Given inflation in the preceding thirty-five years, the revenues from this period for the relevant copyrights easily may have dwarfed the mid-1960s revenues for the same Beatles' musical compositions.

If we are true to an ex ante incentive structure for copyright, the correct market for a work is the present value of dollars at the time of the

23. Tim Dirks, *All-Time USA Box Office Leaders*, *at* http://www.filmsite.org/boxoffice.html (last visited Aug. 25, 2002); STAR WARS (Lucasfilm Ltd. 1977); JAWS (Universal Pictures 1975).

24. Dirks, *supra* note 23; GONE WITH THE WIND (Warner Bros. 1939); SNOW WHITE AND THE SEVEN DWARFS (Walt Disney Pictures 1937).

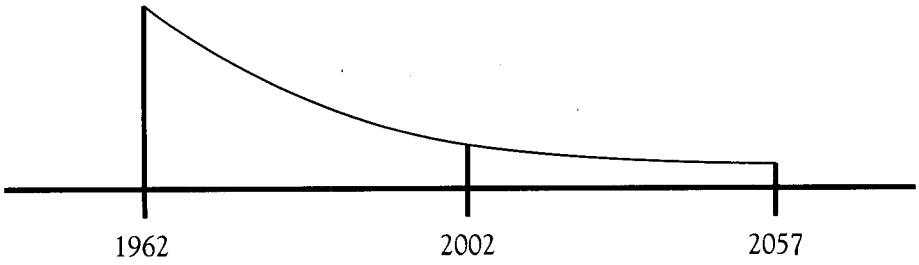
25. MEN IN BLACK (Columbia Pictures 1997); HOW THE GRINCH STOLE CHRISTMAS (Imagine Entertainment 2000); HOME ALONE (20th Century Fox 1990). Once adjusted for inflation, the top twenty U.S. films then include two films from the 1950s (*The Ten Commandments* (Paramount Pictures 1956) and *Ben-Hur* (Metro-Goldwyn-Mayer 1959)); four films from the 1960s (*The Sound of Music* (20th Century Fox Film Corporation 1965), *Doctor Zhivago* (Metro-Goldwyn-Mayer 1965), *One Hundred and One Dalmatians* (Walt Disney Pictures 1961), and *The Graduate* (Embassy Pictures Corporation 1967)); and two additional films from the 1970s (*The Sting* (Universal Pictures 1973) and *The Exorcist* (Warner Bros. Pictures 1973)). *Id.*

26. THE BEATLES, THE BEATLES 1 (Capitol Records 2000).

27. Jon Zahlaway, *Charts: Uneventful Week Keeps Beatles' '1' in Top Spot*, CITYSEARCH LIVE DAILY, JAN. 17, 2001, *at* http://www.livedaily.citysearch.com/news/2474.html.

decision to invest in the work. Because distant dollars are worth less,[28] the work's market viewed ex ante looks more like this:

GRAPH THREE



The actual slope of this curve is almost certainly even steeper. A group of distinguished economists, including five winners of the Nobel prize in economics, recently concluded that the twenty years of copyright term added in 1998 increase the present value of a copyrighted work's market over time by less than 1 percent.[29] This only enhances the effect of fair use across time. A late-term unauthorized use affects the work's value even less because the shadow is not just short, but also cast over a diminishing market.

So understood, I believe fair use across time becomes a meaningful factor only when a court is confident that a large portion of the work's market is behind it[30]—even if the actual end of the copyright term is not yet fixed.[31] That means fair use across time will not affect most copyright litigations. Still, many high-profile copyright cases have involved older works. The "Oh, Pretty Woman" song at issue in the 1994 *Campbell v. Acuff-Rose* case was written in 1962; the 1990 *Stewart v. Abend* case concerned a 1942 short story; and Margaret Mitchell's estate continues to vigorously defend its 1936

28. *See, e.g.*, Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 723 (1945) (noting that when the copyright term consisted of an initial twenty-eight-year term and a twenty-eight-year renewal, the market value of the renewal term, measured at the beginning of the first term, was near zero).

29. Brief of Amici Curiae George A. Akerlof et al., at 2, Eldred v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618) (concluding that the longer term's "present value is small, very likely an improvement of less than 1% compared to the pre-[1998] term"), *available at* http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf [hereinafter Economists' *Eldred* Brief].

30. In other words, at a time well after a work has made "its digital pilgrimage through ancillary market arenas" and well after there is any chance that the "property is pilfered early in its life span." Press Release, Motion Picture Ass'n Am., Copyright & Creativity—The Jewel in America's Trade Crown: A Call to the Congress to Protect and Preserve the Fastest Growing Economic Asset of the United States (Jan. 22, 2001), *at* http://www.mpaa.org/jack/2001/01_01_22b.htm (last visited Feb. 26, 2002).

31. This will be the case with a non-work-for-hire created by an author (or authors) who is still alive. *See infra* Part II.C.

copyright in *Gone with the Wind*.[32] In such cases, claims against derivative works have been based on copyrights that are thirty to sixty-five years old.[33] In such cases, fair use across time could come into play.

II. APPLICATION AND EFFECTS OF THE ANALYSIS

Fair use across time is a simple observation, but it may leave questions and complications in its wake. Issues that immediately come to mind include: (a) how the idea helps address the problem of creeping copyright terms, (b) further complexities for a work's market, and (c) possible criticisms of this approach.

A. The Problem of Creeping Copyright Terms

Like patent law, copyright law is generally considered a social bargain in which inventors and writers are rewarded for their ideas and expression, on the condition that their creations eventually will be freely available to everyone. But a few of copyright's staunchest defenders have made it clear that they do not believe in one of the basic elements of that social bargain: that copyrights expire. Motion Picture Association of America President Jack Valenti, for example, has stated publicly that copyrights should be permanent, like any other property right. He has been joined by at least one member of the U.S. Congress, Representative Mary Bono.[34] Ms. Bono and Mr. Valenti carry on the legacy of many nineteenth-century U.S. authors who were advocates of perpetual copyright protection.[35] There is some

32. MARGARET MITCHELL, GONE WITH THE WIND (1936); *see* SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *vacated and remanded*, 268 F.3d 1257 (11th Cir. 2001).

