

Et Tu, Fair Use? The Triumph of Natural-Law Copyright

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INTRODUCTION

Since its advent in 1841, the fair use doctrine has been hailed as a powerful check on the limited monopoly that a copyright grants. Fair use, we are told, protects public access to the building blocks of creation and advances research and criticism. This Article challenges the conventional wisdom about fair use. Far from protecting the public domain, the fair use doctrine has played a central role in the triumph of a natural-law vision of copyright that privileges the inherent property interests of authors in the fruits of their labor over the utilitarian goal of progress in the arts. Thus, the fair use doctrine has actually enabled the expansion of the copyright monopoly well beyond its original bounds and has undermined the goals of the copyright system as envisioned by the Framers of the Constitution.

In supporting this claim, this Article first charts the antimonopolistic impetus for federal copyright protection and reflects upon the original understanding of copyright as epitomized by a series of early cases on the rights of translation and abridgement. To the Framers, copyright was a form of compensation — a *quid pro quo* for a benefit granted to society — not a natural right to which authors were inherently entitled for their creative efforts. Specifically, the Copyright Clause of the Constitution, the 1790 Copyright Act, and the early jurisprudence of the Republic envisioned copyright as a property right limited in both scope and duration, with the particular goal of encouraging the dissemination of knowledge. Thus, while early copyright laws prohibited slavish copying of a protected work, no interdiction precluded transformative uses of a protected work because such uses were considered accretive to progress in the arts. Ultimately, however, this notion of copyright infringement would undergo a radical transformation.

Justice Story's fair use test set into motion a striking departure from this original heuristic by reintroducing long-spurned natural-law elements into the copyright calculus. Transformative uses were no longer noninfringing *per se*.¹ Instead, the law considered any use of a copyrighted work — whether partial or complete, literal or nonliteral — potentially infringing, excusable only after the alleged infringer proffered an effective fair use defense. The fair use elements, which included the amount and substantiality of the material purloined from the copyrighted work, the nature of the copyrighted work, and the harm done to its economic value, focused more on what *was taken from* a copyrighted work than what *use was made with* the copyrighted work.

¹ See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

Transformative use lay at the heart of the Framers' understanding of the copyright infringement calculus. The fair use test betrayed this understanding by embracing a natural-law, rather than utilitarian, vision of copyright. This vision fetishized the sole dominion of authors over their creative works beyond all other concerns, including an alleged infringing use's potential contribution to progress in the arts. Despite the limited rhetorical revival of transformative use in contemporary fair use jurisprudence, the natural-rights vision has continued to dominate modern copyright law. In particular, an examination of recent court rulings in both the novel area of digital sampling and in the realm of satire epitomizes this trend. As the final part of this Article concludes, this trend undermines the ultimate purpose of federal copyright law — progress in the arts — especially in an era where networked computers and malleable digital content have enabled new forms of artistic and post-modern experimentation. A case study of the origins of one of the most celebrated musical compositions of the past century highlights this point.

I. THE SEEMING TRIUMPH OF INSTRUMENTALISM: COPYRIGHT LAW IN THE EARLY YEARS

To fully appreciate the radical transmogrification in copyright jurisprudence precipitated by Justice Story's fair use test, it is first critical to understand copyright law in the years prior to 1841. To this effect, an examination of early American copyright law, as embodied in the text of the Constitution and the first Copyright Act and as expressed in a series of cases analyzing the right to translate and abridge copyrighted works, is instructive.

A. *The English Background*

The context in which the Framers drafted the Copyright Clause in 1787 serves to illuminate the philosophical underpinnings of federal copyright law. Indeed, copyright protection originally stemmed from profoundly *antimonopolistic* impulses.² Prior to the enactment of the world's first copyright statute, the British Crown issued a royal letters patent that granted the Stationers' Company, a guild of booksellers and printers, a virtual monopoly to publish in England. Under the letters patent system, the Stationers' Company (rather than authors) alone held

² Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y U.S.A. 675 (2002).

perpetual copyrights in works. As the sole guild licensed to publish in England, the Stationers' Company also acted as a royal censor by denying publication of controversial writings.

Parliament sought to break up the publishing monopoly with the passage of the Statute of Anne. First, the Statute granted authors, rather than publishers, the copyright in their works and the exclusive right to publish their intellectual creations.³ Second, the Statute severely curtailed the duration of copyright protection, decreasing it from perpetuity to a mere fourteen years for all new works (with the possibility of a single renewal term if the author were still alive at the end of the initial term).⁴ Meanwhile, existing works received twenty-one years of copyright protection.⁵

The Statute, therefore, represented a radical theoretical shift from the prior regime of perpetual copyright. The Statute of Anne's antimonopolistic origins were inextricably tied to the utilitarian philosophy underlying the Statute. The perpetual copyright formerly enjoyed by publishers at common-law and through the Crown's letters patent had been legitimated through an appeal to the natural rights of authors in their labor, regardless of the impact on progress in the arts. The Lockean logic was seemingly irrepressible: by putting labor into their intellectual creations, authors automatically earned a natural property right in their works.⁶ This right was perpetual, just like the

³ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

⁴ *Id.*

[T]he author of any book or books already composed, and not printed or published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of first publishing the same, and no longer.

Id.

⁵ The Statute of Anne stated:

[T]he author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer.

Id.

⁶ See 2 JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT 24-51 (1924). As Locke argued:

Though the Earth, and all inferior Creatures be common to all Men, yet every

right to real property or chattel, and it passed undiminished to publishers when they purchased works from authors.⁷

The Statute of Anne explicitly rejected this notion. The title of the Statute reflected its purpose: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."⁸ The Statute, therefore, sought to maximize the encouragement of learning, not to protect the inherent property rights that authors (or publishers) possessed in their works. In fact, a preamble concerning "the undoubted property" of authors was removed prior to the Statute's passage.⁹ Thus, to the extent that property rights were granted in intellectual creations, they were endured by legislative fiat, not natural law, and were tolerated for instrumental purposes.

Despite passage of the Statute of Anne, the guild of publishers continued to insist upon the natural rights of authors (transferred, of course, to publishers upon publication) in a perpetual copyright in their creative works. William Blackstone was an ardent and influential proponent of this vision, arguing for the absolute and interminable dominion of authors over their intellectual property that entitled authors to the right to exclude any use of their literal words and even styles and sentiments.¹⁰ As the guild and Blackstone argued, the Statute of Anne merely appended a statutory copyright system to the existing, natural and perpetual right to one's creations. The knell for this view ultimately

Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joynd to it something that is his own, and thereby makes it his *Property*.

Id. at 305-06. For a further examination of competing theories of property, including those of John Locke, and their influence on legal thought, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁷ Ochoa & Rose, *supra* note 2, at 683.

⁸ 8 Ann., c. 19.

⁹ MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 45 (1993).

¹⁰ See WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *405-06 (noting that author "has clearly a right to dispose of [his work] as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right to property."); see also Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 782-83 (2000) (arguing that Blackstonian vision of copyright embraced author's "'sole and despotic dominion' over a given work, a right of 'total exclusion' asserted in perpetuity against any attempt to imitate the sentiments, vary the disposition, or derive any social or economic value from a work.").

rang in 1774 with *Donaldson v. Becket*,¹¹ in which the House of Lords determined whether the copyright granted by the Statute of Anne merely co-existed with the prior common-law copyright scheme for creative works or supplanted it. As the House of Lords ruled, copyright was a mere statutory construct developed for instrumental reasons by the legislature, not a natural and perpetual right; or, in the parlance of French legalese, copyright was deemed *privilège* rather than *propriété*.¹² Thus, the task first undertaken with the Statute of Anne appeared complete.

B. *The Creation of American Copyright*

It is within this context that the Framers drafted, without much recorded debate or controversy,¹³ the Constitution's Copyright Clause. The Copyright Clause of the Constitution is clearly grounded in an instrumentalist discourse, granting Congress the power 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."¹⁴ Reflecting a utilitarian, rather than a natural-law, impulse, the language of the Copyright Clause was borrowed directly from the Statute of Anne. Beyond this expressly utilitarian rationale, the Clause advances no notion of the inviolability of intellectual property rights and explicitly limits copyright and patent protection to a finite duration. Thus, the Copyright Clause carefully eschews any embrace of a natural-law or labor theory of intellectual property — a fact made all the more remarkable by the rather heavy influence of Lockean hermeneutics on the Framers.¹⁵

The various niceties of the first Copyright Act, passed in 1790 pursuant to the authority of the Copyright Clause, further reveal the utilitarian origins of American copyright law. The title of the Act is thoroughly instrumentalist in bent, emphasizing the ends of the law and

¹¹ *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774).

¹² See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 13 (1966).

¹³ See Irah Donner, *The Copyright Clause of the U.S. Constitution: Why did the Framers Include It With Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 361 (1992); Edward C. Walterscheid, *To Promote the Progress of the Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 26-27 (1994). Indeed, the only mention of the Copyright Clause in the Federalist Papers is a brief reference in Federalist 43 that simply states what an obvious need there is for federal copyright and patent protection. See THE FEDERALIST NO. 43 (James Madison).

¹⁴ U.S. CONST. art. I, § 8, cl. 8.

¹⁵ See Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 57 (1985).

the temporary nature of the monopoly granted therein: "An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."¹⁶ Moreover, the federal copyright scheme Congress adopted only conferred protection upon publication, or when a work was first made available to the public. The instrumental quid pro quo was, therefore, explicit: in return for publishing work and disseminating it to the public, a writer would receive a limited monopoly for exclusive exploitation of the publication. Additionally, by making the benefits of copyright protection available only to American citizens and residents, Congress eschewed a natural-law vision of copyright as an inherent property right.¹⁷

All told, "[t]he limited monopoly granted to authors by [the Copyright Act] was justified by the need to maximize the production of new works for public consumption, and its scope was measured by that justification."¹⁸ Thus, contrary to the views of some scholars,¹⁹ it was copyright's ability to serve public needs, not the moral claims of the author, that made its monopoly defensible.²⁰ Both loathe to tolerate monopoly in any form, James Madison and Thomas Jefferson reflected this view in their writings. As Thomas Jefferson once poignantly noted:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone. . . . He who receives an idea from me receives instruction himself without lessening mine. . . . That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man. . . seems to have been

¹⁶ See 1 Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831) (emphasis added).

¹⁷ Of course, this policy choice also reflected profoundly protectionist impulses.

¹⁸ See Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 506-11 (1945); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 704 (1992).

¹⁹ See, e.g., John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 80 (1996) (arguing that Framers' paramount purpose with Copyright Clause was to protect "individual's natural property in his information"). McGinnis and other scholars who take such a position on the Framers' intent ignore the instrumentalist language of the Copyright Clause, its significant temporal and utilitarian limits (by sharp contrast to material property rights), the Framers' profound skepticism of monopolies, the influence of the English experience with the Statute of Anne, and the historical context of its promulgation.

