Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium

William C. Walker Jr.
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FOR MAINTAINING COPYRIGHT EQUILIBRIUM

William C. Walker, Jr.*

INTRODUCTION

Both the United States Supreme Court and Congress currently are considering judicial1 and legislative2 responses to the television public's alleged usurpation of authors' exclusive right to reproduce their work. Both bodies are attempting in different ways to resolve the conflict caused by home video tape recording of television broadcasts. The Court will consider whether such activity is a noninfringing fair use of copyrighted works. Congress will consider whether such activity should be statutorily declared noninfringing, without regard to the fair use doctrine. In formulating their responses, both the Court and Congress are attempting to balance the authors' interest in receiving compensation for certain uses of their work and, at a minimum, the social interest in developing video tape recording technology. Hence, both branches of government are engaged in carrying out the constitutionally authorized compromise—the fostering of creativity and eventually resulting social advancement at the expense of more immediate social benefits—by appropriate enforcement of the copyright monopoly.

The judicial tool for maintaining this appropriate balance between social and individual interests in copyrights is the legislatively recognized doctrine of fair use. Although often deemed "the most troublesome in the whole law of copyright,"3 this doctrine, if understood to be a tool which has limited application, is quite manageable. In other words, many problems arising in the application of fair use are the result of misunderstandings of the tool itself—misconceptions about its suitability for achieving precise adjustments

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3. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); see also Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 969 (9th Cir. 1981). When faced with the application of the fair use doctrine, courts often begin by quoting the Dellar court's pronouncement. See, e.g., Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).
in the copyright balance and about its manner of use in achieving
the equilibrium. These misconceptions may be avoided if the fair use
tool is understood and utilized in light of its purpose.

MAINTAINING COPYRIGHT EQUILIBRIUM

The role of any copyright doctrine should be to implement the
purpose of copyright protection. Success in this endeavor depends upon
a decision maker's understanding of both the reason for granting a
copyright monopoly and the available methods for controlling the
monopoly in the most suitable manner.

Copyright Compromise

Perhaps the drafters of the Constitution were familiar with Dr.
Johnson's quip concerning the reason authors create—"[n]o man but
a blockhead ever wrote except for money"—or perhaps this
knowledge of human nature was intuitively possessed by them and
so obvious as to need no explanation. Apparently, the only contem-
porary gloss is Madison's brief comment in The Federalist: "The tility
of this power will scarcely be questioned. The copyright of authors
has been solemnly adjudged, in Great Britain, to be a right at com-
mon law. . . . The public good fully coincides in . . . [such a case]
with the claims of individuals." No matter what the individual understanding of the Framers or their
basis for it, Congress was given, in the copyright clause, the power to
enact legislation which grants authors exclusive but temporal rights in
their writings. The reason for this grant is stated in the clause itself—
"to promote the Progress of Science and useful Arts." The clause also
includes the means to be used to achieve this end result—"by securing
for limited Times to Authors . . . the exclusive Right to their . . . writings." The Supreme Court has stated that

[t]he clause thus describes both the objective which Congress may
seek and the means to achieve it. . . . In other words, to encourage
people to devote themselves to intellectual and artistic creation, Con-
gress may guarantee to authors . . . a reward in the form of control
over the sale or commercial use of copies of their works.

Stated a different way, since no one but a blockhead will write unless
he hopes to receive monetary compensation and since writing is good

6. U.S. CONST. art. I, § 8, cl. 8: "[Congress shall have power] To promote the Pro-
gress of Science and useful Arts, by securing for limited Times to Authors and Inven-
tors the exclusive Right to their respective Writings and Discoveries."
for society, society should provide the carrot of compensation by granting authors a monopoly, which is the economic situation that assures their payment. However, since monopolies, at least in the long run, are harmful to society, an author should not have his monopoly forever. Moreover, if an author will create works without being granted a monopoly or if society's immediate needs justify the risk that he will not create works in the future unless he is granted one, no monopoly should be granted.  

Copyright protection is provided to encourage authors to create by protecting their right to receive monetary compensation. This, in turn, benefits society by promoting progress. Congress has the difficult task of implementing this "purpose." The Copyright Act is the fruit of this labor.

**Legislative Balancing With Precision Tools**

The Copyright Act attempts to effectuate the purpose behind the constitutional copyright grant. Initially, the Act completely excludes the ideas contained in an author's work from copyright protection. Free access to and repetition of ideas is too important to society to be subject to any monopoly at all. Subsequently, however, broad grants of monopoly protection are provided in section 106 for the expression contained in an original work of authorship. This bundle

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8. Although "[creative work is to be encouraged and rewarded, ... private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."

9. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102 (1976).

10. See Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967) (copyright protection should not be extended to the expression of matter which is so limited in the form in which it can be presented that copyright of the expression would effectively prevent public access to the substance).

11. 17 U.S.C. § 106 provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual im-
of rights, known as copyright, is subject to further limitation in sections 107 through 118. These sections, with the exception of 107, constitute the precision tools used to fine tune the copyright balance.

Examples of what can be done legislatively to maintain copyright equilibrium are found in sections 108 through 118 as well as in the several versions of proposed section 119. Each of these provisions is limited in application to the precise circumstances described. Thus, only certain section 106 rights, certain kinds of works, and particular uses are adjusted by these tools. For example, only distribution and display rights are affected under section 109 by the transfer of a copy or phonographic record and only reproduction and distribution by certain libraries and archives are affected by section 108.

One notable illustration of just how precisely Congress can adjust the copyright balance is contained in section 110(5), where the broad section 106 performance right is denied in a very particular situation. Thus, when a person turns on, in a public place, an ordinary radio or television set like those used in homes, the copyright owner's monopoly is not violated. The rationale is that in the past, royalties have not been collected for such activity and, therefore, the author will continue to create despite this minor limitation upon his monopoly.

Another illustration in section 110 appears to be based upon a different rationale: society's immediate need to have knowledge disseminated outweighs the copyright owner's performance rights. Thus, the performance of a work by teachers or students in the course of face-to-face teaching activities in a classroom is exempted from copyright liability.


12. The proposed bills are cited in note 2, supra.
17. The basic rationale of this clause (§ 110, cl. 5) is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute.
The proposed versions of section 119 indicate the precision with which Congress may adjust the interests of author and society to maintain copyright equilibrium. Thus, if one of these proposals is enacted, individuals who videotape for private use will not be liable, in spite of section 106. Recently, however, concern for author compensation has given rise to two proposals for a compulsory licensing provision. Similar provisions which also abrogate the monopoly while retaining the compensation carrot, have been used in other specific limitations enacted by Congress.

In short, Congress has used its ability to make precise adjustments to the copyright balance in sections 108 through 118 and the proposed versions of section 119. Although generally desirable because of its relative certainty in purpose and application, legislative specificity may be unsatisfactory in its lethargy and inflexibility. The legislative process often is not efficiently responsive because of the necessary delay associated with it and the inherent incompetence of language used in any attempt at universal and enduring communication. The need for flexibility and more immediate responsiveness was in fact recognized by Congress in section 107.

Judicial Balancing with the Adjustable Tool

In enacting section 107, Congress statutorily recognized the judicial doctrine of fair use. In so doing, however, Congress did not seek to transform fair use into a legislative precision tool for adjusting the copyright balance. Rather, prior jurisprudence is left unchanged by section 107. Moreover, both judicial accommodation of the doctrine

19. See note 2, supra.
17 U.S.C. § 107 (1976) provides:
Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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 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
to suit future developments and free adaptation on a case-by-case basis are encouraged expressly in the legislative reports.24

The fair use doctrine survives as a flexible tool to be used by courts in making immediate adjustments to the copyright balance. The doctrine continues to be both "one of the most important and well-established limitations on the exclusive right of copyright owners"25 and "the most troublesome in the whole law of copyright."26 Fair use is important and troublesome because of its flexibility. On the one hand, fair use ameliorates the potentially harsh application of the section 106 exclusive rights in a wide variety of factual situations. On the other hand, fair use's flexible application makes precise definition and predictability in a particular case more difficult. The House Report frankly admits that "no real definition of the concept has ever emerged."27 Rather, fair use is described as an equitable rule of reason necessitating case-by-case determinations28 to facilitate the appropriate balancing of a copyright owner's rights against society's need to allow abridgement of those rights.29

This doctrine is not the only adjustable tool available to the judiciary. Determinations that unprotected ideas, rather than protected expression, have been taken by an alleged infringer involve judicial adjustments to the copyright balance. On occasion, courts erroneously have viewed these decisions as involving the fair use doctrine. Thus, in Shipman v. R.K.O. Radio Pictures, Inc., fair use "is defined as copying the theme or ideas rather than their expression,"30 and in Sheldon v. Metro-Goldwyn Pictures Corp., the court stated that "it is convenient to define such a use by saying that others may 'copy' the 'theme' or 'ideas,' or the like, of a work, though not its 'expression.'"31

The fair use doctrine, as a general limitation upon a copyright

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copyrighted work as a whole; and
(d) the effect of the use upon the potential market for, or value of the copyrighted work.

24. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Id.

27. H.R. REP. No. 1476, supra note 25.
28. Id.
30. 100 F.2d 533, 537 (2d Cir. 1938).
31. 81 F.2d 49, 54 (2d Cir.), cert. denied, 298 U.S. 669 (1936).
owner's exclusive rights, is neither as broad in application as the idea—expression dichotomy nor as narrow in scope as the limitations provided in sections 108 through 118 and proposed section 119. Unlike these latter legislative precision tools, section 107 fair use is not limited by the exclusive right involved, the nature of the work, or even a particular, specific use made of the work. Rather, fair use depends upon a balancing of several factors with due but not determinative regard to certain socially useful purposes.

**ADJUSTING THE FAIR USE TOOL**

Although the fair use doctrine is an adjustable, rather than inflexible, tool for maintaining copyright equilibrium, section 107 does provide guidance as to its intended application through illustrative uses, purposes, and factors. Section 107 begins by stating the broad rule that fair use does not infringe upon the exclusive rights provided in section 106: “Notwithstanding the provisions of section 106, the fair use of a copyrighted work... is not an infringement of copyright.” Thus, any use of a copyrighted work which is fair under section 107 is not an infringement; in such a case, references need not be had to the more specific limitations on a copyright owner’s exclusive rights contained in sections 108 through 118. Although use “by reproduction in copies or phonorecords or by any other means specified” in section 106 is mentioned specifically in the statute, this reference is “intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use...[and] not...to give these kinds of reproduction any special status.” Fair use, therefore, depends upon an evaluation of an alleged violation of section 106 in light of certain socially useful purposes and, more importantly, certain fair use factors.

Some examples of purposes which traditionally have been the subject of fair use decisions are furnished separately in section 107, although the purpose and character of the allegedly illegal use are expressly listed as part of the statutory factors. Thus, an arguable violation of section 106 “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” may be a fair use. The enumerated purposes are similar to those contained in a slightly more comprehensive list of “the sort of activities the courts might regard as fair use

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34. Section 101 clearly provides that the terms “including” and “such as” are illustrative and not limitative. 17 U.S.C. § 101 (1976).
under the circumstances” contained in the Register’s 1961 Report and quoted in the House Report.\textsuperscript{36} Even if a use is for one of the codified purposes (and especially if it is not), the determination of whether the use is a fair one in a particular case depends upon an analysis of certain fair use factors.

The statutory factors to be considered in determining whether an arguable violation of the section 106 exclusive rights is not an infringement because the use is a fair one are, as listed in section 107, the following:

(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 or value of the copyrighted work.\textsuperscript{37}

The listed factors are neither exhaustive nor particularly weighty in any given case. By providing in section 107 that the fair use factors “shall include” those listed, Congress has, according to the definition of “including” in section 101,\textsuperscript{38} merely given examples of traditional fair use factors. These factors, which are designed to restate the fair use criteria developed by the courts, merely provide “some gauge for balancing the equities.”\textsuperscript{39} Apparently, no single factor is to be either definitive or determinative in every case.\textsuperscript{40} Indeed, one commentator

\textsuperscript{36} The examples enumerated at page 24 of the Register’s 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”


\textsuperscript{37} 17 U.S.C. § 107.

\textsuperscript{38} See note 34, supra.


\textsuperscript{40} The House Report states, “On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities.” \textit{Id.}
has viewed the failure to define fair use and to weight the factors as serious defects in section 107. Although commentators generally have viewed the effect of the use on the potential market for the copyrighted work as the most significant factor, the fair use decisions seemingly emphasize other factors, especially the "substantiality of the portion used."

While certain factors have been viewed as controlling under particular facts, all four statutory factors and perhaps others as well may be considered in a suit for infringement. The order of their consideration apparently is not indicated by the section 107 arrangement. However, courts often initially treat the factor which has received the most emphasis in the lawsuit. This approach seems reasonable since the parties generally focus upon the most difficult issues. Thus, if any one of the factors is viewed by the parties themselves as dealing with the most important question in the case, a judicial determination of the appropriate weight for that factor may pretermit detailed consideration of the remainder of the list. Since resolution of the fair use question depends upon balancing all appropriate factors, if the weightier ones in the particular case are considered initially, the balance may be struck more quickly.