33. *See also* MCA, Inc. v. Wilson, 425 F. Supp. 443, 446 (S.D.N.Y. 1976) (concerning the 1974 song "The Cunnilingus Champion of Co. C" using the music of the song "Boogie-Woogie Bugle Boy," first published in 1941), *modified and aff'd*, 677 F.2d 180 (2d Cir. 1981); Greg Burk, *Space Suit:* Star Twek*: Parody or Galactic Menace?*, L.A. WEEKLY, June 7, 1996, at 33 (discussing Paramount Studios' surprising 1996 decision to sue a small theater troupe for a parody of the 1960s *Star Trek* series).

34. Mary Bono is heir not just to Sonny Bono's Palm Springs congressional seat, but presumably also to the copyrights in his musical compositions, along with Sonny's children. *See* 144 CONG. REC. H9946, H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Bono) (noting that "Sonny [Bono] wanted the term of copyright protection to last forever").

35. Historically, advocates of perpetual protection appear to have included Mark Twain, Cornelius Mathews, Washington Irving, and Grenville Sackett. *See generally* GRANTLAND S. RICE, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 70–96 (1997) (discussing different views on copyright law, including nineteenth-century advocates of perpetual protection). Twain himself wrote, "I am aware that copyright must have a limit, because that is required by the Constitution of the United States . . . . When I appeared before [a] committee of the House of Lords the chairman asked me what limit I would propose. I said, 'Perpetuity.'" MARK TWAIN, *Copyright*, *in* MARK TWAIN'S SPEECHES 314, 315–19 (Shelly Fisher Fishkin ed., 1910).

(many would say, superficial) appeal to their position: If one views a copyright as just another form of property, it makes sense to ask why it is treated differently than the enduring property rights in real estate, chattels, and financial instruments.[36]

The problem is a pesky constitutional provision that says copyrights shall be for "limited times."[37] Reading that, Mr. Valenti has proposed an easy fix—set the copyright term as eternity minus one year.[38] No one would be concerned about this issue if the only strategies to make copyrights deathless relied on a constitutional amendment or Mr. Valenti's mathematics. But there is another means to achieve approximately the same end, what Professor Peter Jaszi dubbed "perpetual copyright on the installment plan."[39] Article I, section 8, clause 8 of the U.S. Constitution says only that copyrights shall be granted "for limited times."[40] It sets no outer bounds. So every ten or twenty years, Congress can pass a law extending copyrights another ten or twenty years. This is what Congress did in 1998, extending all copyrights twenty years.[41] Those ringing the alarm bells have noted that the

36. From 1927 to 1966, Portugal provided for perpetual copyright on this basis. Intellectual property was considered to be analogous to physical property and, as such, a perpetual right. E-mail from Nuno Rocha de Carvahlo, to Justin Hughes (Jan. 31, 2002, 03:01 PST) (on file with author). My thanks to Nuno Rocha de Carvahlo for bringing this to my attention. Denmark and Norway are also among the countries that, at one time, granted perpetual rights in copyrighted works. The ordinance that created these rights was somewhat less perpetual. It was adopted in 1741 and repealed in 1814. UNESCO, THE ABC OF COPYRIGHT 15 (1981).

37. U.S. CONST. art. I., § 8, cl. 8.

38. *See* source cited, *supra*, note 34.

39. *Copyright Term Extension Act of 1995: Hearing on S.483 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Peter Jaszi, Professor, Washington College of Law), *available at* 1995 WL 10524355; *see also* Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 303 (1996); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1071 (2001).

40. "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." U.S. CONST., art. I, § 8, cl. 8.

41. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302–304). The Sonny Bono Copyright Term Extension Act increased the term of protection by twenty years for almost all works. *Id.* §§ 302(b)–04(d). For works created on or after January 1, 1978, the term of protection is now the "life of the author and 70 years after the author's death." *Id.* § 302(a). For "work[s] made for hire," "anonymous work[s]," and "pseudonymous work[s]," the term of protection is now either ninety-five years from the first year of publication or 120 years from the year of creation, whichever expires first. *Id.* § 302(c). The term of extension also was extended for works created prior to January 1, 1978. The renewal term for pre-1978 works also was extended, such that "[a]ny copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured." *Id.* § 304(b).

1998 extension is the just most recent in a series of term extensions; depending on how you count them, there have been between three and a dozen.[42]

Legal scholars and economists are virtually unanimous in saying the most recent copyright extension is unjustified.[43] Yet litigation against the law has so far been unsuccessful.[44] If the Supreme Court upholds the most recent copyright extension,[45] the reason will be simple and fundamental: If the previous copyright term had been limited and constitutional, how could the new term—just another twenty years—suddenly move outside the "limited" box? The 1998 extension is not yet part and parcel of a recurring ten- or twenty-year pattern (although it does follow extension and recalibration of the U.S. copyright term in 1976). In this framework, it may be difficult for the judiciary to say an average of 80.2 years of copyright protection under pre-1998 law was "limited," but a new prospective average of 100.7 years is "unlimited."[46]

42. In the words of the *Washington Post* editors, "Congress's repeated extensions of protection to copyright holders have shredded any meaningful limit." *Copyright Craziness*, WASH. POST, Aug. 17, 2001, at A22. Prior to the 1998 extension, the copyright term was extended by acts of Congress in 1831, 1909, and 1976. *See* Pub. L. No. 94-553, tit. I, 90 Stat. 2573 (1976); Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1076 (repealed 1976); Act of Feb. 3, 1831, ch. 15, 4 Stat. 436 (repealed 1870). In addition, in the 1960s and early 1970s, copyrights in existing works were extended nine times in anticipation of the major copyright reforms which eventually became the 1976 Copyright Act. *See* Pub. L. No. 93-573, tit. I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 87-668, 76 Stat. 555 (1962).