²⁰ See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970).

peculiarly and benevolently designed by nature.²¹

James Madison agreed. In a manuscript published posthumously, Madison balanced his distaste for monopoly with the need for copyright protection to encourage dissemination. “Monopolies though in certain cases useful ought to be granted with caution, and guarded with strictness against abuse,” he warned.

The Constitution of the U.S. has limited [monopolies] to two cases, the authors of books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given.²²

Madison’s statement on the nature of the copyright monopoly is both revealing and instructive. First, Madison’s thoughts are grounded in an instrumentalist discourse that envisions copyright as a form of compensation — a quid pro quo for a benefit granted to society — not as a natural right to which authors are entitled for their creative efforts. Moreover, Madison emphasizes the temporary nature of the monopoly and its key role in providing encouragement for the sharing of knowledge. Thus, the Constitution would tolerate intellectual property monopolies only to the extent that they served a clear, instrumental purpose that benefited society.

C. *Wheaton: The Apparent End of Natural-Law Copyright*

Any lingering doubts about the viability of a natural-law vision of copyright ostensibly vanished in the United States with *Wheaton v. Peters*.²³ In this case, the United States Supreme Court followed the lead of the House of Lords in *Donaldson* and rejected the natural-rights view that held that all published creative works imbued in their authors a perpetual, common-law monopoly right. The Court was readily familiar with the facts of *Wheaton*. Peters had succeeded Wheaton as the Supreme Court reporter. Because Wheaton had not undertaken the

²¹ Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 333-34 (Albert Ellery Bergh, ed., 1907) (emphasis added).

²² JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed., 1999).

²³ 33 U.S. 591 (1834).

proper procedures to obtain copyright protection under federal law,²⁴ Peters argued that he owned a copyright in his reports by virtue of the common-law right (justified under natural-law theory) that predated the establishment of the statutory copyright. As Wheaton maintained, “[t]he import of the act of congress of 1790 is that, before its enactment, there were legal rights of authorship existing; it provides for existing property, not for property created by the statute. . . . That law is not one of grant or bounty; it recognizes existing rights, which it secures.”²⁵ The Court rejected his argument and held that, with respect to published works, there was only one copyright: federal statutory copyright.²⁶ After all, if copyright were a common-law right, the statutory grant would be thoroughly superfluous.²⁷

The upshot of the Court’s ruling was its rejection of a strong, natural-law, property-based vision of copyright. Under the natural-law view, “[t]he right of an author to the production of his mind is acknowledged every where. It is a prevailing feeling, and none can doubt that a man’s book is his book — is his property.”²⁸ By contrast, the Court held that copyright protection represented a statutory construct designed to grant strictly delimited rights to authors. All published works fell under the exclusive jurisdiction of this instrumentalist federal scheme, which aimed to reward authors with a limited monopoly term in their creative works that would encourage progress in the arts through dissemination of the works to the public. The Court thereby confirmed the Framers’ intention for a limited-duration copyright that served the public interest.²⁹

It is critical to note that the *Wheaton* Court did acknowledge one exception to this framework: at common-law, authors continued to retain rights in unpublished manuscripts because unpublished works remained outside of the purview of the Copyright Act.³⁰ This common-

²⁴ *Id.* at 664-68.

²⁵ *Id.* at 653.

²⁶ *Id.* at 661.

²⁷ *Id.* (“Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.”).

²⁸ *Id.* at 653.

²⁹ See Ochoa & Rose, *supra* note 2, at 675.

³⁰ *Wheaton*, 33 U.S. at 657 (“That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted.”).

law protection for authors' unpublished writings continued until 1976,³¹ and, significantly, it was not rationalized on strict property or natural-law grounds. Instead, it represented the enforcement of the more general right of the individual "to be let alone."³²

All told, by the mid-nineteenth century, "the constitutional principle of copyright was that one is entitled to only a limited monopoly of material taken from the public domain and then only if its use benefits society."³³ With *Wheaton*, it appeared that the utilitarian vision of copyright had triumphed. As a consequence, the infringement test the courts developed reflected this instrumentalist interpretation of the Copyright Clause and the Copyright Act by embracing the principle of a *limited* monopoly in two different senses. First, there was temporal limitation to the monopoly. Second, even during its duration, a stringent notion of infringement limited the monopoly. The next part focuses on the second limitation.

D. *The Early Copyright Decisions: Abridgement, Translation, and the Focus on Transformative Use*

A series of Anglo-American rulings on the right to translation and abridgement epitomizes the utilitarian understanding of copyright embraced by the Founders and enforced in the United States until the early part of the last century.³⁴ Operating from the premise that copyright was a statutory construct with an instrumentalist bent, rather than a natural-law property right, courts viewed the act of infringement in a light largely unfamiliar to contemporary standards. Consequently, these cases focused on the transformative use made of the original work by the defendant rather than on the value of the material wrested from the original author.

³¹ See, e.g., 17 U.S.C. § 104(a) (2004).

³² Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 193 (1890). As Samuel Warren and Louis Brandeis argued in their famous article on the right of privacy: "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality," *id.* at 205, or, put another way, the right of privacy. The very act of publication changes the nature of authorial rights in a work — publication constitutes a waiver of the right to privacy and subjects the work to the limited intellectual property rights dictated by the Copyright Act.

³³ L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 445 (1998).

³⁴ See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853); *Newbery's Case*, 98 Eng. Rep. 913 (Ch. 1773); *Gyles v. Wilcox*, 26 Eng. Rep. 489 (Ch. 1740); *Burnett v. Chetwood*, 35 Eng. Rep. 1008-09 (Ch. 1720).

The English courts' early judicial interpretations of the Statute of Anne, the antecedent for the Constitution's Copyright Clause, are the starting point of this examination. The first substantial question addressed under the Statute was whether a complete word-for-word translation of a copyrighted book automatically constituted a form of infringement. The English courts ultimately held in the negative. In the seminal case of *Burnett v. Chetwood*, Lord Mansfield reasoned that "a translation might not be the same with the reprinting [of] the original, on account that the translator has bestowed his care and pains upon it."³⁵ Ultimately, this observation prevailed and became the law.³⁶ Proceeding from the premise that translations were formidable intellectual enterprises, English courts held that their transformative quality transcended the original work and granted a tremendous benefit to the public. As a result, translations were not copyright infringements.

The translation rule is significant for what it reflects about the nature of infringement and the power granted by copyright: there is no infringement so long as an accused infringer creates a substantial work of authorship with her use of the original work.³⁷ The focus of infringement was, therefore, not on the inherent property rights held by an original work's creator; rather, it was on the transformative application undertaken by subsequent users.

The English view of translation carried across the Atlantic. The case of *Stowe v. Thomas*³⁸ best illustrates this westward migration in jurisprudence. In 1853, when Harriet Beecher Stowe sued the author of a German translation of her celebrated work, *Uncle Tom's Cabin*, for copyright infringement, American courts were apparently faced with the translation question for the first time.³⁹ Drawing from the available English jurisprudence, Justice Grier found no infringement. His reasoning, particularly in light of the facts of the case, is significant.

In the case, Harriet Beecher Stowe urged the court to adopt a distinctly natural-rights vision of copyright, arguing that "[t]he right is original, inherent; a right founded on nature, acknowledged, we think, at common-law; a right which stands on better ground and is more deeply rooted than the right to any other property whatever. . . . What a man earns by thought, study, and care, is as much his own, as what he obtains

³⁵ *Burnett*, 35 Eng. Rep. at 1009.

³⁶ KAPLAN, *supra* note 13, at 10-12.

³⁷ As Kaplan argues, the rule that emerged in this time was that "if the accused book was a work of authorship, it could not at the same time infringe." *Id.* at 10.

³⁸ *Stowe*, 23 F. Cas. at 201.

³⁹ *Id.* at 201 (noting that Stowe's attorney stated, "[t]he question is novel").

by his hands."⁴⁰ Operating from a premise that copyright grants absolute property rights to its owner, Stowe argued that the transformative value of the translation to society should be irrelevant to the court's infringement analysis. Instead, the court should acknowledge that the defendant's German translation was free-riding on Stowe's intellectual efforts and trampling upon her natural property rights stemming from those efforts. Thus, translation inherently constituted infringement of the natural right to one's intellectual property, as

[t]he translator aims to convey to the mind of his reader the ideas and thoughts of the author; nay, the very shades of his ideas and thoughts; his exact manner and form of expression, and even his words, so far as represented by similarly constructed expressions in the new language.⁴¹

As the causal chain of Stowe's argument reveals, the philosophical underpinnings of a court's view of copyright would ultimately determine the result. If the court conceptualized copyright as a natural-law property right, translation would constitute infringement. By contrast, if the court viewed copyright as utilitarian in nature, then the transformative nature of the translation process would lead to a finding of no infringement.

Besides the natural-rights appeal of her argument and the popularity of her work, the circumstances surrounding the *Stowe* case were particularly favorable to Ms. Stowe. When a translator renders an author's work into a foreign language, the translation effectively introduces a new audience to the work and perhaps even stimulates the market for the original work. Thus, barring plaintiff's intention to enter the translation market, the original work suffers from little to no harm. This certainly was not the case in *Stowe*, however. Prior to defendant's translation of *Uncle Tom's Cabin*, Harriet Beecher Stowe had commissioned and authorized a German translation so that her book could be purchased and read by the large German-speaking population in the United States at that time. In fact, her husband even helped put together the translation.⁴² Stowe had every intention of profiting in the translation market for her book, and defendant's translation caused her direct market harm: as a result of its superior readability, the German translation by Thomas had virtually killed the market for the translation authorized by Stowe. In a remarkable concession, the defendants

⁴⁰ *Id.* at 202 & n.2.

⁴¹ *Id.* at 202.

⁴² *Id.* at 201.

happily acknowledged this fact: "The sale of [Stowe's] translation, indeed, was impaired [by defendants' work]." ⁴³

However, rather than using this fact as a basis for *finding infringement* (due to the market harm to Stowe's work and her right to reap the just rewards for her intellectual labor), the court drew upon this fact as a reason for *finding no infringement*. The court squarely rejected Stowe's philosophical position regarding her natural, exclusive right to use and exploit her creation. Casting the copyright bargain in a light largely unfamiliar to any modern judge, the court noted:

By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. (Uncle Tom and Topsy are as much publici juris as Don Quixote and Sancho Panza.) All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. (They are no longer her own — those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished.) ⁴⁴

The fact that Thomas's German translation caused market harm to Stowe garnered no sympathy from the court, thereby reflecting just how strongly the infringement test embraced a utilitarian analysis that assessed the intellectual use made of a work. As the defendants argued, the injury to Stowe's translation was the simple result of the competitive forces of the marketplace. As they observed, "the reason why [her authorized translation] is injured, is that her translation has less genius than ours." ⁴⁵ The court seized upon this observation when it performed its utilitarian calculus on the infringement claim. Justice Grier noted that:

To make a good translation of a work often requires more learning, talent and judgment, than was required to write the original. Many can transfer from one language to another, but few can translate. To call the translations of an author's ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation. ⁴⁶

⁴³ *Id.* at 206.