The desire of certain courts and commentators for a prescribed

41. First, it does not attempt a definition of fair use at all. Second, by not providing the slightest guidance in the ordering of priorities in the application of the four "factors to be considered" it has not only said nothing not obvious about fair use, but, worse, implied that there is no general order of priority deriving from the copyright scheme.


43. Id. at 110.


46. See, e.g., id. (the fourth factor was considered first by the district court because of its emphasis in the suit and the suggestion of the commentators).
order and weight for the fair use factors overlooks the recognized need for flexible application of a rule of reason to various factual patterns. The section 107 listing of factors is similar to the approach often taken by the Restatement (Second) of Torts, and as in the tort analysis of duty, the balancing of the utility of the alleged infringer's conduct with the gravity of harm to the copyright owner is made possible by the section 107 list. Thus, as in tort law, a duty is imposed by law under section 106, but that duty is qualified by a rule of reason in section 107. What is reasonable in copyright is similar to what is reasonable in the law of torts: socially useful conduct that does not result in undue harm to the individual arguably injured by such conduct.

The statutory factors may be arranged on either side of the scale. Thus, the purpose and character of the use determines whether the arguable violation of an exclusive right will benefit society. The nature of the copyrighted work also affects the utility of the conduct side of the balance. The more specific harm of substantial taking and the more general economic injury expressed in terms of the effect upon the potential market for the copyrighted work are on the other side. Admittedly, all the factors may contain negative as well as positive weights to be added into the overall balance, but the significance of using a tort-like balancing instead of a contractual-expectations approach is that the former correctly reflects the two sides to copyright protection: society's and the author's.

Of course, the copyright scheme is designed primarily or, at least, ultimately to benefit the public through increased artistic effort by individuals. As previously mentioned, monopoly and resulting compensation to the individual have been viewed as necessary for that encouragement. Consistent with this overall copyright purpose, the doctrine of fair use allows more immediate benefit to society at the expense of the monopoly owner in situations where that benefit outweighs the individual's harm and presumably will not discourage further creativity and the resultant further benefit to society.

47. See, e.g., Restatement (Second) of Torts § 520 (1977).
48. Reasonableness in terms of a breach of a statutory duty, rather than the expectations of the copyright owner and the public, determines the outcome of the balancing test. Cf. L. Seltzer, supra note 41.
49. The duty is qualified more specifically in §§ 108-118.
50. The development of "fair use" has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection "To Promote the Progress of Science and the useful Arts." Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), aff'd per curiam by an equally divided Court, 420 U.S. 376 (1975).
FAIR USE

JUDICIAL EXPERIENCE WITH THE FAIR USE TOOL

Although the flexibility allowed by section 107 does make predictability in a specific case more difficult, an examination of the cases which have emphasized particular factors provides some additional understanding of the fair use tool. In addition, since the statutory list for fair use determination is neither exclusive nor essential, factors which are not codified expressly will be considered as well. Finally, a particular factual situation has been singled out for specific treatment herein because of the crystallized judicial rules concerning it.

Purpose and Character of Use

The first fair use factor listed in section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." The reference to the commercial nature or nonprofit educational purpose of the use was added by the House Bill and, according to the House Report, "is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works." Rather, the reference expressly recognizes that "the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors," as it had been in prior fair use decisions. Thus, although the decisions have considered the commercial nature of an alleged infringing use, other considerations under this first factor also are important. As previously pointed out, use for purposes "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" is recognized as a potential fair use in the body of section 107. This nonexclusive list of purposes sheds light on the first fair use factor as well.

The application of this first factor, as in the case of the other three, depends upon the theoretical basis of fair use as a balancing of societal interests against the interests of the copyright holder.

53. Id.
55. As stated in Rosemont Enters., Inc. v. Random House, Inc.: The fundamental justification for the fair use privilege lies in the constitutional purpose in granting copyright protection in the first instance to wit, "To Promote the Progress of Science and the useful Arts." To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."

If the purpose and character of the use is directed toward dissemination of knowledge (especially if not motivated primarily by profit seeking), the courts are more likely to find the use to be a fair one. Thus, the court in *Williams & Wilkins Co. v. United States,*\(^66\) in finding the photocopying of entire articles published in plaintiff's journals to be a fair use, relied in part\(^57\) upon its belief that "medical science would be seriously hurt if such library photocopying were stopped."\(^68\) Similarly, "the coordination of fire prevention activities" was held to be a reasonable purpose for the use of copyrighted maps in *Key Maps, Inc. v. Pruitt.*\(^69\) Other uses which necessitate reference to prior works so that knowledge or facts may be disseminated further have raised the fair use question. Such uses include directories,\(^60\) biographies,\(^61\) textbooks,\(^62\) tests,\(^63\) news,\(^64\) and criticism.\(^65\)

Even if the character of the use is one designed to advance knowledge, if the profit motive is significant in a particular case, the use may be deemed unfair. Thus, the saving of time and effort has

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\(^{56}\) 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided Court, 420 U.S. 376 (1975).