43. *See, e.g.*, Robert Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187, 2236–37 (noting that from an incentive perspective the 1998 extension "is virtually worthless" because "from a present-value perspective, the additional incentive to create a copyrightable work is negligible for an extension of copyright from life-plus-fifty-years to life-plus-seventy years."); Affidavit of Hal R. Varian, Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999), No. 1-99 CV00065, *available at* http://cyber.law.harvard.edu/eldredvreno/varian.pdf (last visited Jan. 13, 2003) (explaining the economics of the de minimis present value of an additional twenty years of copyright protection seventy years in the future).

44. *See, e.g.*, *Eldred*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd*, 123 S. Ct. 769 (2003).

45. As this Article was in final editing, the Supreme Court issued its decision in *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), upholding the twenty-year extension of the copyright term for existing and future works granted by Congress in 1998. As predicted in this paragraph, the seven-member majority reasoned that, given Congress's historic practice of extending copyrights, the addition of twenty years to the copyright term could not violate the "limited Times" requirement of Article I, section 8, clause 8 of the Constitution. *Id.* at 778–81. The result in *Eldred* makes the fair use across time analysis especially timely.

46. These numbers are just an extrapolation. If the copyright term was life plus fifty years in 1980, the average lifespan was 70.2 years, and the average work was written when the author was forty years old, the result would be an 80.2 year term. If lifespans increased slightly, but the average age of creation did not, then adding twenty years to the term might produce a number like 100.7 years.

Fair use across time helps address creeping copyright terms because, as a work grows older, more and more of its market is behind it. That portion of the work's market that is past cannot be affected by an infringing practice being tolerated as fair use (and, thereby, becoming widespread). As the work ages, fair use continues to expand as long as the term extensions of copyright occur incrementally. More precisely, as long as the term extensions occur incrementally and roughly equal the amount of time that has passed, two things happen: (1) The zone of fair use shrinks for a short time after the extension as, suddenly, there is more copyright term in the future, but (2) overall and over time, there is a continued expansion of the zone of fair use.

The short-term contraction of fair use is nullified by the midpoint of the term extension. At that juncture, the term extension has put as much of the work's additional market behind a present unauthorized activity as in the work's future market.[47]

In this way, fair use across time may make copyright term extensions considerably more tolerable. William Fisher has noted that between a broad range of entitlements for a short duration and a narrow range of entitlements for a long duration, it often may be "more efficient to select a long patent or copyright life and then to . . . determine which small set of entitlements would be optimal than to select a shorter life and . . . identify a larger optimal set of entitlements."[48] For better or worse, copyright law already establishes a relatively broad range of entitlements. Our cultural industries, institutions, and individuals are too successful and too influential to tinker with that. But fair use across time affects the range of entitlements in the latter part of the copyright term because it narrows entitlements as it increases fair uses. For example, certain derivative uses, certain uses of larger chunks of a work, and certain somewhat marginal uses—such as public display cases—might become fair as a work grows older, while the core entitlements to reproduce and distribute the work in its entirety might remain undisturbed. If the courts ultimately uphold the 1998 copyright extension (or any future extension, perhaps limited prospectively to future works), fair

47. Of course, strictly speaking, a retroactive extension of the copyright term could not change the incentive structure that was in the mind of the authors, publishers, and financiers when the work was originally created. My thanks to Mark Lemley for this point. On that basis, it would be correct to argue that fair use across time just keeps expanding fair use without pause—just as the Energizer Bunny keeps on going and a Timex watch keeps on ticking. The recalibration in light of a copyright term extension, as described above, would be the most copyright-friendly implementation of fair use across time.

48. Fisher, *supra* note 3, at 1719 n.265. A similar analysis has recently been presented regarding the duration of patent protection in relation to uncertainty and some failure in the enforcement of patent rights. *See* Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985 (1999).

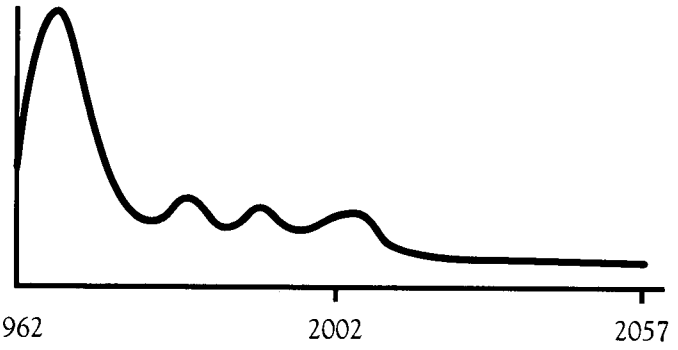
use across time could have a valuable role to play in gently expanding the public's easements on materials kept out of the public domain.

B. Further Complexities of the Market

The description of a copyrighted work's market as extending across the copyright term and the proceeds from that market being discounted for the present value of money as of the time of the decision to invest in a work follow directly from the purpose of copyright law—incentivizing the creation of new works.

But how precise should our understanding of copyright markets become? For example, we know that adjusted for inflation, the vast bulk of the money made by a film will be made early (in the first ten years, in the first year, or, increasingly, in the first weekend).[49] The same is generally true of sound recordings and the book trade. Staying with our 1962 film examples, an average market performance of a profitable film might look something like this:

GRAPH FOUR



The first and most important peak is the gain from the theatrical release box office. Additional peaks are inserted for VHS and DVD release, cable television exploitation, broadcast television exploitation, and, eventually, internet on-demand delivery.

49. *See* James Bates, *Films' Big Openings Fade Fast, but Studios Cash in*, L.A. TIMES, Aug. 12, 2001, at A1 (noting that 2001 marked the first summer during which films on average lost half their opening business within a single week); *see also* Carl DiOrio, *B.O.s Big Dippers: Even 'Apes' Faces Fight to Hold Its Top Spot*, DAILY VARIETY, Aug. 2, 2001, at 1 (explaining that the "one week syndrome" has caused many recent films to decline rapidly in popularity after their first week); Dade Hayes, *A Tale of Two Blockbusters*, VARIETY, Nov. 26–Dec. 2, 2001, at 12 (comparing the 1990 hit *Home Alone* (20th Century Fox), taking a month to reach the $90 million mark in box office receipts, with 2001's *Harry Potter and the Sorcerer's Stone* (Warner Bros. Pictures), reaching $90 million in box office receipts during the first weekend).