⁴⁴ *Id.* at 208.

⁴⁵ *Id.* at 206.

⁴⁶ *Id.* at 207.

While the court suggested that a word-for-word mechanical translation *might* constitute infringement, it held that a learned rendition, such as Thomas's work, clearly did not run afoul of copyright law.⁴⁷ The reason was plain to the court: at the core, copyright was not about protection of an authorial monopoly based on a natural-rights theory of property; instead, it was about striking a utilitarian balance that enables authors to reap economic rewards for publishing and disseminating their creations while also enabling others to make progressive uses of these disseminated works for the public benefit. Thus, the intellectual craft undertaken in the creation of the translation was central to the court's decision. Instead of looking at what was taken from the plaintiff, the court examined what *use* the defendant made of that work and how it impacted the promotion of the arts. Because the availability of a superior translation advanced progress in the arts, Stowe lost her infringement claim.

The abridgement jurisprudence announced during copyright's early years is similarly revealing. The English courts first addressed the issue of abridgement in *Gyles v. Wilcox*.⁴⁸ In that case, the publisher who owned the copyright for Sir Matthew Hale's *Pleas of the Crown* pursued an infringement suit against the publishers of *Modern Crown Law*, accusing them of abridging Hale's work. The language of the opinion is highly instructive. According to presiding Lord Chancellor Hardwicke, a work only "colourably shortened" constituted piracy.⁴⁹ However, as he cautioned, this principle

must not be carried so far as to restrain persons from making a real and fair abridgement, for abridgements may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some cases prejudicial, by mistaking and curtailing the sense of an author.⁵⁰

Hardwicke, therefore, expounded the notion that an abridgement could constitute a new work of authorship, imbued with invention, learning, and judgment, despite how heavily an abridger borrows from a copyrighted work.

⁴⁷ *Id.*

⁴⁸ *Gyles v. Wilcox*, 26 Eng. Rep. 489 (Ch. 1740).

⁴⁹ *Id.* at 490.

⁵⁰ *Id.*

Although he did not fully adjudicate the instant case,⁵¹ Lord Hardwicke did provide guidance for an infringement test that would focus less on what was taken from the copyrighted work and more on the nature and extent of the defendant's use of the copyrighted work. Under Hardwicke's view, courts should eschew any recognition of a plaintiff's inherent, natural-law based property right in their work and instead look to an instrumentalist calculation of how that work was being used by the allegedly infringing party. If the use was transformative and helped to promote progress in the arts, then a court should find no infringement. This fundamentally utilitarian analysis would still allow for authors and publishers to obtain just rewards for their intellectual labors — the just returns that came from the exclusive right of plaintiffs to have their work, as it existed, published in the marketplace.

Drawing on Hardwicke's opinion in *Gyles*, the court in *Newbery's Case* found that the act of abridgement did not infringe an author's copyright.⁵² Newbery had condensed and abstracted Hawkesworth's novel, *Voyages*.⁵³ Just as Chancellor Hardwicke had done, Lord Chancellor Apsley, the presiding judge in *Newbery*, argued that an abridgement preserving "the whole" of a work constituted "an act of understanding. . . in the nature of a new and meritorious work."⁵⁴ As a consequence, Newbery escaped liability for infringement. Remarkably, as Benjamin Kaplan points out, "Newbery was not only exculpated but congratulated for reducing Hawkesworth and preserving the substance in different language perhaps better than the original."⁵⁵

As with translation, courts considered abridgement an intellectual exercise, which, when performed with superior competence, only improved an original work. As a consequence, it advanced the central jurisprudential concern in an infringement suit — progress in the arts. Thus, the act of abridgement could not be an act of infringement. The United States adopted the abridgement rule, as it did the translation rule.⁵⁶ In *Wheaton*, the plaintiff even acknowledged the right of an

⁵¹ Lord Hardwicke ultimately recommended the case to arbitration, where the plaintiff lost. See KAPLAN, *supra* note 13, at 11.

⁵² *Newbery's Case*, 98 Eng. Rep. 913 (Ch. 1773).

⁵³ KAPLAN, *supra* note 13, at 12 (quoting *Newbery's Case*, 98 Eng. Rep. at 913). Hawkesworth's work was itself based on a reconstruction of the original journals of several notable explorations, including Captain James Cook's first circumnavigation of the globe. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See, e.g., *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497)

individual to create an abridgment.⁵⁷ Similarly, Justice Story's well-chronicled decision in *Folsom v. Marsh* affirmed the vitality of the abridgement rule.⁵⁸

As epitomized by the translation and abridgement cases, this examination of eighteenth and nineteenth century copyright jurisprudence demonstrates that the notion of transformation lay at the heart of any infringement analysis. Whether appropriation of someone's work resulted in a finding of infringement depended largely upon the benefit of the use to society. As a consequence, the value of an expropriated copyrighted work was often irrelevant to a court's infringement calculus. This is not to say that all natural-law supporters of authors' rights, both in the law and in society at large, had been silenced. However, the infringement test was largely utilitarian in bent, as the Constitution and Copyright Act intended. All of that would change over the next century and a half. The morphing of copyright law began, most centrally, with Justice Story's decision in *Folsom v. Marsh*.⁵⁹

II. NATURAL-LAW REDUX: THE DEVELOPMENT OF THE FAIR USE DOCTRINE

With the enunciation of his decision in *Folsom v. Marsh*, Justice Story precipitated a radical change in copyright law. The prior emphasis on transformative use withered as courts began to focus on natural-law factors that had long been rejected by the Framers and the courts' early applications of copyright law. This sharp change in the underlying rationale for copyright protection continues to have a profound and unappreciated influence to this day.

(finding that "[a] fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment").

⁵⁷ See *Wheaton v. Peters*, 33 U.S. 591, 651 (1834) ("An abridgement fairly done, is itself authorship, requires mind; and is not an infringement, no more than another work on the same subject."). The plaintiffs, however, argued that the Condensed Reports at issue in the case did not constitute an abridgement: "The [defendant's] Condensed Reports have none of the features of an abridgement, and the work is made up of the same cases, and no more than is contained in Wheaton's Reports." *Id.* at 652.

⁵⁸ See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901) (noting that "real, substantial condensation" of work did not constitute act of infringement so long as "intellectual labor and judgment [was] bestowed thereon"). As we shall see, however, this affirmation was somewhat disingenuous, as the opinion fundamentally altered copyright law. See *infra* Section II.A.

⁵⁹ *Folsom*, 9 F. Cas. at 342.

A. *Folsom v. Marsh: Justice Story and the Betrayal of a Utilitarian Vision of Copyright*

The *Folsom v. Marsh*⁶⁰ decision marks the origin of the fair use test. Although the decision did not bandy about the term “fair use,” the opinion is the first to set out the modern balancing test for fair use analyses.⁶¹ Celebrated by many observers as a triumphant victory for the public domain,⁶² *Folsom* achieves nothing of the sort. Quite to the contrary, *Folsom* represents a fundamental betrayal of 200 years of copyright law and a re-embrace of the monopolistic, natural-rights based vision of copyright rejected by the Constitution, the Framers, and the jurisprudence of the time. For this reason, at least one scholar has hailed *Folsom* as the worst intellectual property decision ever.⁶³ Unfortunately, it is also the most cited case in copyright law and the foundation of modern copyright jurisprudence.

As L. Ray Patterson notes, two prevalent myths surround the *Folsom* decision. First, commentators claim that *Folsom* created fair use. Instead, it merely redefined what constituted infringement.⁶⁴ Secondly, *Folsom* is viewed as having diminished the rights of copyright holders. Rather, Patterson argues that “the case enlarged those rights beyond what arguably Congress could do in light of the limitations on its copyright power and, indeed, fair use today continues to be an engine for expanding the copyright monopoly.”⁶⁵ Far from creating fair use and carving a hole into the copyright monopoly, Justice Story’s decision in *Folsom* transformed copyright law and expanded its monopoly. As Patterson argues, Story accomplished this coup by categorizing copyright as a subset of property law grounded in natural rights instead of a subset of public domain law characterized by a limited statutory monopoly.

⁶⁰ *Id.*

⁶¹ *Id.* at 348. According to Justice Story, in deciding questions of infringement, courts should “look to the nature of 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.” *See id.* This test is closely replicated in the current fair use provisions of the Copyright Act. *See* 17 U.S.C. § 107 (2004).

⁶² *See, e.g.,* Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1, 1 (2002) (praising fair use as “one of the most important limits on the monopoly of copyright owners over the use of their copyrighted expression”).

⁶³ Patterson, *supra* note 34, at 431.

⁶⁴ *Id.*

⁶⁵ *Id.*

Since the law of which copyright is a subset is the source of copyright rules, the choice has important consequences. Whether copyright is a statutory monopoly or a proprietary right is significant for both copyright owners and users of copyrighted material. The former concept provides greater, the latter less, leeway for use by others.⁶⁶

The tenor and logic, rather than the actual (and probably rightful) outcome, of *Folsom* is most salient. In the case, plaintiffs argued that the Reverend Charles Upham's 866-page, two-volume *The Life of Washington*, which lifted 255 pages directly from Jared Sparks's former work, infringed Sparks's 6763 page, twelve-volume *The Writings of George Washington*, a collection of Washington's official and private papers with additional narrative and editorial notes.⁶⁷ Justice Story of the United States Supreme Court, acting in his capacity as a Circuit Court Judge, heard the case.

Story's bent is clear from the outset of the opinion, when he immediately emphasized that Sparks's work "has been accomplished at great expense and labor, and after great intellectual efforts, and the very patient and comprehensive researches, both at home and abroad."⁶⁸ Only a few lines into the decision, the court clearly emphasized the plaintiff's property right stemming from the creation of the work rather than the value of the defendant's use to society. Such focus represented a radical departure from prior jurisprudence, especially as epitomized by the translation and abridgement cases discussed earlier.

Story's legal analysis shows little regard for the potential benefit that dissemination of the allegedly infringing work may have for society. In fact, he readily admitted the value of the defendant's work to society: with his "very meritorious labors"⁶⁹ in this "great undertaking,"⁷⁰ Story conceded that the defendant had "produced an exceedingly valuable book. . . ."⁷¹ However, the admitted value of the defendant's work had little bearing on his analysis or decision. Rather, Story likened the act of borrowing to an act of stealing — a clear violation of property rights. To any potential borrower or "free-rider," Story sternly warned, "[n]one are entitled to save themselves trouble and expense, by availing themselves,

⁶⁶ *Id.* at 432.

⁶⁷ The 255-page statistic excludes official documents and documents that had appeared in publication prior to Sparks's own use.

⁶⁸ *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

⁶⁹ *Id.* at 349.