\(^{57}\) The court listed eight factors as important but stated that it did not rely upon any one "or on any combination less than all." 487 F.2d at 1354.

\(^{58}\) Id. at 1356.


\(^{60}\) G. R. Leonard & Co. v. Stack, 386 F.2d 38, 39 (7th Cir. 1967) ("It is recognized that a compiler of a directory or the like may make a fair use of an existing compilation serving the same purpose if he first makes an honest, independent canvass; he merely compares and checks his own compilation with that of the copyrighted publication; and publishes the result after verifying the additional items derived from the copyrighted publication."); Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83 (2d Cir.), cert. denied, 259 U.S. 581 (1922).

\(^{61}\) See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (an author can refer to and rely on prior works but cannot appropriate the entire body of his predecessor's research); *Lake v. Columbia Broadcasting Sys., Inc.*, 140 F. Supp. 707, 708-09 (S.D. Cal. 1956) (historical facts and events in themselves are in the public domain and are not entitled to copyright protection).

\(^{62}\) See *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir.), cert. denied, 371 U.S. 817 (1962) (the court remarked that one cannot appropriate the "fruits of another's labor and skill in order to publish a rival work"); *Meredith Corp. v. Harper & Row Publisher, Inc.*, 413 F. Supp. 385 (S.D.N.Y. 1975).


\(^{65}\) *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 175 (S.D. Cal. 1955), aff'd, 239 F.2d 532 (9th Cir. 1956), aff'd, 356 U.S. 43, reh'g denied, 356 U.S. 934 (1958) ("Criticism is an important and proper exercise of fair use. Reviews by so-called critics may quote extensively for the purpose of illustration and comment.").
been held to render an otherwise permissible use unfair. 66 Additionally, if the work is "commercial" as distinguished from "scholarly," fair use may be even more difficult to show. But, the court in Rosemont Enterprises, Inc. v. Random House, Inc. concluded "that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use." 67 Therefore, commercial motive appears less significant in cases where advancement of knowledge is important and more significant when the reverse is true.

Under certain circumstances, the fair use tool may not be adjusted to allow a use without a productive purpose like those listed in the body of section 107. The court in Universal City Studios v. Sony Corp. of America, stated, "Without a 'productive use', i.e. when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case [home video-recording] precludes an application of fair use." 68 As said elsewhere in that decision, "[i]t is noteworthy that the statute does not list 'convenience' or 'entertainment' or 'increased access' as purposes within the general scope of fair use." 69 Indeed, the Sony court relied upon the relationship between general purposes and the first fair use factor, stating, "The fact that the use involved does not further a traditionally accepted purpose clearly weighs against a finding of fair use." 70 Significantly, the facts of this case involved application of other fair use factors and the mass taking of entire works weighed heavily in the fair use balance struck by the court.

Nature of Copyrighted Work

The second listed fair use factor in section 107 is "the nature of the copyrighted work." 71 This factor differs from the first one in that it focuses upon the copyrighted work rather than on the arguably

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66. Toksvig v. Bruce Pub. Co., 181 F.2d 664 (7th Cir. 1950) (noting that fair use implies independent research and limited reliance on prior work even when dealing with biography).
67. E.g., Loew's, Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 175 (S.D. Cal. 1955) ("As we draw further away from the fields of science or pure or fine arts, and enter the fields where business competition exists we find the scope of fair use is narrowed but still exists."); Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prod., Inc., 508 F. Supp. 854 (D. Ga. 1981).
69. 659 F.2d 963, 971-72 (9th Cir. 1981), cert. granted, 102 S. Ct. 2926 (1982).
70. 659 F.2d at 970.
71. Id. at 972.
infringing work. The nature of both works is often similar, as in biographies, maps, and directories. The writer of certain kinds of works, such as books or articles of learning, invites "the use of the books and portions and quotations therefrom for the purpose of the advancement of learning," although not for the purpose of "commercial gain alone." Thus, a relationship between the first two fair use factors is apparent. This "invitation theory" has been criticized by commentators, however, since copyright owners who have negated an implied consent by expressly prohibiting such use nevertheless have been held subject to a fair use defense. The real basis for a finding of fair use in such cases is society's interest in the dissemination of knowledge, despite the copyright owner's monopoly.