Understanding the market in this way, fair use across time could have considerably stronger effects on § 107 analysis. A judge might not wait until a third or a half of the way through the copyright term to notice that a substantial portion of the work's market would not be affected by the shadow of an unauthorized use becoming widespread. At this point, the analysis must focus on how much of the market is past, rather than on how much of the term is past.[50] Imagine that empirical research showed that most audiovisual works, musical compositions, sound recordings, and books had roughly the kind of front-loaded market shown in Graph Four. In that situation, could or should a court assume that the market for the plaintiff's work has such a form?

The answer should be "no." A slightly finer resolution on the category of creative work probably would reveal many kinds of works that have much flatter return curves: church hymnal musical compositions, children's stories (with constantly renewing audiences), pornographic films, and seasonal classics (*Rudolph the Red-Nosed Reindeer*, *It's the Great Pumpkin, Charlie Brown*,[51] or Tchaikovsky's *Nutcracker*) all come to mind as works that may have more enduring, more consistent returns over the years.

More pointedly, there may be works that are late bloomers—books that become cult classics decades after the initial publisher ended their print runs, paintings, and other visual artworks that gain notoriety (and print editions) decades after creation. Such late bloomers are rare, but they exist. Related to the late bloomer issue, there is the concern that Graph Four captures only the market for a work; it does not capture the market for derivative works to which the copyright holder is entitled. When a work has an initial peak, as with a bestselling novel or a blockbuster movie, the market for derivative works can endure several years, even decades. These are the great franchises such as *Indiana Jones*, *Star Trek*, or *The Matrix*.[52] Mapping

50. For example, in William Fisher's elaborate 1988 example of infringement of detective stories, the plaintiff already had enjoyed a few months of undisturbed hardback sales, a fact that bore on the economically efficient deployment of § 107 fair use. Fisher, *supra* note 3, at 1705–17.

51. RUDOLPH THE RED-NOSED REINDEER (Rankin-Bass Productions 1964); IT'S THE GREAT PUMPKIN, CHARLIE BROWN (Paramount Pictures 1966).

52. Patrick Goldstein, *The Big Picture: In Box-Office Game, It's All About the Franchise Players*, L.A. TIMES, Nov. 20, 2001, at F1 (describing a film franchise as "a self-perpetuating commodity, a carefully constructed cash cow designed to appeal to the widest possible spectrum of moviegoers, fueling merchandising tie-ins, DVD sales, theme park attractions and video game spinoffs, all geared to keeping consumers occupied until the next movie starts the cycle again"); RAIDERS OF THE LOST ARK (Paramount Pictures 1981); INDIANA JONES AND THE TEMPLE OF DOOM (Paramount Pictures 1984); INDIANA JONES AND THE LAST CRUSADE (Paramount Pictures 1989); STAR TREK: THE MOTION PICTURE (Paramount Pictures 1979); STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982); STAR TREK III: THE SEARCH FOR SPOCK (Paramount Pictures 1984); STAR TREK IV: THE VOYAGE HOME (Paramount Pictures 1986); STAR TREK V: THE FINAL FRONTIER (Paramount Pictures 1989); STAR TREK VI: THE UNDISCOVERED COUNTRY (Paramount Pictures 1991); STAR TREK: GENERATIONS (Paramount Pictures 1994); STAR TREK: FIRST CON-

the derivative work market becomes more complicated still with literary and dramatic works that may generate derivative work markets far in excess of the original work's value, even adjusted for present value.

If we look at actual market conditions, the copyright holder might go on the offensive: The issue should not be the market for a single (successful) work, but the market for copyrighted works as a whole. One aspect of intellectual-property-protected commerce is that, in general, it appears that only a small minority of works are ever profitable. One in ten is a figure commonly used for profitability of Hollywood films, pop music albums, and pharmaceuticals, making each industry a sort of crap shoot.[53] This low hit ratio is often true for successful individual artists, as well as for large commercial concerns. For example, one quarter of the royalties received by the Kurt Weill estate comes from one song: "Mack the Knife,"[54] made popular by Bobby Darin and Ella Fitzgerald. The profitability statistics for patented inventions and copyrighted poems are even more dismal.

TACT (Paramount Pictures 1996); STAR TREK: INSURRECTION (Paramount Pictures 1998); STAR TREK: NEMESIS (Paramount Pictures 2002); THE MATRIX (Warner Bros. 1999).