⁷⁰ *Id.*

⁷¹ *Id.* at 348.

for their own profit, of other men's works, still entitled to the protection of copyright."⁷² With this Blackstonian vision⁷³ of copyright guiding his opinion, both the potentially transformative use by the defendant and the benefit to public were of little import — a stark contrast to and departure from the translation and abridgement jurisprudence of the time.

Story's property-based analysis became more pronounced further along in the decision. Adopting strong natural-rights language, Story maintained that "[t]he entirety of the copyright is the property of the author; and it is no defense, that another person has appropriated a part, and not the whole, of any property."⁷⁴ With these words, Story explicitly expanded copyright protection to prevent filching of parts of a work, rather than the slavish duplication of an entire work. However, this alone is not necessarily a dangerous, or even inappropriate, position. It is the next step in Story's logic that is particularly pernicious. With the quick stroke of his pen, Justice Story presumed that an act of borrowing, either in whole or in part, constituted an act of infringement. After all, to Story, the borrowing party usurped control of someone else's property. Borrowing could still be excused, but only if it did not amount to conversion — if, in fact, the borrowing was *de minimis* and did not affect the value of the property taken. Thus, under *Folsom*, a court might excuse the act of borrowing if the defendant effectively proffered a fair use defense.

In numerous respects, Story's opinion represents a striking reversal of prior copyright jurisprudence. Previously, courts viewed acts of borrowing, if they were sufficiently transformative, as simply *non-infringing* uses. In other words, the burden of persuasion lay with the copyright holder to demonstrate that the work was infringing and *not transformative*. Under *Folsom* and its progeny, once the copyright holder made a *prima facie* showing that the alleged infringer borrowed the protected work, the burden then shifted to the alleged infringer to demonstrate that his use was excusable.

⁷² *Id.* at 349 (quoting *Lewis v. Fullarton*, 48 Eng. Rep. 1080, 1081 (K.B. 1839)).

⁷³ The influence of Blackstone on Story's vision of copyright is not at all surprising. Justice Story was a disciple of Blackstone and, as Hannibal Travis has noted, Story was the author of "a three volume series of *Commentaries on the Constitution of the United States*, in which he quotes so many passages from Blackstone's *Commentaries* that he may have been liable for infringement under *Folsom* or *Harper & Row*, had not Blackstone's work been in the public domain due to the 1790 Copyright Act's reservation of its protections to U.S. citizens." Travis, *supra* note 11, at 821 n.223.

⁷⁴ *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

Second, a showing of transformative use no longer constituted a legitimate defense to an infringement claim. Instead, the transformative use of a copyrighted work would become, at best, one of several criteria used in determining whether a defendant proffered a proper fair use defense. According to Story, to determine fair use, courts should look “to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”⁷⁵ The factors enumerated by Justice Story, and later codified in the Copyright Act,⁷⁶ were grounded in a natural-rights vision of copyright, focusing on what was borrowed from the original work and on Lockean protection of the original work’s value, not on the use made through the act of borrowing.

Thus, the paramount purpose of an infringement action became the preservation of the commercial value of an author’s intellectual property, not the balancing of a fair return on creative works with the public’s right to make transformative uses of such works in order to advance progress in the arts. Indeed, three of the four fair use factors now codified in the Copyright Act — factors two (“The nature of the copyrighted work”),⁷⁷ three (“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”),⁷⁸ and four (“the effect of the use upon the potential market for and value of the copyrighted work”)⁷⁹ — focus on what a potential infringer is taking from a copyright owner, rather than on the use made with the

⁷⁵ *Id.*

⁷⁶ See 17 U.S.C. § 107 (2004). The modern fair use test balances four factors to determine when an individual or corporation can make use of copyrighted works without permission or payment. As the statutory provisions provide:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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

Id.

⁷⁷ 17 U.S.C. § 107(2) (2001).

⁷⁸ *Id.* § 107(3).

⁷⁹ *Id.* § 107(4).

copyrighted work. All told, fair use introduced natural-rights based protections explicitly into the judicial calculus on infringement. As I discuss later,⁸⁰ these considerations were vital to the outcome of copyright disputes because they altered the fundamental nature of the infringement equation.

Moreover, a disingenuous air permeates Justice Story's opinion. As Patterson points out, Justice Story was on the Supreme Court at the time of the *Wheaton* decision. Yet, *Folsom* utterly ignores *Wheaton* and rewrites the law of copyright:

Since the two theories — natural law and statutory monopoly — were fully argued and considered in *Wheaton* when Story was a member of the Court, he must have been familiar with them and conscious of the fact that the Court had rejected the natural law theory in favor of the statutory monopoly theory. Against this background, one is justified in concluding that Story's use of natural law copyright ideas in deciding *Folsom* is a classic case of intellectual dishonesty, and that the *Wheaton* case was one of his targets.⁸¹

Patterson may overstate his case. After all, Story's shifts in the infringement calculus were subtle. Moreover, courts, after 1841, were totally free to ignore *Folsom* and follow *Wheaton* as well as the previous translation and abridgement cases. Most significantly, however, subsequent courts *did not ignore Folsom*, and *Folsom* laid the groundwork for a fundamental change in infringement analysis. With its embrace of a natural-law, property-rights vision of intellectual property and its development of a fair use test based thereon, *Folsom v. Marsh* marked a basic reversal in copyright jurisprudence through its reinterpretation of the infringement test. In fact, instead of limiting the scope of the copyright monopoly, the fair use test expanded the property rights of copyright holders, thereby frustrating copyright's utilitarian goals.

Significantly, Justice Story's revised formulation of the infringement test and his fair use criteria in *Folsom* did not emerge from thin air. Rather, Story's jurisprudence in the copyright arena reflected a recurring desire to protect the property rights of authors in their creations under a natural-law vision. Just as in *Folsom*, in *Gray v. Russell*,⁸² Story focused the infringement calculus on what a defendant had taken from the original work, not on the defendant's use of that work. Although he

⁸⁰ See *infra* Section III.B (documenting failure of modern fair use doctrine, as applied, to permit transformative uses of copyrighted works outside of realm of parody).

⁸¹ Patterson, *supra* note 34, at 442.

⁸² 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728).

acknowledged the well-established abridgement rule in *Gray*, Story stated that, in determining what is a bona fide use of an existing work versus a copyright infringement, one must examine the value of the selections made and the probable effect on the market for the original work.⁸³ It was on the basis of these criteria that, in the end, he found the use at issue in *Gray* (which another court may well have characterized as an abridgement) infringing.

Similarly, in his first major infringement opinion following *Folsom, Emerson v. Davies*,⁸⁴ Story further developed his natural-law vision of copyright. In that case, Story resolved a dispute over the alleged infringement of a map. Acknowledging the existing state of law, Story conceded that he “who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copy-right therein; if the variations are not merely formal and shadowy, from existing works.”⁸⁵ However, just as he did in *Folsom*, he acknowledged the existing law with one hand while altering it with the other. By broadly defining which variations were merely “formal and shadowy,” Story was able to find the defendant’s work infringing, despite the rhetoric of his previous proclamation. In the end, his decision profoundly strengthened the rights of copyright owners in largely factual works, such as maps, and did so on Lockean grounds: “A man has a right to the copy-right of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money.”⁸⁶ With his rulings in *Folsom*, *Gray*, and *Emerson*, Justice Story paved the way for a radical alteration in the modern copyright infringement inquiry.

B. *The Hegemony of Natural-Law Copyright: Fair Use and Its Progeny*

All told, the rulings of Justice Story unleashed a steady morphing in copyright law that would fully take shape in the twentieth century. According to Hannibal Travis, copyright law has transformed along two axes during the past 150 years.⁸⁷ First, the definition of copyright infringement expanded from merely proscribing unauthorized duplication of a copyrighted work to forbidding literal copying of small fragments of a work. This trend began with *Folsom v. Marsh*, which

⁸³ See *id.* at 1038-39.

⁸⁴ *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436).

⁸⁵ *Id.* at 619.

⁸⁶ *Id.*

⁸⁷ Travis, *supra* note 11, at 819.

found infringement in the borrowing of only a portion of a work, and, according to Travis, perhaps reached its nadir in *Harper & Row*.⁸⁸ Second, copyright protection expanded from protecting the literal language of a work to nonliteral elements such as characters and scenes.⁸⁹ Like Justice Story in *Folsom*, judges have rationalized each step of the expansion by appealing to the need to safeguard an author's natural right to the fruit of her intellectual labors.

The two axes Travis identified can really be characterized as one significant mutation in copyright law: the focus in the infringement test has shifted from the product created by the allegedly infringing use to the original copyrighted work itself. This shift in focus eventually led to the reversal of both the abridgement and translation rules. As our previous discussion revealed, abridgement and translation were noninfringing acts precisely because of their transformative quality. However, with the diminished importance of transformative use and the development of a fair use test largely based on natural-law criteria, abridgement and translation activities became infringing actions not excused by fair use. First, such uses inherently drew too greatly, both in terms of quantity and value, on original copyrighted works. Second, such uses had the ability to destroy the market for the original work and, more importantly, its derivatives.

Consequently, in 1870, Congress overturned the *Stowe* decision by statute,⁹⁰ explicitly adding the right to translate one's work to the list of exclusive rights guaranteed to a copyright owner.⁹¹ Meanwhile, the protection afforded to abridgement and commentary has shrunk markedly over the past century, particularly in recent years, despite the enunciation of an explicit fair use test in the 1976 Copyright Act.⁹² In short, abridgement is no longer considered a noninfringing act, or even fair use.⁹³

⁸⁸ See *id.* at 819.

⁸⁹ See *id.*

⁹⁰ Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198 (1870).

⁹¹ *Id.* The Act provided that "authors may reserve the right to dramatize or to translate their own works." *Id.*

⁹² See, e.g., *Twin Peaks Prod., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993) (finding that defendants' book about television program *Twin Peaks* infringed copyrights in teleplays for series); cf. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 268 (S.D.N.Y. 1997) (holding that *Seinfeld Aptitude Test*, trivia book on all things *Seinfeld*, constituted unauthorized derivative work that infringed Castle Rock's copyright in *Seinfeld* television program).

⁹³ See, for example, the suit by Scholastic, the owner of the Harry Potter copyright, against the New York Daily News, which published a synopsis of the plot of the then-forthcoming *Harry Potter and the Order of the Phoenix*. Keith J. Kelly, *Scholastic Sues Daily*

Besides the overturning of the abridgement and translation rules, the unwitting hegemony of the property rights vision of copyright has been reflected in numerous other trends. Historically, the courts and Congress have grounded the rationale for the Copyright Clause in the discourse of use/access, not production rights. However, with the notable exception of the rejection of the Lockean sweat-of-the-brow theory by the United States Supreme Court in *Feist*,⁹⁴ natural rights continue to taint the copyright equation, increasingly dominating the direction of intellectual property laws.