Some works obviously are useful only if "copying" ordinarily is allowed. Thus, form books, by their very nature, require as well as "invite" copying as a matter of practical utility. Works of fiction, on the other hand, need not be copied to be used except, perhaps, for the purpose of criticism. The legislative reports offer some examples of copyrighted works which by their nature affect the question of fair use. For example, both audiovisual works and newsletters ordinarily could not be fairly used, but material in newspapers of

76. E.g., G.R. Leonard & Co. v. Stack, 386 F.2d 38, 39 (7th Cir. 1967) (a compiler of a directory "may make fair use of an existing compilation serving the same purpose if he first makes an honest, independent canvass; he merely compares and checks his own compilation with that of the copyrighted publication; and publishes the result after verifying the additional items derived from the copyrighted publication."); Jewelry's Circular Publ. Co. v. Keystone Publ. Co., 281 F. 83 (2d Cir. 1922).
78. See L. SELTZER, supra note 41, at 19.
79. E.g., Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968) (defendant asked plaintiff for use of certain photographs and, after being refused, defendant had drawings made based on the photographs).
83. The House Report states:

The availability of the fair use doctrine to educational broadcasters would be nar-
current interest to students presumably could be. 84

When the nature of the copyrighted work does not easily fit the category of a work of fact, the courts have more difficulty assessing the effect of this factor. A recent example is found in the district court opinion in University City Studios, Inc. v. Sony Corp. of America. 85 The court discussed the second fair use factor in terms of a "free offering to the public," rather than in terms of education, information, or mere entertainment. 86 Apparently finding difficulty in making this novel categorization of a work fit the precedents, the court relied upon the interaction between the free-offering nature of the work and the issue of harm (the fourth factor) and stated that "[b]ecause plaintiffs [derived] their revenues only indirectly from the alleged infringers of their work, the harm resulting from the infringement [was] more speculative." 87 The circuit court was correctly unimpressed with this analysis. 88

Concededly, all the fair use factors are interrelated, but this alone does not resolve the matter of how much weight a particular factor should be given. Still, especially as to the first two factors, interdependence is often important in making the fair use determination. However, since no single factor is necessarily determinative, a court should not feel compelled to find that all of the factors weigh on one side or the other of the fair use balance.

Substantiality of Portion Used

The third listed fair use factor in section 107 is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 89 The word portion may support the argument that fair use has no application if an entire work is used. 90 Many of the decisions under the old act had taken this position, although contrary authority exists.

rowly circumscribed in the case of motion pictures and other audiovisual works. ... [A]s a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals.

84. "With respect to material in newspapers and periodicals the doctrine of fair use should be liberally applied to allow copying of items of current interest to supplement and update the students' text books." S. REP. NO. 473, at 64.
86. 480 F. Supp. at 452-53.
87. Id. at 453.
88. 659 F.2d 963, 972 (9th Cir. 1981).
89. 17 U.S.C. § 107(3).
Arguably, the fair use question must be answered negatively if an entire work is copied or if excessive copying is shown. Hence, the substantiality of the portion used apparently is the most important and determinative factor in determining the fair use question and, as a result, should be considered first. The substantiality of the copying factor can be read, nevertheless, as merely establishing a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. One commentator has noted that this factor has been mentioned most often in the decisions. However, the similarity between this factor and the “substantial similarity” test for infringement may account for this frequency. This similarity also may account for the difficulty in giving this factor preemptive effect in a fair use decision. Thus, cases which have laid down the rule that no use is fair if copying is substantial should not be read as making the test for fair use the same as the test for infringement.

A use may be fair even if the entire work is copied because the substantiality factor is simply one of the four factors listed and “is given no special position in relation to the others” included in section 107. Ordinarily, the likelihood that a use will be deemed fair is inversely related to the substantiality of the taking; i.e., the more likely will a use be deemed fair, the less substantial is the taking. Even if an entire work has been reproduced by means of photocopying or videotaping, the use nonetheless may be regarded as fair. Thus, in Williams & Wilkins Co. v. United States, the Court of Claims described the argument that the copying of an entire work could never be fair use as “an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice.” The decisions usual-