53. In the case of feature films, the numbers really are not so grim. It appears that approximately six out of ten films eventually recoup their original investment through all distribution channels. *See* Edna Gundersen, *Any Way You Spin It, Music Industry Is in Trouble*, USA TODAY, June 4, 2002, *available at* http://www.usatoday.com/life/music/2002/2002-06-05-cover-music-industry.htm (last visited Jan. 13, 2003); MOTION PICTURE ASSOCIATION OF AMERICA, ANTI-PIRACY RIVALRY, *at* http://www.mpa.org/anti-piracy/content.htm (last visited Aug. 17, 2002); Chuck Philips, *Record Label Chorus: High Risks, Low Margins*, L.A. TIMES, May 31, 2001, at A1 (reporting that "[f]or every successful act such as the Spice Girls, there are nine bands . . . signed for a ton of money . . . that never make it"); Alwyn Scott & Tricia Duryee, *Fight over CD prices: Whose Spin Is Right?*, SEATTLE TIMES, Aug. 14, 2000 at A1 ("Major labels release about 7000 new CD titles each year, and not even one in 10 is profitable, according to the Recording Industry Association of America."); George Varga, *Stars United in Goals; Recording Artists' Coalition Pushes for Industry Changes*, S.D. UNION-TRIB., Feb. 26, 2002, at C1. A blanket one-in-ten proposal for the pharmaceutical industry would be more difficult because one must decide "ten" what? Promising chemical compounds synthesized? Compounds introduced into laboratory testing? Drugs introduced into the market? But whatever the reference point, there is no question that the vast majority of the chemical compounds explored, synthesized, and researched by the pharmaceutical industry never produce a profit. *See, e.g.*, *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary and the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 103d Cong. 296 (1994) (statement of Gerald J. Mossinghoff, President, Pharmaceutical Research and Manufacturers of America) ("Only 1 in every 5000 [pharmaceuticals] tested in the laboratory is ultimately approved for human use."); Harry Goldsmith, Pharmaceutical Invention, 47 J. PAT. OFF. SOC'Y 648, 649 (1965) (stating that out of hundreds of thousands of compounds synthesized by chemists for use as potential new drug products, only about 1 in 8500 passes the stringent tests required before a new drug product reaches the consumer); *see also* Roger D. Cohen et al., *Reducing Risk and Improving Profitability of New Medical Products*, Mar. 1999 (concluding that pharmaceutical development is "[l]ike a poker game, [in which] each subsequent phase of product development gets increasingly expensive"), *available at* http://thegsgroup.com/reports_papers.htm.

54. BOBBY DARIN, *Mack the Knife*, *on* THAT'S ALL (Atco Records 1959); ELLA FITZGERALD, *Mack the Knife*, *on* MACK THE KNIFE/ELLA IN BERLIN (Verve Records 1960).

Because so few created works are marketed and so few marketed works become profitable properties, one could argue that the copyright owner needs to be able to extract every unit of value from a profitable work to support the hobby, habit, or business of making unprofitable works.[55] At the first level, the decision to fund the production of unprofitable commercial works (by increasing the monopoly rents extracted from the commercially popular works) could be a decision that the existence of these unprofitable works produces more social utility than increased (free) public use of the popular works. Alternatively, we could be funding these unprofitable commercial works simply because no one can distinguish, ex ante, commercial successes from commercial failures—forcing us to gather the capital for X works, knowing that only X–Y of these works will be commercially successful.

It is beyond the scope of this Article to resolve these questions, but let me sketch out some answers. As to the one-in-ten profitability ratio, its implications do not lead to the inexorable conclusion that fair use should be cabined or eliminated with profitable works any more than it leads to the conclusion that fair use should be epic, if not unlimited, in the case of unprofitable works. More importantly, we can eliminate this "whole market" approach on statutory grounds. The fourth factor of § 107 directs a court to ponder "the potential market for or value of the copyrighted work"—singular. There is no statutory basis to consider the owner as an owner or producer of multiple copyrighted works or to consider market conditions as a whole.

As to the market over time for a single work and whether courts should treat that market as heavily front-loaded as in Graph Four, let me propose two possible approaches. One approach would be for courts to acknowledge that the market for a copyrighted work occurs over time along the lines of Graphs One, Two, and Three—such that the timing of the unauthorized use in relation to the copyright term becomes a legitimate consideration as the work grows old. Another approach would be for courts to be open to proof that most of the market for a copyrighted work is in the past or, conversely, that most of the market for the work is in the future.[56] For example, particu-

55. F.M. Scherer, *The Innovation Lottery*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 20–21 (Rochelle Cooper Dreyfuss et al. eds., 2001).

56. To the degree that § 107 fair use is an affirmative defense, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560–61 (1985), the defendant would have the burden of establishing fair use under the four factors. But at least in the case of noncommercial uses, the Supreme Court has suggested that the plaintiff has the burden of showing the market harm under the fourth factor. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). It also can be argued that § 107 is what it says it is: a "limitation" on exclusive rights, not an affirmative defense to the assertion of those rights.

lar kinds of works known to have flatter return curves, such as the seasonal movies and children's stories mentioned above, might be more readily amenable to proof that most of the work's market is still in the future.

A second possible approach would be more theoretically rigorous, but arguably too rigid: Presume a front-loaded curve as depicted in Graph Three because even for actual late bloomers, the ex ante expectations at the time of the decision to invest in the work were for early blooms, not a late harvest. To rebut a presumption of a front-loaded market over time, the copyright owner would be required to establish that the decision to invest in the work was made with the expectation that the work would be a late bloomer.

C. Possible Criticisms of This Approach

In developing this idea of fair use across time, there is a variety of criticisms and concerns that might be addressed. Some of these concerns are substantive and some are procedural (that is, whether it would be practical to implement fair use across time in actual cases). The discussion below sketches two of the former and one of the latter—along with some tentative responses.

1. This Denies Copyright Holders Market or Value That Congress Intended Them to Have

A central substantive criticism is that this approach denies copyright holders part of the market that Congress intended them to have. As Professor Marci Hamilton has observed, copyright "delivers not an entitlement, but rather only a ticket to the market where the work must compete to attract monetary reward."[57] But it is a ticket to the full market, a market in which the monetary reward may be a genuine jackpot. One could add a textual argument that the fourth factor refers to the "potential market" of a work and, therefore, directs a court to consider the market only prospectively.

The answer to the textual point is that the words "potential market" can include the market that is already realized. If someone asked, during the third week of a film's run at the box office, "What is your guess on the film's total potential take?," surely the answer would include the two weeks that already had occurred. The truth is that there is very little in the legislative history and the reports leading up to the 1976 enactment of § 107 that elaborate on how we are to understand the "potential market" or "value" of a

57. MARCI A. HAMILTON, THE HISTORICAL AND PHILOSOPHICAL UNDERPINNINGS OF THE COPYRIGHT CLAUSE 15 (The Benjamin N. Cardozo School of Law, Yeshiva University, Occasional Papers in Intellectual Property, No. 5, 1999).

work. The initial proposal of statutory language for what became § 107(4) called for an evaluation of only "the effect of the use upon the potential value of the copyrighted work."[58] However, there is no question that from inception this measure of fair use was intended to capture "the effect of the use on the copyright owner's potential market for his work" and whether the unauthorized use was or was not "competitive with the copyright owner's market for his work."[59]

As to the broader point, that this refinement of fair use analysis would deprive copyright owners of a market that Congress intended them to have, I am not sure that there are any answers that are not circular or that have not been discussed already. Congress intended copyright markets to exclude fair uses and handed the courts the intentionally open-ended mission of declaring the farthest frontiers of the copyright market.