First, in recent decades, the rhetoric of copyright law has changed. For example, in both academia and practice, we now talk about the field of "intellectual property." The use of the term, clearly grounded in a discourse of property, is a recent phenomenon.⁹⁵ In fact, use of the term can only be traced to 1967.⁹⁶ Moreover, as Mark Lemley has persuasively demonstrated, courts are increasingly foregoing detailed analyses of intellectual property cases. Instead, courts decide copyright disputes based on "earthy moralisms"⁹⁷ that are grounded in a natural-rights discourse that inevitably favors plaintiffs.⁹⁸

In recent years, copyright doctrine has also expanded well beyond the point at which enhanced protection provides authors with greater incentives to create or publish their works.⁹⁹ For example, it is far from clear how retroactive expansion of copyright terms under the Copyright Term Extension Act ("CTEA")¹⁰⁰ encourages more creativity from artists and benefits the public.¹⁰¹ However, the CTEA and the endless string of

News for \$100M in 'Pottergate,' N.Y. POST, June 19, 2003, at 37.

⁹⁴ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352-57 (1991).

⁹⁵ Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895-96 (1997).

⁹⁶ See *id.* at 895 n.123.

⁹⁷ See Travis, *supra* note 11, at 826.

⁹⁸ Lemley, *supra* note 96, at 898 n.126.

⁹⁹ See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996) ("The notion that according copyright protection to architectural works will generate more creative architecture, for instance, is manifestly ridiculous. Even in [other] situations where instrumental justifications [for protection] remain plausible, their foundation is often shaky.").

¹⁰⁰ See 17 U.S.C. §§ 302(a), (c), 304 (2004).

¹⁰¹ Even the majority's decision in *Eldred v. Ashcroft* suggests this point. See 537 U.S. 186, 208 (2003) (noting that "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA — which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes — is an impermissible exercise of Congress' power under the Copyright Clause.").

copyright term extensions that preceded it are entirely consistent with a natural-law vision of copyright that grants authors an inherent property right in the fruits of their intellectual labors.

Similarly, Congress has expanded derivative rights significantly through the years. Under the 1831 Copyright Act, like the 1790 Copyright Act and the Statute of Anne before it, a copyright holder only possessed “the sole right and liberty of printing, reprinting, publishing, and vending” a work.¹⁰² In 1870, Congress added the right to dramatize or translate one’s work to the list of exclusive rights of copyright holders.¹⁰³ The 1909 Act went even further, securing such derivative rights as novelization and musicalization for copyright holders.¹⁰⁴ Finally, the 1976 Act gave authors the exclusive right to prepare all derivatives of their copyrighted works¹⁰⁵ and provided an expansive definition of what constituted a derivative work.¹⁰⁶

Derivative rights appear much more justifiable on natural-law, rather than utilitarian, grounds.¹⁰⁷ As Stewart Sterk notes, the argument that derivative rights are necessary to help authors recover their costs is weak;¹⁰⁸ such situations are exceedingly rare.¹⁰⁹ As a consequence, it is

¹⁰² Copyright Act of 1831, ch. 16, 4 Stat. 436.

¹⁰³ Copyright Act of 1870, ch. 230, 16 Stat. 198.

¹⁰⁴ See Copyright Act of 1909, ch. 320, 35 Stat. 1075. The Act gave authors the exclusive right to “translate the copyrighted work into other language or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.” See *id.* § 1(b).

¹⁰⁵ See 17 U.S.C. § 106(2) (2004).

¹⁰⁶ Under the current (1976) Copyright Act, a derivative work is “a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adopted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” See 17 U.S.C. § 101 (2004).

¹⁰⁷ See Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1215-17 (1996).

¹⁰⁸ On a related note, some theorists have even challenged the idea that copyright encourages innovation and creation. As Mark Nadel notes, very few creators ever reap significant financial rewards from copyright protections. See Mark S. Nadel, *Questioning the Economic Justification for Copyright* at 39, available at <http://www.serici.org/2003/nadel.pdf>. In the winner-take-all entertainment, publishing, and software industries, only a precious few creators achieve extraordinary wealth through a hit record or bestseller. In these superstar-driven markets, copyright protection may simply enable publishers to support larger marketing campaigns and greater rents for powerful talents; these marketing costs and rents may well dissipate all of the increased revenues generated by copyright protection. Thus, borderline creators will never enjoy greater profits from copyright

not surprising that even derivative-rights advocates, such as William Landes and Richard Posner, reject this justification.¹¹⁰ Moreover, two other justifications Landes and Posner offer — that derivative rights prevent delays in production while authors simultaneously produce derivative works and that derivative rights reduce transaction costs by placing the copyright of the original work and any derivative rights in one person — are similarly untenable. As Sterk points out, the first justification can work both ways: derivative protections may actually result in delayed production of the derivative works by an author in order to increase sales of the original.¹¹¹ The second justification is also specious. The legal unavailability of derivative rights reduces transaction costs just as effectively.¹¹²

Moreover, as applied to individual authors, the existence of derivative rights may actually serve to stifle artistic progress. Given that people at the upper echelons of wealth often face backward-bending labor supply curves, it could be argued that copyright itself harms the rate of output by those creators of content deemed most valuable by society.¹¹³ On utilitarian grounds, therefore, we may not want to reward the biggest sellers in the content creation community quite so much, lest they become lazy, bloated rockers. For example, in the 1950s and 1960s, top music acts such as Elvis Presley and the Beatles routinely released at least one album per year. In those days, creators of copyrighted content received far lower rates of return on their creative output. With the advent of greater intellectual property enforcement, improved opportunities for licensing of derivative and original rights, and superior contract negotiations by content creators, artists such as Bruce Springsteen and U2 release a new album once every few years, if at all.

However, derivative rights are entirely consistent with a natural-law vision of copyright, which maintains that an author should have exclusive control over any works derived from their intellectual

protection. *See id.* However, Nadel carries his point too far. While actual financial rewards go to very few, it is possible that the promise and potential of huge financial rewards encourage individuals to create art. Thus, like a lottery effect, the promise of huge rewards may still incentivize artistic creation. Admittedly, the existence of derivative rights may further add to the incentives. However, the magnitude of this effect is uncertain and it may be more than offset by another effect noted by Nadel — the backward bending labor supply curve. *See id.* at 10.

¹⁰⁹ *Id.*

¹¹⁰ *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 354 (1989).

¹¹¹ *See* Sterk, *supra* note 108, at 1216-17.

¹¹² *See id.* at 1217.

¹¹³ *See* Nadel, *supra* note 109, at 10.

creations. Indeed, as derivative rights expanded, courts no longer lent great weight to the transformative value of the alleged infringing works in copyright cases.¹¹⁴ Instead, courts' infringement inquiries emphasized protection of the commercial value of original works.

The jurisprudential basis for derivative rights is particularly revealing. In *Daly v. Palmer*,¹¹⁵ the first derivative rights case in the United States, a New York court found that Dion Boucicault's play, *After Dark*, infringed Augustin Daly's play, *Under the Gaslight*. Specifically, Daly claimed a copyright in the now all-too-familiar "Railroad Scene," wherein an evil character ties his victim, who is only rescued at the last second by our hero, to a railroad track.¹¹⁶ Extensively citing Justice Story's rulings in *Folsom*, *Gray*, and *Emerson*, the *Daly* court issued an injunction preventing defendants from publicly performing any version of the Railroad Scene. The justification for such equitable relief was particularly significant. As the court rationalized, a dramatic work based on a copyrighted play constitutes a piracy

if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.¹¹⁷

Daly, therefore, conferred copyright in nonliteral elements.

Thus, infringement was no longer limited to the mere slavish reproduction of a part or the whole of a copyrighted work. Rather, an infringement finding could result from a transformative use of a copyrighted work where the underlying nonliteral elements of the copyrighted work were still recognizable. Thus, derivative rights did not encourage progress in the arts so much as they sought to protect the natural property rights of authors in both the literal and nonliteral elements ascribed to their creations.

¹¹⁴ See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1890 (1990); see also *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61-62 (1911); *Dam v. Kirk La Shelle Co.*, 175 F. 902, 907-09 (2d Cir. 1910) (holding that defendant's play infringed plaintiff's right to dramatize his story, even though play borrowed only story's central incident and contributed events, characters, and dialogue of its own); *Daly v. Palmer*, 6 F. Cas. 1132, 1134-38 (S.D.N.Y. 1868) (No. 3552).

¹¹⁵ *Daly*, 6 F. Cas. at 1132.

¹¹⁶ *Id.* at 1133.

¹¹⁷ *Id.* at 1138.

At the same time, even the *Feist* decision has drawn fire, resulting in database compilers lobbying Congress heavily for bills such as the Collections of Information Antipiracy Act (the "CIAA").¹¹⁸ Such proposed legislation has sought to grant *sui generis* intellectual property rights to those who create databases lacking in sufficient originality and innovation to qualify for ordinary copyright protection.¹¹⁹ While some economists have supported such protections on utilitarian grounds,¹²⁰ natural-law rights are at the core of the CIAA, which seeks to protect the hard work and labor that database owners put into their compilations of information. Finally, and most importantly, the current infringement test and fair use scheme privileges the natural-rights view of copyright over a more instrumentalist vision. The next part examines this critical issue.

IV. TRANSFORMATIVE USE AND PROGRESS IN THE ARTS

Despite rhetoric to the contrary, modern courts have eviscerated transformative use and progress in the arts from the infringement calculus. An examination of contemporary jurisprudence in the two particular arenas, digital sampling and satire, demonstrates the degree to which courts have come to embrace an unadulterated, natural-law vision of copyright at the expense of the utilitarian rationale. In particular, Justice Story's fair use doctrine continues to drive this sharp disjuncture from the original basis for copyright protection.

¹¹⁸ See Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998).

¹¹⁹ For an extensive background on the debate over extending intellectual property protection to databases, see Jane C. Ginsburg, *No 'Sweat'? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587 (1997); Jessica Litman, *After Feist*, 17 U. DAYTON L. REV. 607 (1992); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997).

¹²⁰ See, e.g., Laura D'Andrea Tyson & Edward F. Sherry, *Statutory Protection for Databases: Economic & Public Policy Issues — Executive Summary* (Oct. 23, 1997), available at <http://www.house.gov/judiciary/41118.htm> (arguing that database market could have grown at even quicker pace had it received intellectual property protections).

A. The Need for Transformative Use

As Marcel Duchamp pointed out at the beginning of the last century, and as postmodern artists such as Negativland have argued at the beginning of this century, “the act of selection can be a form of inspiration as original and significant as any other.”¹²¹ One need not look much further than the work of pop artists such as Andy Warhol and of appropriationist artists such as Barbara Kruger for illustration of this point. With the rise of digital technology and the potential for new forms of appropriation (and new forms of art based upon the act of appropriation), the dangers of the modern infringement test are even more significant. Digital technology has enabled a world of new transformative uses in the arts likely to remain unexploited due to the threat of copyrights’ limits on derivative works.