91. See, e.g., Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Benny v. Loew’s, Inc., 239 F.2d 532 (9th Cir. 1956), aff’d by an equally divided Court, 356 U.S. 43 (1958).
93. Hayes, supra note 42, at 110.
96. See Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff’d per curiam by an equally divided Court, 420 U.S. 376 (1975); Public Affairs Assocs., Inc. v. Rickover, 264 F.2d 262 (D.C. Cir. 1960), vacated and remanded, 369 U.S. 111 (1962).
98. 480 F. Supp. at 454.
99. 487 F.2d 1345, 1353 (Ct. Cl. 1973), aff’d per curiam by an equally divided Court, 420 U.S. 376 (1975).
ly cited for the proposition that the copying of an entire work could not be fair use were distinguished by the court as involving publication and multiple distribution and not merely the making of a copy for individual or restricted use.\textsuperscript{100} In commenting upon accepted practice, the court, without citation to legal authority, offered as examples the handwritten or typed copying of an article for personal use and the copying of poems and songs by individuals for personal use or limited distribution.\textsuperscript{101} The copying of entire articles in medical journals, therefore, was held to be a fair use.\textsuperscript{102} A similar approach to the substantive test was taken by the district court but rejected by the circuit court in \textit{Universal City Studios, Inc. v. Sony Corp. of America}.\textsuperscript{103}

If the substantiability of the portion taken was viewed as a shortcut to finding undue harm to the copyright owner in adjusting the copyright balance, both of the above views (the copying of an entire work can \textit{never} be fair use or can \textit{sometimes} be fair use) would be supportable. The application of either view would depend upon the facts of the particular case. If an entire work were copied, it reasonably might be presumed that serious harm to the copyright owner would result. Whether that harm was \textit{undue} (unreasonable) would depend on whether society’s needs outweighed this effect.

\textbf{Effect of Use Upon Potential Market}

The fair use factor listed fourth in section 107 is “the effect of the use upon the potential market for or value of the copyrighted work.”\textsuperscript{104} Although this factor has been said to be the most important in a fair use determination\textsuperscript{105} and, when applicable, ordinarily decisive,\textsuperscript{106} it is only one of the four factors to be included in the fair use balance. The effect of the arguably infringing use upon the potential market for the copyrighted work directly focuses upon the question of harm. Still, the uncertain meaning of harm or injury in this context makes the question a difficult one to answer.

\begin{itemize}
\item \textsuperscript{100} 487 F.2d at 1353. The court distinguished Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937), Public Affairs Assocs., Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), \textit{vacated and remanded}, 369 U.S. 111 (1962), and Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).
\item \textsuperscript{101} 487 F.2d at 1353
\item \textsuperscript{102} Id.
\item \textsuperscript{103} 480 F. Supp. 429 (C.D. Cal. 1979), \textit{rev’d}, 659 F.2d 963 (9th Cir. 1981), \textit{cert. granted}, 102 S. Ct. 2926 (1982).
\item \textsuperscript{104} 17 U.S.C. § 107(4).
\item \textsuperscript{105} See Hayes, \textit{supra} note 42, at 108; cf. Mura v. Columbia Broadcasting Sys., 245 F. Supp. 567, 590 (S.D.N.Y. 1965). Commentators agree that perhaps the most important factor is whether the use tends to interfere with the sale of the copyrighted article.
\item \textsuperscript{106} Hill v. Whalen & Martell, 220 F. 339, 360 (S.D.N.Y. 1914).
\end{itemize}
Although actual harm may not be essential to a determination that a use is an unfair one, the determination may be much more difficult without proof of such harm.\textsuperscript{107} Thus, in \textit{Williams & Wilkins Co. v. United States},\textsuperscript{108} the court considered the fact that the plaintiff failed to prove its assertion of economic detriment (either in the past or potentially in the future) very important in finding fair use.\textsuperscript{109} The court rejected the trial court’s assumption that it was reasonable to infer that the defendant’s extensive photocopying of the plaintiff’s medical journals had resulted in some loss of revenue or at least reduced the number of potential subscriptions in the future.\textsuperscript{110}

The procedural posture of a case has been said to justify a finding of adverse impact upon the copyright owner’s market sufficient for granting preliminary relief.\textsuperscript{111} Thus, when a plaintiff sought a preliminary injunction against the defendant’s video tape recording of educational television broadcasts and distribution of the tapes to schools for delayed viewing, the court assumed that the challenged use had already had or would have a substantial adverse economic impact upon plaintiff’s market based upon the plaintiff’s affidavits.\textsuperscript{112} The court distinguished \textit{Williams & Wilkins} on the basis of its different procedural posture\textsuperscript{113} and concluded that the presumption of irreparable injury in a copyright case, coupled with the defendant’s burden of proving fair use, warranted an assumption of harm to the plaintiff’s market. Summary judgment for the defendant was reversed in \textit{Meeropol v. Nizer}\textsuperscript{114} since it was conceded that the plaintiffs might have incurred damages. The court reasoned that the fact that the copyrighted letters used in the defendant’s allegedly infringing work had been out of print for twenty years did not necessarily mean that they had no future market which could be injured.\textsuperscript{115}