If one were to look for an overriding intent vis-à-vis copyright, it is surely that it creates incentives to produce and distribute public goods that otherwise would be underproduced. This is unquestionably the overriding purpose of the law as expressed, explained, and elaborated by the Constitution, Congress,[60] and the Supreme Court.[61] Everything we know about in-

58. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REPORT, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 6 (Comm. Print 1964) [hereinafter COPYRIGHT LAW REVISION, PART 3].

59. COPYRIGHT LAW REVISION, PART 1, *supra* note 6, at 24. During the 1960s discussions of the draft statute that became the 1976 Copyright Act, there was remarkably little comment on the language that became § 107. Most of the comments concerned whether to codify the fair use doctrine as a whole. I have found no discussions of the meaning of a work's "market" or "value," potential or otherwise.

60. *See, e.g.*, H.R. REP. NO. 60-2222, at 7 (1909) (on the Copyright Act of 1909). Consider the following expression of congressional purpose:

> In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

Id.; *see also* COPYRIGHT LAW REVISION, PART 1, *supra* note 6, at 5 ("[T]he ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end."). For well-known scholarly explication of the incentive function of copyright in addition to sources already cited, see Stephen G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001); and William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

61. One of the Supreme Court's clearest statements of the incentive structure of the copyright system is found in *Twentieth Century Music Corp. v. Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music,

vestment decisions in the arts and content industries suggests that this refinement of the fourth factor would not reduce the production of creative works. Anyone who has worked in or looked at the audiovisual, music, or publishing industries knows that investment decisions are made on the likely returns one, five, ten, perhaps—at the extreme—twenty years hence, not on the possible returns in the final quarter of a ninety-five-year copyright term, and particularly not on derivative uses or marginal uses during that last period.[62] With the copyrights of many works now exceeding one hundred years, the value of each dollar of royalties in the work's eightieth year of protection is—at the time the work is created—less than one half of one cent ($00.0045).[63] Despite what George Gershwin's heirs may argue, people who support themselves in the arts choose their projects guided either by their muse or by the likely economic return in the short and medium term (as in monthly rent and mortgage payments), not on the basis of likely returns to great-grandchildren.

2. Personality Interests and Other Theories of Copyright

There is a hardy core of commentators who, over the years, have maintained that the personality interests of authors and artists can and should be protected.[64] Over the course of the past few decades, the reasoning has established a bridgehead in U.S. jurisprudence, through both statutory developments[65] and judicial pronouncements.[66]

> and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citations omitted) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)); *see also* Fogerty v. Fantasy, 510 U.S. 517, 526 (1994) ("We have often recognized the monopoly privileges that Congress has authorized, while 'intended to motivate the creative activity of authors and inventors by the provision of a special reward,' are limited in nature and must ultimately serve the public good." (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984))).

62. Economists' *Eldred* Brief, *supra* note 29, at 5–7.

63. *Id.* at 6.

64. *See, e.g.*, Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 3–5 (1988); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288–90 (1988); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 4 (1985); Martin Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 578 (1940) (arguing that American common law already provided moral-rights-like protections).

65. *See* Visual Artists Rights Act of 1990, 17 U.S.C. §§ 101, 106A, 107, 113, 301, 501, 506, 411, 412 (2000); California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982); CONN. GEN. STAT. ANN. §§ 42-116s to -116t (West 1992); Artists' Authorship Rights Act, LA. REV.

In this context, it is appropriate to ask if any late-term curtailment of control of a copyrighted work, however narrow, would accord with a personality theory or a moral rights perspective. Traditionally, the concern of moral rights is to protect the artist's reputation against the effects of changes in the artist's works.[67] Protecting the integrity of the artist's works also can be understood as protecting the integrity of the artist's meaning and message. As Professor Roberta Kwall has observed, long-term protection of the artist's personal rights can help ensure that the public can "enjoy the fruits of a creator's labors in original form."[68] In some continental legal systems, such moral rights continue beyond the copyright term, sometimes becoming part of the national patrimony in that the state may defend the long-deceased artist's (apparent) interests.[69]

Increasing late-term fair use may not be fully compatible with some moral rights regimes, particularly where late-term fair use leads to derivative works to which the original artist or author objects. I have addressed this concern elsewhere, arguing that a long, but limited, period of exclusive control allows the author to establish his or her message in the mind of the

STAT. ANN. §§ 51:2151–:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2000); Fine Arts Preservation Act, PA. STAT. ANN. tit. 73 §§ 2101–2110 (West Supp. 1993); R.I. GEN. LAWS §§ 5-62-1 to 5-62-5 (1987).

66. *See* Seshadri v. Kasraian, 130 F.3d 798, 803 (7th Cir. 1997) ("[T]here are glimmers of the moral-rights doctrine in contemporary American copyright law."); *see also* Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1173 (7th Cir. 1997) (Posner, J.) (stating that a preliminary injunction "draws additional sustenance from the doctrine of 'moral right,' . . . a doctrine that is creeping into American copyright law"); Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35, 36 (1998).