The law restrains public dissemination of these transformative, progressive, instructive, and enlightening uses. The infringement and fair use test, delineated in *Folsom* and adopted by the courts and Congress over the past 150 years, comes dangerously close to an unadulterated embrace of a natural right in intellectual creation, and it does so at the expense of the utilitarian rationale for copyright. The modern notion of copyright infringement operates from the premise that substantial similarity and illicit copying form a prima facie case for infringement, which can then be refuted by a defendant, who, bearing the burden of persuasion, offers a successful fair use defense. Such a gestalt ignores the origin¹²² of copyright as a privilege that is bestowed through legislative act and that serves utilitarian purposes. Indeed, in the modern copyright calculus, little room remains for considering transformative use and progress in the arts.

An examination of the way in which a federal court in New York resolved the novel issue of music sampling is particularly instructive and reflects how the modern infringement test, with its embrace of a property-based view of copyright, largely ignores the question of progress in the arts. In *Grand Upright Music v. Warner Brothers*,¹²³ Raymond “Gilbert” O’Sullivan sued rapper Biz Markie for unlawfully sampling *Alone Again (Naturally)*, a song written and recorded by

¹²¹ See Negativland, *Fair Use*, at <http://www.negativland.com/fairuse.html>.

¹²² Simply witness the language of the Copyright Clause, the antimonopolistic origins of American copyright law, and the early jurisprudence on copyright, including the unequivocal holding of the Supreme Court in *Wheaton*.

¹²³ *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

O'Sullivan.¹²⁴ In a rather brief decision, the court resolved the case by quoting Exodus and equating the Seventh Commandment with the law of copyright. "Thou shalt not steal,"¹²⁵ stated the court, in a simplistic, property-based analysis of the case before it. However, the court failed to answer the (far from settled) threshold question: were the actions of the defendants really akin to stealing? After all, the law censures the act of stealing precisely because it makes a plaintiff worse off to make a defendant better off and it deprives a plaintiff of the use of his property. By contrast, the act of digital sampling does no such thing; a copyright owner can still use a work in any way she chooses even after someone else has digitally sampled the work.¹²⁶

Thus, courts have made it clear that the practice of digital sampling, used frequently in hip-hop and, increasingly, in other modern genres, requires the permission of a sound recording's copyright owner.¹²⁷ Depending on the quantity of the material copied, a sampler may also need to request permission from the musical work's copyright owner.¹²⁸ However, in denying fair use to digital samplers, courts have not considered the impact of their decisions on progress in the arts, as clearly contemplated by the Constitution. Moreover, the digital sampling cases have epitomized how hegemonic the natural-rights vision of copyright has become. Sampling helps to create a new work — one that possibly advances the arts. In most digital sampling cases, the allegedly infringing use actually makes a plaintiff better off economically by generating increased exposure for commercially passé artists such as P-Funk/Parliament/Funkadelic, Rick James, the Isley Brothers, and James Brown.

Yet, despite this fact, sampling without a license typically constitutes an act of infringement. When viewed in historical context, this is a striking result. In *Stowe v. Thomas*, a court found no infringement from the act of translation, even where the defendants happily conceded that their allegedly infringing work had obliterated the plaintiff's market for her translated work.¹²⁹ A century and a half later, in the *MP3.com* case, a

¹²⁴ *Id.* at 183.

¹²⁵ *Id.*

¹²⁶ Though, if allowed with permission, digital sampling will not enable plaintiffs to gain exclusive benefit of any use of their copyright works.

¹²⁷ *Id.* As one federal circuit recently cautioned, "get a license or do not sample." *Bridgeport Music, Inc. v. Dimension Films*, 2004 WL 1960167, at *6-7 (6th Cir. Sept. 7, 2004) (holding that any unauthorized sample of sound recording, no matter how small, constitutes copyright infringement).

¹²⁸ See *Jarvis v. A & M Records*, 827 F. Supp. 282, 288-92 (D.N.J. 1993).

¹²⁹ *Stowe v. Thomas*, 23 F. Cas. 201, 206 (E.D. Pa. 1853).

court held that even if the MP3.com website had improved the market for a copyright owner's work, there could not be fair use.¹³⁰ As modern fair use cases demonstrate, copyright is increasingly protected like real property and viewed as so inviolable that a plaintiff need not even show real damages to recover on a theory of trespass.¹³¹

B. *The Failure of Fair Use to Protect Progress in the Arts*

The fair use doctrine has played a central role in the move towards a natural-law based protection of copyright. As the preceding analysis of *Folsom* revealed, fair use is a resoundingly natural-rights based doctrine that subverts the utilitarian logic of copyright protection under the United States Constitution. Ray Patterson notes:

If copyright is a statutory monopoly, fair use should be viewed as a limitation on the monopoly in the public interest, which means that it is an affirmative right, not excused infringement. The paradox is that while U.S. copyright is a statutory monopoly copyright, fair use is treated as a natural law right to protect that monopoly.¹³²

As an examination of relevant jurisprudence reveals, a multitude of transformative uses that advance progress in the arts cannot survive the modern fair use test.

To begin with, transformative quality constitutes only a meager fraction of the fair use test, playing a role in only one of the section 107 factors — “the purpose and character of the use.”¹³³ Admittedly, on a rhetorical level, transformative use has grown increasingly important in the fair use calculus in recent years. In *Campbell v. Acuff-Rose*,¹³⁴ the Supreme Court extensively cited and adopted the reasoning in Judge Pierre Leval's influential article, *Toward a Fair Use Standard*,¹³⁵ wherein Leval advocated making transformative use the focus of the first factor of the fair use test.¹³⁶ As the Court held, the “central purpose” of its inquiry

¹³⁰ See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

¹³¹ A cognizable trespass claim at common law has, of course, no actual damages requirement.

¹³² Patterson, *supra* note 34, at 451.

¹³³ 17 U.S.C. § 107(1) (2000).

¹³⁴ 510 U.S. 569 (1994).

¹³⁵ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

¹³⁶ The *Campbell* Court, citing Leval's work, emphasized the importance of transformative use in the copyright infringement calculus and the need to determine whether “the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” See *Campbell*, 510 U.S. at 579 (citations omitted).

into the character and purpose of an allegedly infringing work should be to determine whether the allegedly infringing work is "transformative."¹³⁷ However, such findings have not meaningfully reintroduced transformative-use considerations in the infringement calculus.

To the extent that transformation has infiltrated infringement jurisprudence in recent years, it has done so under a limited definition of transformation. As Rebecca Tushnet notes, fair use has consistently favored criticism and parody over other transformative uses.¹³⁸ Thus, with the exception of parody, cases have repeatedly demonstrated that the slightest appropriation of a copyrighted work will result in a finding of infringement, even when the use is transformative and the result receives critical acclaim.¹³⁹

On this point, *Rogers v. Koons*¹⁴⁰ is instructive. In that case, celebrated artist Jeff Koons found inspiration in a cheap postcard that he had seen in a tourist shop. The postcard, *Puppies* by Art Rogers, featured a photograph of a couple and some puppies, posing in Rockwellian tranquility, embodying the quintessence of the American ideal. Koons appropriated the kitschy depiction of the couple and the puppies and accentuated various elements of the photography in order to create a work that served as a satire of suburban American aesthetic sensibilities. As Koons's attorney, Martin Garbus, eloquently explained:

[Koons] saw sentimentality, inanity and kitsch. When he blew up the image to larger than life size, stuck daisies in the hair of the sickly sweet smiling couple (the flowers were not in the photograph) and painted the finished ceramic, the sculpture acquired a horrific quality quite distinct from the original.¹⁴¹

This explanation of Koons's transformative use of the work was no *ex post facto* rationalization. Indeed, it was utterly consistent with Koons's artistic and philosophical leanings, as illustrated by his body of work.

However, despite Koons's satirical and critical use of the *Puppies* photo to satirize suburban American aesthetic sensibilities, the court found no fair use and no transformative use. As the *Koons* Court reasoned:

¹³⁷ *Id.* at 578-80.

¹³⁸ Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 26 (2000).

¹³⁹ Naomi A. Voegtli, *Rethinking Derivative Rights*, 63 BROOKLYN L. REV. 1213, 1216 (1997).

¹⁴⁰ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

¹⁴¹ Martin Garbus, *Lolita and the Lawyers*, N.Y. TIMES BOOK REVIEW, Sept. 26, 1999, at 35.

It is the rule in this Circuit that though the satire need not be only of the copied work and may. . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.¹⁴²

The rulings of the Second and Ninth Circuits govern the copyright creation Meccas of New York and Los Angeles, respectively. So, it is particularly significant that the Ninth Circuit has concurred with the logic of *Koons*.¹⁴³

Such a limited view of what constitutes transformative use is not surprising given the Supreme Court's guidance in *Campbell v. Acuff-Rose*.¹⁴⁴ In *Campbell*, the Supreme Court offered a broad definition that allegedly categorized works as transformative if they did not "merely 'supersede the objects' of the original creation," but "instead add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."¹⁴⁵ Observers have either hailed¹⁴⁶ or criticized¹⁴⁷ this move as a dramatic re-invigoration of transformative use in the infringement calculus. However, *Campbell* achieved no such thing. Significantly, the Court retreated on its own definition of transformation by restricting fair use to parodies, and not to other transformative uses.¹⁴⁸ As the Court rationalized:

For the purposes of copyright law, the nub of definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. If, on the contrary, the commentary has no critical bearing on the

¹⁴² *Koons*, 960 F.2d at 310.

¹⁴³ See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997).

¹⁴⁴ 510 U.S. 569 (1994).

¹⁴⁵ *Campbell*, 510 U.S. at 579.

¹⁴⁶ See, e.g., Pierre N. Leval, *Copyright in the Twenty-First Century: Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L. J. 19 (1994) (praising elevation of transformation in fair use analysis with Supreme Court's decision in *Campbell*).

¹⁴⁷ See, e.g., Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677 (1995) (decrying elevation of transformation in fair use analysis with Supreme Court's decision in *Campbell*). As Laura Lape argues, "[t]he productive use doctrine is not a traditional part of fair use analysis; it stands in the way of sensible application of fair use and should be abandoned as a doctrinal dead-end." *Id.* at 724.

¹⁴⁸ Compare *Campbell*, 510 U.S. at 569 (finding fair use in 2 Live Crew's parody of Roy Orbison's song *Pretty Woman*), with *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (finding no fair use in Jeffrey Koons's satirical use of Art Rogers's *Puppies* photograph).

substance or style of the original composition, which the alleged infringer merely uses to get attention to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish). . . Parody needs to mimic an original to make its point. . . whereas satire can stand on its own two feet.¹⁴⁹

Thus, to the extent that an appropriationist's work does not directly criticize the original, the "claim to fairness in borrowing from another's work diminishes accordingly."¹⁵⁰

The Supreme Court's distinction between satire and parody in the application of the fair use test is ultimately unsatisfying, however. Such a formulation reduces fair use to a test about *necessity*. Thus, where use is necessary to produce a form of speech (parody), it reluctantly will be tolerated as fair. But, where use is unnecessary to produce a form of speech (satire), it will not be tolerated.¹⁵¹ Such a conceptualization of fair use is highly propertized, allowing borrowing only when conditions *require* it. Such a view casts fair use as a privilege, not a right — a stark contrast to the former view of copyright as a privilege, not a natural right. Under a utilitarian vision of copyright, progress in the arts, rather than a necessity calculus, should drive the fair use doctrine. As a consequence, there is no inherent reason that satire should have different fair use rights than parody.¹⁵²

Indeed, one need not address the original work itself (as in parody) to make "transformative" use of it. As many appropriationist artists have

¹⁴⁹ *Campbell*, 510 U.S. at 580-81.