67. Reputational interests may extend beyond traditional moral rights. For example, sometimes older works not only go out of circulation, they are *taken* out of circulation by the copyright holder. Walt Disney Corporation no longer airs or distributes some of its less racially sensitive animations from the 1940s—and one has to sympathize with, if not respect, this decision to send bigoted artistry to the crypts. *See, e.g.*, Suzi Parker, *Amid Linen and Lace, Antibellum Legacy Thrives*, CHRISTIAN SCI. MONITOR, Nov. 20, 2002, at 2; Orlando Ramirez, *Many Race-Based Cartoon Stereotypes Aren't Acceptable Now but Still Remain Accessible*, PRESS-ENTERPRISE (RIVERSIDE, CAL.), May 28, 1995, at E1. Freedom of expression includes the "right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). While the Supreme Court has made it clear that this right not to speak does not "sanction abuse of the copyright owner's monopoly as an instrument to suppress facts," Harper & Row v. Nation Enters., 471 U.S. 539, 559 (1985), where the operative *facts* are only the expression at issue, the balance drawn may be quite different than a situation where the expression is a unique carrier of other facts, as in the Zapruder film of the assassination of President Kennedy. *See* Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968) (holding the film of the Kennedy assassination copyrightable).

68. Kwall, *supra* note 64, at 69.

69. *See* A. LUCAS & H.J. LUCAS, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE & ARTISTIQUE §§ 473–479, at 380–89 (1994) (discussing situations where the Ministry of Culture or courts may intervene to protect an artist's moral rights interests under French law).

public.[70] But at some point the "marketplace of ideas" inevitably will determine whether an idea "mutates" or is successful in its original form and meaning.[71] Allowing some expanded derivative work capacity (as well as other fair uses) at the end of a century-long copyright term need not endanger those initial decades when the author is trying to secure a place in the culture for her work as she intended it.

In recent years, there also have been other insightful analyses as to the nature of copyright law in general and the fair use doctrine in particular. For example, some scholars have explored the general role of copyright in advancing the interchange and communication necessary to a robust civil society.[72] As to the reasons for recent changes in copyright law, other scholars have not shirked from a public choice explanation of the law in which campaign contributions and interest group politics shape the contours of the law.[73] Concerning the fair use doctrine in particular, scholars have noted its role in eliminating inefficiencies stemming from transaction costs.[74]

---

70. Hughes, *supra* note 64, at 364–65 (reasoning that market imperfections in recognizing the value of particular new ideas could justify moral rights regimes that would "require[e] at least a generation to pass before . . . altering an idea").

71. *Id.*; *see also* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 961 (1999) (describing cultural icons that seem to retain their meaning without legal protections).

72. A number of scholars have reasoned that copyright protection should be weakened to promote self-expression by people other than the copyright holder. *See* note 84, *infra*. Similarly, Professor Neil Netanel has argued that copyright's "internal safety valves"—the idea/expression dichotomy and the fair use doctrine—no longer police copyright doctrine adequately from a First Amendment perspective and that "intermediate scrutiny" First Amendment analysis should be brought to bear on copyright law. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, *passim* (2001). But in the 2003 *Eldred* decision, the seven-member majority forcefully rejected that view and affirmed their belief that "copyright law contains built-in First Amendment accommodations." *Eldred v. Ashcroft*, 123 S. Ct. 769, 774 (2003). If the *Eldred* decision teaches anything, it is that it is most useful to develop limitations on copyright within the internal logic of existing copyright case law, not from the application of doctrines external to copyright.

73. *See, e.g.*, Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869–79 (1987) (detailing the significant extent to which the Copyright Act of 1976 was a negotiated settlement among specific stakeholders); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244–46 (1996) (discussing interest group politics in copyright law).

74. *See, e.g.*, Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 233 ("One can justify the fair-use doctrine on grounds that Guido Calabresi and Douglas Melamed would have argued: fair use applies when transaction costs make it impractical for parties to negotiate ahead of time."); Gordon, *supra* note 7, at 1628–30. As William Landes has noted,

> Fair use limits the rights of the copyright holder by allowing unauthorized copying in circumstances that are roughly consistent with promoting economic efficiency. One such circumstance involves high transaction costs. For example, copying a few pages from a book probably does not harm the copyright holder because the copier would not have bought the book. But if copying were prohibited, transactions costs would prevent an otherwise beneficial exchange from taking place. Here, fair use creates a net social gain.

Fair use across time may or may not jibe with these varied explanations of copyright. For example, fair use across time can accord with a transaction-costs-based explanation of fair use. The transaction costs argument is, in essence, that some uses are "sub-threshold" in that they are not valuable enough to support the costs of a payment mechanism.[75] Surely such costs tend to increase as works get older. Small publishers, record labels, and other commercial sources of copyrighted material fold, relocate, or are absorbed by larger entities; creators disappear from the scene or pass away. Until the day of perfect information digital clearinghouses, all this suggests that older works will tend to have higher transaction costs associated with rights clearance, meaning that judging more pronounced unauthorized uses to be fair uses would tend to be economically efficient.

As for other explanations of what is really going on with copyright, the answer is simple: If we want to provide judges with the most useful tools to contain overreaching copyright claims, it is best to focus on what Congress and the Supreme Court have told us about copyright law. It is best to read the lines, not between the lines. "[I]t is incentive language that pervades the Supreme Court's copyright jurisprudence,"[76] and it is through incentive language that judges are most empowered to make copyright law work as it should.

3. A Procedural Concern: Fair Use Does Not Need Further Complexity

As a thoughtful colleague said when I first pitched this idea to him, "That's all we need—another dial on the fair use control panel." Legal commentators need to be mindful that many theoretically sound plans to elaborate the legal system should not be implemented because of imperfect information in the real world. Section 107 analysis is already opaque and unpredictable, especially when we know that for creators using preexisting materials (which may be most creators), "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible."[77] If we want artists, authors, publishers, and distributors to have a reasonably clear ex ante understanding of the fair use of preexisting works, § 107 may already fail to fulfill its critical mission.

William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 10 (2000).

75. COPYRIGHT LAW REVISION, PART 3, *supra* note 58, at 172 ("'Fair use' is an *ad hoc* way of treating something that is, shall we say, sub-threshold—that hasn't got enough voltage to actuate the grid. You can't find anybody to whom to pay that small copying royalty for what you want copied—in the time necessary to get it done." (comment of Laurence Heilprin)).