¹⁵⁰ *Id.* at 580.

¹⁵¹ It is possible that the Court's parenthetical language does leave a limited protective berth for satire:

[W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.

Id. at 580 n.14.

¹⁵² According to Ernest Hemingway, we should also question the extent to which parody is truly transformative and productive: "The parody is the last refuge of the frustrated writer. Parodies are what you write when you are associate editor of the Harvard Lampoon. The greater the work of literature, the easier the parody. The step up from writing parodies is writing on the walls above the urinal." Paul Hirshson, *Names and Faces*, BOSTON GLOBE, July 22, 1989, at 7. *But see* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277 (11th Cir. 2001) (Marcus, J., concurring) (noting that "[p]arodies and caricatures . . . are the most penetrating of criticisms").

demonstrated, something new, expressive, and meaningful can emerge from the combination or alteration of copyrighted works of the past.¹⁵³ However, under the modern copyright infringement test and its fair use provisions, both appropriationist art and transformative uses of existing copyrighted works will rarely, absent licensing, escape liability.¹⁵⁴ An examination of the most salient jurisprudence following *Campbell* is illustrative.

In *Paramount Pictures Corp. v. Carol Publishing Group*,¹⁵⁵ the owners of the *Star Trek* copyright sued the publishers of *The Joy of Trek*, a guide to all things *Star Trek* that included brief descriptions of plots, major characters, technologies, and alien races in the series; famous lines from the series, and accounts of the Trekkie movement. In holding that the book infringed on the *Star Trek* copyright, the court found no transformative use since the book was not a parody.¹⁵⁶ "Asides such as [various quips] do not sufficiently transform a summary that the book's own cover admits is 'everything a *Star Trek* novice needs to know.'"¹⁵⁷ Such a statement reveals confusion about the notion of transformation. As Michael Bunker argues:

[*The Joy of Trek*] borrowed certain factual elements from the *Star Trek* story line and cosmology and combined those with humor, commentary, comic sociological analysis and other transformative elements. It seems fairly clear that a work dealing with, among other things, the idiosyncrasies of *Star Trek* fans and humorous interpretations of the television show's plots and cosmology adds at least some new message and meaning to the original story, [and, therefore, constitutes transformative use.]¹⁵⁸

However, the fact that *The Joy of Trek* did not constitute parody doomed it to losing the first factor of the fair use test¹⁵⁹ and, ultimately, the case.

Such a restrictive notion of transformative use also determined the outcome of another key copyright case. In the *Dr. Seuss* case,¹⁶⁰ a satire of the O.J. Simpson murder trial, based on Dr. Seuss's *Cat in the Hat*, failed

¹⁵³ See *infra* Section III.A-C.

¹⁵⁴ Naomi A. Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1227-28 (1997).

¹⁵⁵ 11 F. Supp. 2d 329 (S.D.N.Y. 1998).

¹⁵⁶ *Id.* at 335-36.

¹⁵⁷ *Id.*

¹⁵⁸ BUNKER, *supra* note 63, at 12-13.

¹⁵⁹ *Paramount Pictures Corp.*, 11 F. Supp. 2d at 335.

¹⁶⁰ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 27 (1997).

the fair use test. In considering the issue, the court found that the use was nontransformative, and that there was market harm.¹⁶¹ On the first factor of the fair use inquiry, the court virtually equated transformative use with parody; as the court reasoned, because the book did not meet the definition of parody, it could not constitute transformative use.¹⁶² As noted earlier, this syllogistic logic is specious, because it ignores the fact that satirical works can be highly transformative, and that they advance progress in the arts and implicate free expression rights.¹⁶³ On the fourth factor, the court inferred market damage from its conclusion that the work was nontransformative,¹⁶⁴ therefore compounding its error. Such a finding, even absent evidence on this point,¹⁶⁵ is patently silly. The notion that the *Cat in the Hat* copyright owners were contemplating entering the market for satires of the O.J. Simpson trial does not survive the laughter test. Nevertheless, the appeals court affirmed a preliminary injunction against publication of the book.¹⁶⁶

Additionally, even where courts have heralded the importance of transformative use and adopted a broad definition of transformation that includes nonparodic uses, the other elements of the fair use test have limited the ability of transformative users to escape liability for copyright infringement. Consequently, the rhetoric supporting transformative use in the infringement calculus is frequently mere lip service. For example, a federal court in New York acknowledged that a book of trivia about the *Seinfeld* television series was a transformative use for the purposes of the fair use test.¹⁶⁷ As the court noted, the *Seinfeld Aptitude Test* ("SAT") met the Supreme Court's transformation test as enunciated in *Campbell*: "By testing *Seinfeld* devotees on their facility at recalling seemingly random plot elements from various of the show's episodes, defendants have 'added something new' to *Seinfeld*, and have created a work of a 'different character' from the program."¹⁶⁸ In so holding, the court

¹⁶¹ *Id.* at 1403.

¹⁶² *Id.* at 1401.

¹⁶³ See *infra* Part III.

¹⁶⁴ *Dr. Seuss*, 109 F.3d at 1403 (reasoning that "[b]ecause, on the facts presented, [the defendants'] use of *The Cat in the Hat* original was nontransformative, and admittedly commercial, we conclude that market substitution is at least more certain, and market harm may be more readily inferred.").

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1400-01.

¹⁶⁷ *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260 (S.D.N.Y. 1997).

¹⁶⁸ *Castle Rock*, 955 F. Supp. at 268 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

repeatedly emphasized the importance of transformative use in the fair use balancing equation.¹⁶⁹ However, the court's palaver regarding the importance of transformative use, which the court later called "generous,"¹⁷⁰ ultimately rang hollow. The court noted the expansive and exclusive right to create derivative works granted under the Copyright Act and made a finding of infringement by rejecting the defendant's fair use defense.¹⁷¹

Two points in the court's analysis are particularly salient. First, the court found that "without *Seinfeld*, there can be no SAT" and, as such, determined that the third element of the fair use test (amount of borrowing) strongly favored the plaintiff.¹⁷² However, such reasoning renders the purported importance of transformative use utterly null. After all, *no transformative use can ever exist without the original work*. Secondly, the court found that the fourth element of the fair use test, market harm,¹⁷³ also strongly favored the plaintiff. As the court reasoned, while the transformative SAT did not hurt the demand for the *Seinfeld* television program, it harmed the market for such derivative works as trivia books that the copyright owners of *Seinfeld* might want to publish.

Once again, such logic crushes any hope for transformative users to receive the protection of the fair use doctrine. Because the inquiry for market harm "must extend to the potential market for as-yet-nonexistent derivative works,"¹⁷⁴ virtually any transformative use will harm the potential market for as yet nonexistent derivative works, particularly under the expansive definition of derivative works adopted by the Copyright Act and the courts. The SAT may or may not have constituted a transformative work; however, the court's approach and analysis to that question presupposed the answer in the negative. Thus, even where transformative use is considered and its prominence in the first factor is acknowledged, courts' typical readings of the other fair use factors, as illustrated by *Castle Rock*, render the importance of transformative use null.¹⁷⁵

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 272.

¹⁷¹ *Id.* at 271.

¹⁷² *Id.* at 270.

¹⁷³ The fourth factor assesses the "effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4) (2000).

¹⁷⁴ *Castle Rock*, 955 F. Supp. at 271; *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-93 (1994).

¹⁷⁵ This was not the only error committed by the *Castle Rock* and *Dr. Seuss* courts. As David Nimmer notes, the problematic interpretation of the fair use balancing test in both

At the same time, the other portion of the first part of the fair use test, which determines whether a use is commercial,¹⁷⁶ also undermines the impact that transformation has in the fair use calculus. Courts repeatedly bog themselves down in determining whether a use is commercial or noncommercial. Finding a meaningful and consistent definition of commercial use has proved an elusive goal. For example, in the *Napster*¹⁷⁷ case, the Ninth Circuit held that peer-to-peer trading, a quintessentially noncommercial sharing activity (if there is ever such a thing in our society) with no quid pro quo attached,¹⁷⁸ constituted commercial use of copyrighted material simply because users were not paying the "customary price" for the copyrighted works they received.¹⁷⁹ Whether trading music on Napster or any similar peer-to-peer network is illegal, it is certainly not commercial activity in any meaningful sense. Specifically, this definition of commercial use conflates infringement with the fair use defense. As an affirmative defense to infringement, fair use grants individuals the right not to pay the customary price for a work even if their activity constitutes infringement.

Similarly, in *Worldwide Church of God*, the Ninth Circuit held that giving away 30,000 free copies of a religious work constituted a commercial activity because the defendant "profited" from the use of the work by attracting new members who ultimately contributed to the organization by tithing.¹⁸⁰ Taken to its logical extreme, all use is commercial use because, at some level, any unpaid use of a copyrighted work causes someone to lose potential revenue, and any use has some conceivable commercial motivation. While the courts have not consistently adopted such untenable definitions,¹⁸¹ the *Napster* and *Worldwide Church of God* decisions certainly highlight the dangers

cases also went hand in hand with erroneous application of the substantial similarity doctrine. See David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1242 nn.63-66 (2004).

¹⁷⁶ 17 U.S.C. § 107(1) (2000).

¹⁷⁷ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹⁷⁸ On the original Napster, users were free to simply act as "leeches" and download music from other people's computers without reciprocating or opening up their file folders to other users.

¹⁷⁹ *Napster*, 239 F.3d at 1015.

¹⁸⁰ See *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117-18 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

¹⁸¹ See, e.g., *Williams v. Columbia Broad. Sys., Inc.* 57 F. Supp. 2d 961 (C.D. Cal. 1999), *vacated by consent*, 1999 WL 1260143 (C.D. Cal. Dec. 21, 1999) (finding that "spirit message" from Army unit broadcast during 1997 Army/Navy football game which featured animated clay "Sailor Bill" that drew on copyrighted Mr. Bill character constituted fair use because, *inter alia*, use was quasi-noncommercial).

inherent to a nebulous notion of commercial use.

All told, most transformative-use defenses stand little chance of success under the current infringement test, despite the influence of Judge Leval and the Supreme Court's rhetoric in *Campbell*. However, because a natural-rights vision has firmly taken hold of modern copyright law, this result is not surprising. The dominant role of fair use in the protection of authors' natural rights is best illustrated by the Supreme Court's declaration in recent years that the fourth factor of the fair use test, "the effect of the use upon the potential market for or value of the copyrighted work,"¹⁸² is the most important.¹⁸³ Despite the judicial authority cited for this proposition, Congress' explicit guidance, in 1976 that the fair use factors be balanced makes this assertion somewhat curious.¹⁸⁴ Presumably, if Congress had intended to make one factor in the fair use test more important than any other, it would have said so. Nevertheless, the Court has deemed that the economic harm caused by a potentially infringing use of a copyrighted work is paramount in ascertaining whether use of a copyrighted work is fair.¹⁸⁵ However, such a reading of fair use, especially under the expansive notions of market harm espoused by modern courts, is anathema to the utilitarian origins of copyright.

After all, before considering a fair use defense, a court has to make a finding of infringement. It accomplishes this by determining substantial similarity between the original copyrighted work and the use. Unfortunately, substantial similarity is itself a proxy for the fourth factor. The more similar the two works, the more likely it is that the secondary use will subvert the commercial market for the copyrighted work. Thus, by considering the issue of market harm in the fair use test, and particularly by elevating market harm to the highest level in that test, a court is largely duplicating a task already accomplished when it considers the threshold requirement of substantial similarity. The elevation of the fourth factor to the forefront of fair use is entirely consistent with the natural-law vision of copyright, however, which seeks to protect an author's property rights in his works even if it clashes with the advancement of the arts. The increasing natural-law bent of

¹⁸² 17 U.S.C. § 107(4) (2000).

¹⁸³ See *Stewart v. Abend*, 495 U.S. 207, 238 (1990); *Harper & Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

¹⁸⁴ 17 U.S.C. § 107 (2000).

¹⁸⁵ *But see American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (suggesting that *Campbell's* omission of language emphasizing fourth factor as most important may indicate abandonment of idea that "any factor enjoys primacy").

copyright certainly has strengthened the ability of copyright owners to profit from their creations. However, under the current fair use test, modern copyright law has proscribed most transformative uses at a great price to progress in the arts.

C. *Borrowing and Progress in the Arts: Smells Like Teen Spirit*

Critics of the modern copyright system frequently point to the fact that many of Shakespeare's greatest works would never have been written if Elizabethan England had embraced our stringent notion of authorial protection. Shakespeare, they argue, could not have existed under the modern copyright regime.¹⁸⁶ The point is a fair one. The modern notion of plagiarism did not exist in Elizabethan times,¹⁸⁷ when imitation (though not mere "servile imitation") was truly considered the greatest form of flattery. However, the analysis does not need to be confined to the Elizabethan era to demonstrate the negative impact a strict notion of copyright protection has on progress in the arts. A more current example poignantly highlights just how much creativity and development in the arts we may be missing as a consequence of the expansive ambit of our modern copyright paradigm. Take, for example, the band Nirvana and their 1991 hit song, *Smells Like Teen Spirit*,¹⁸⁸ arguably the most important and critically lauded musical work of the past few decades.

The song's syncopated rhythm and charged lyrics constituted a scathing indictment of pop culture, the mass media, and cliquish society, and played a critical role in altering the landscape of modern music. The song was nothing short of a "progress in the arts," as deserving as any song of copyright protection and widespread dissemination. Yet, for all of its lyrical and musical originality, the song never would have been released to the public had it not been for a peculiar series of circumstances that allowed Nirvana to eschew copyright infringement litigation. A little background to the inspiration of the song sheds light on this point. The lyrics to *Smells Like Teen Spirit* are, depending on one's perspective, either inspired by or plagiarized from Thomas Pynchon's acclaimed novel, *Gravity's Rainbow*.¹⁸⁹ Indeed, the similarities are eerie.

¹⁸⁶ KENNETH MUIR, *THE SOURCES OF SHAKESPEARE'S PLAYS* (1978); James D. A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 629 (1988).

¹⁸⁷ Boyle, *supra* note 187, at 628.

¹⁸⁸ NIRVANA, *Smells Like Teen Spirit*, on NEVERMIND (Geffen Records 1991).

¹⁸⁹ THOMAS PYNCHON, *GRAVITY'S RAINBOW* (Viking ed., 1973). A book that is much more frequently cited and discussed than read, *Gravity's Rainbow* has been simultaneously hailed as a masterpiece and dismissed as utter nonsense. Winner of the National Book

In a section of *Gravity's Rainbow*, one of Pynchon's characters hums a whimsical ditty, inspired by the spirits of teenage woman: "Ah, they do bother him, these free women in their teens/their spirits are so contagious."¹⁹⁰ From these words by Pynchon, the title of Nirvana's *Smells Like Teen Spirit* was born.¹⁹¹ Moreover, the actual lyrics found in *Gravity's Rainbow* are strikingly similar to those of *Smells Like Teen Spirit*.

The chorus to Pynchon's song, replete with textualized intonations adopted by Nirvana, reads:

I'll tell you it's just -out, -ray, -juss
 Spirit is so -con, -tay, -juss
 Nobody knows their a-ges¹⁹²

With a similar rhyme scheme, phrasing, and syncopation, the chorus to *Smells Like Teen Spirit* reads:

With the lights out it's less dangerous
 Here we are now
 Entertain us

I feel stupid and contagious
 Here we are now
 Entertain us¹⁹³

The rejoinder to Pynchon's song utters the phrase "nevermind" repeatedly, reading:

Nev -ver, -mind, watcha hear from your car
 Take a lookit just -how -keen -they are,
 Nev -ver, -mind, -what, your calendar say,
 Ev-rybody's nine months old today! Hey¹⁹⁴

Award, the novel was also unanimously recommended for a Pulitzer Prize by the Pulitzer jury. However, the Pulitzer trustees overturned the decision on the grounds that the work was turgid and unintelligible. See WILLIAM GADDIS, *AGAPE AGAPE* 61 (2002).

¹⁹⁰ PYNCHON, *supra* note 190, at 538.

¹⁹¹ Of course, Nirvana was also referring to the product *Teen Spirit*, a deodorant noxiously marketed by Mennon (and oft advertised on MTV) to teens of the era.

¹⁹² PYNCHON, *supra* note 190, at 538.

¹⁹³ NIRVANA, *supra* note 189.

¹⁹⁴ PYNCHON, *supra* note 190, at 538.

Meanwhile, the album on which *Smells Like Teen Spirit* resides is entitled *Nevermind*, and that phrase is mentioned in the song as Kurt Cobain repeatedly sings “well, whatever, nevermind. . . .” Moreover, the rejoinder to *Smells Like Teen Spirit* invokes a similar intonation and pattern:

An albino
A mullato
A mosquito
And a beetle! Hey¹⁹⁵

Thus, in appropriating and transforming Pynchon’s lyrics, Nirvana took a course of action that could have subjected them to a cognizable copyright infringement suit. The unique and unusual phrasing in the *Gravity’s Rainbow* lyrics as well as their intonations certainly would be enough to raise an inference of remarkable similarity and borrowing. This is particularly true in light of recent decisions that have upheld the viability of an infringement action based entirely on a theory of subconscious filching — the precise result when a federal court found George Harrison liable for plagiarizing the Chiffon’s perky hit *He’s So Fine* with his somber and reflective ballad *My Sweet Lord*.¹⁹⁶ Moreover, a court would likely find no fair use under the modern balancing test. As a commercial and nonparodic use, *Smells Like Teen Spirit* would decidedly lose the first factor. Because Pynchon’s song was a creative and original work, the second factor would also go against Nirvana. The lifting of significant lyrics and the unusual and unique syncopated rhythm of Pynchon’s song would weigh the third factor against Nirvana. Finally, a court would likely infer economic harm as Nirvana would be occupying the market for setting Pynchon’s copyrighted song to music. All told, Nirvana would, at the very least, face a serious infringement suit for creating an unauthorized derivative work.

However, a unique series of circumstances enabled Nirvana to appropriate Pynchon’s lyrics with little regard for the legal consequences. Pynchon is an infamous recluse. In fact, until some recent stalking of Pynchon,¹⁹⁷ no picture of him had been published since

¹⁹⁵ NIRVANA, *supra* note 189.

¹⁹⁶ See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

¹⁹⁷ See John Yewell, *Tracking Thomas Pynchon Through Space and Time*, available at <http://www.metroactive.com/papers/metro/10.01.98/cover/lit-pynchon-9839.html> (noting efforts of CNN and New York Magazine, among others, in tracking down

his high school yearbook photo from a half-century ago.¹⁹⁸ His desire to avoid publicity is so great that, instead of personally accepting the prestigious National Book Award in 1973, he sent famed clown Bozo in his place. In his entire career, which has spanned over four decades, Pynchon has never granted an interview.

Consequently, Pynchon is as unlikely as anyone to pursue an infringement suit.¹⁹⁹ Such an action would be far too public for a man who assiduously has averted efforts by the media to track him down.²⁰⁰ The idea of him testifying in court, appearing for depositions, or engaging in any kind of public appearance is unthinkable. Hence, Nirvana could borrow without threat of a suit, which, if waged, may have prevented Nirvana from ever writing and releasing *Smells Like Teen Spirit*. At the very least, the threat of a plausible suit would have discouraged a garage band from Seattle, Washington and its record label from taking a chance at bankrupting litigation.

The Nirvana example illustrates the social benefits from the reiterative process of works building upon one another. However, under the modern infringement regime, such a reiterative process cannot occur. Because most copyright owners are not Thomas Pynchon, transformative works will not enter the public sphere without a significant up-front price. Such a system is not only detrimental to progress in the arts; it also curtails expressive freedoms.

CONCLUSION

All told, this examination of fair use in a historical context reveals that, far from championing the right of the public to access creative works, the fair use doctrine has played a key role in the expansion of the copyright monopoly. As a consequence, this Article suggests a need for rethinking the modern test for infringement and for re-evaluating the viability of the fair use defense as a means of ostensibly incorporating First Amendment and public access concerns into copyright law. Quite simply, the fair use doctrine has transformed federal copyright from a

Pynchon).

¹⁹⁸ See Jules Siegel, *Who Is Thomas Pynchon . . . and Why Did He Take Off with My Wife?*, PLAYBOY, Mar. 1977, at 97.

¹⁹⁹ A similar dynamic — Bobby Fischer's status as a fugitive — enabled Paramount Studios to green light the movie *In Search of Bobby Fischer*, despite the notorious ambiguity of laws protecting the right of publicity. I am grateful to David Nimmer for pointing this out. See SEARCHING FOR BOBBY FISCHER (Paramount Pictures 1993).

²⁰⁰ Just to avoid a brush with publicity, Pynchon once defenestrated from an apartment when a reporter tracked him down in Mexico City. See *supra* note 198.

utilitarian system of compensation — a carefully delimited quid pro quo for a benefit granted to society — into a natural-law right to which authors are entitled for their creative efforts. Such a vision of copyright not only betrays the intentions of the Framers, it comes at a great price to progress in the arts.