76. Sterk, *supra* note 73, at 1203.

77. Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

The answer is that while fair use across time may make fair use analysis more complex, it does not make it more opaque. In fact, fair use across time could make ex ante fair use analysis more predictable. In this respect, not all elements of fair use analysis are created equal. Published or unpublished?—that is a pretty bright-line test that a nonowner can see immediately. Commercial or noncommercial use by the nonowner? That is also something that can be judged fairly easily by the user before she becomes a defendant. In a grayer zone, the user controls how much of the work she uses and knows at least the quantity of what she is taking, but she might have doubts about the qualitative measure of the same material.

Compared to all these considerations, the fourth § 107 factor tends to be much more opaque to the person edging toward becoming a copyright defendant. Generally speaking, the secondary user will know little about the copyright owner's marketing; unless the work is high-profile, there will be little public information about its value. Whether the copyright in the original work is held by a private individual or a media conglomerate, the market and value of the original work will tend to be a black box.

In contrast, the age of a work is generally available information. Most books, record albums, and films indicate the year of publication on marketed copies. The internet provides ready information on when mainstream works are released. Registrations at the Copyright Office are a matter of public record. It would have been much easier for 2 Live Crew to figure out when "Oh, Pretty Woman"[78] was published (1962) than other aspects of its "potential market or value."

Of course, the precise copyright term will be known to the secondary user only when either (1) the author of the work has passed away at the time of the secondary use, or (2) the work is a work-for-hire. Yet even with a non-work-for-hire, it is much easier to learn the age of the author than other aspects of the market for a work. If one knows that a novel was written by a novelist when she was twenty-five years old and that she is now seventy years old, one reasonably can infer that more than a third of an approximate 125-year copyright term has passed.[79]

In other words, of all the elements that may be in play with the fourth factor in § 107, the actual or approximate copyright term of the work is arguably the most transparent. On that basis, fair use across time actually could add a bit of stability to an already wobbly balancing test.

78. Roy Orbison, *Oh, Pretty Woman* (Monument Records 1962).

79. The rough calculation is as follows: Assuming the author lives to be eighty years old (a reasonable inference for someone already seventy years old), then the copyright term extends from her twenty-fifth year until seventy years after her eightieth year—fifty-five years plus seventy years equals 125 years.

CONCLUSION

In a 1963 discussion of the legislative language that ultimately became § 107, Charles Brown of the American Society of Composers, Authors, and Publishers (ASCAP) commented that it will (not) do "to treat fair use as though it were some grudging toleration of an annoying public."[80] Yet to the degree that fair use limits or curtails the exclusive rights of the copyright holder, it does run counter to the incentive structure of American copyright law. For that reason, our analytic framework for fair use traditionally has included and should include a heavy emphasis on the market impact of unauthorized uses.

But market analysis under § 107 has failed to consider that the market for a copyrighted work occurs over a fixed duration: the copyright term. The Supreme Court repeatedly has told us that an unauthorized use may not be a fair use if, as a widespread practice, such activity would damage the copyrighted work's market. In other words, the concern is not the particular harm, but the shadow such harm would cast over the market.

If we are to be true to that reasoning, the shadow is cast only over the prospective or future market. A small infringing practice can become widespread only as to the remaining market. Tolerating a small infringing practice, say, one-half or two-thirds of the way through a copyright term cannot have any impact on the work's market that has already passed. Appreciating the market's temporality has one important effect: When a work is new, unauthorized uses are less likely to be fair uses; when a work approaches the end of its copyright term, unauthorized uses are increasingly likely to be fair uses. As more and more of a work's term is in the past, unauthorized uses, particularly small ones, should be more likely to be fair uses.

This Article explores a few issues that arise in the wake of this simple observation, including how fair use across time might help ameliorate the adverse effects of copyright term extensions and how fair use across time modestly helps clarify the fair use test.

Fair use across time does not affect copyright's exclusive rights when the copyright holder most needs them; indeed, it says that we should assiduously guard against the "property [being] pilfered early in its life span."[81] Fair use across time only affects the range of entitlements in the latter part of the copyright term, narrowing, but not eliminating, entitlements as it increases fair uses. In short, as a work grows older, the public domain aspects of the work increase.[82]

80. COPYRIGHT LAW REVISION, PART 3, *supra* note 58, at 171.

81. Press Release, *supra* note 30.

82. One colleague suggested that if a judge assumed that Congress will grant further extensions of the copyright term, the fair use across time analysis would have no effect. But even in light

Fair use across time also comports with the rigorous incentive structure that Congress and the Court have repeatedly told us is the foundation of American copyright law. The copyright term is now the life of the author plus seventy years. While this technically comports with the Constitution's requirement that a copyright be for "limited times," the present value of a copyright now approximates the present value of a copyright with an *infinite* term.[83] Considering the present value of revenue at the end of a copyright term, *at the time of the initial decision to invest in the copyrighted work*, a rational investor should care very little about that revenue—and, hence, very little about "fair uses" that might modestly impinge on that revenue. Fair use across time does not rely on any of the very interesting, but unproven theories of the role of copyright in relation to the public domain, democracy, or personal autonomy.[84] In short, fair use across time gives judges an economically rigorous, statutorily unimpeachable tool to make copyright law protect what should be protected and withhold liability when the unauthorized use has little impact on the total market for the copyrighted work.

---

of the Supreme Court's *Eldred* decision, it is not for a federal judge to make assumptions about what kinds of laws Congress might pass and it is for a federal judge to assume that Congress will pass laws in compliance with the Constitution, that is, that Congress will not knowingly attempt to create a perpetual copyright term.

83. Economists' *Eldred* Brief, *supra* note 29, at 8 (concluding that "the current copyright term already has nearly the same present value as an infinite copyright term").

84. For example, in the 1990s, there was extensive scholarly writing theorizing that copyright law is about who controls social meaning and, therefore, advocating a loosening of copyright control to further self-expression of persons beside the copyright holder. *See, e.g.*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992). For an early argument in the same vein, see Patricia Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1565 (1984) (advocating an "expanded First Amendment defense" for visual art works that incorporate others' copyrighted images).