Analysis of the effect upon the potential market for or value of the copyrighted work often has focused upon the question of competition between the two works. Thus, if both the plaintiff’s and the defendant’s works meet exactly the same demand in the same market,

\textsuperscript{107} See also Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 455 (1979), rev’d, 659 F.2d 963 (9th Cir. 1981), cert. granted, 102 S. Ct. 2926 (1982).
\textsuperscript{108} 487 F.2d 1345 (Ct. Cl. 1973), aff’d per curiam by an equally divided Court, 420 U.S. 376 (1975).
\textsuperscript{109} 487 F.2d at 1359.
\textsuperscript{110} \textit{Id.} at 1357.
\textsuperscript{112} \textit{Id.} at 252.
\textsuperscript{113} “The Williams & Wilkins decision followed a full trial on the merits.” \textit{Id.}
\textsuperscript{114} 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).
\textsuperscript{115} The court thought that the market for republication or for the sale of motion picture rights could be adversely affected by the infringing work. 560 F.2d at 1070.
a court is more likely to find an unfair use. On the other hand, where
the subsequent use of the copyrighted work is not in competition with
the copyrighted use, at least in the absence of proof of an adverse
impact upon the copyrighted work, the fair use defense often is
sustained. When a present noncompeting use is made of the
copyrighted work, the courts occasionally have said that such use
would help rather than harm the market for the copyrighted work. Thus,
when a defendant made charcoal sketches of frames in the plain-
tiff's film of the Kennedy assassination and published the sketches
in a book, the court could find no injury to the copyright owner despite
the plaintiff's future projects for using the film as a motion picture
or in books, since the plaintiff's and the defendant's works presently
did not compete.

Nevertheless, even when present competition is absent, courts
have found potential harm to a plaintiff's market for a derivative work
which would satisfy the same demand as that currently filled by the
defendant's allegedly infringing work. Thus, although harm to the
potential market for or value of such a derivative work is difficult
to specify, such harm was found when the defendant used the plain-
tiff's novel and motion picture as a basis for its comic stage play.

If copyright equilibrium is to be maintained, the general harm
to the copyright owner contemplated by this factor should not be
applied too narrowly. Proof of actual damages should not be required
since undue harm to an author occurs when that author loses the
monetary incentive to create in the future. This incentive will be
affected adversely if actual sales of a current work are lost. The in-
centive to create will also be affected adversely (consistent with the
original philosophical basis for a copyright monopoly) by limiting poten-
tial sales of current works. Whether such harm ultimately is found

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116. See, e.g., College Entrance Book Co. v. Amsco Book Co., 119 F.2d 874 (2d Cir.
1941) (where the defendant copied the word lists that the plaintiff had compiled
for French examinations); New York Times Co. v. Roxbury Data Interface, Inc., 434 F.
Supp. 217 (D.N.J. 1977) (where the defendant used the New York Times Index to make
a personal name index).

1978) (ABC filmed a parade and recorded some of plaintiff's music).

(the use of plaintiff's hand puppets on defendant's television program would stimulate,
rather than prejudice, sales of the puppets); Time, Inc. v. Bernard Geis Assoc., 293


120. Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013
(1978); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937).

351 (N.D. Ga. 1979) (where the dramatic movie Gone With The Wind staged as Scarlett
Fever, was found to be neither parody, satire, or criticism).
to be unreasonable depends upon the weight to be given other fac-
tors in a particular case.

Fair Use Factors Not Included in Section 107

Since the four listed fair use factors contained in section 107 are
neither exclusive nor essential to a fair use determination, factors
which are not codified expressly may be useful in determining the
fair use balance. At least some of these nonstatutory factors may be
read as actually fitting within the statutory list. Nevertheless, it is
appropriate to examine some of the most frequently mentioned reasons
for finding or refusing to find fair use that are not listed in section 107.

Perhaps the most often mentioned nonstatutory factor entering
the fair use equation is the public interest in free dissemination of
information. This factor actually reflects the underlying basis for
any fair use decision—an attempt to balance the copyright owner's
right to compensation against society's interest in immediate, as well
as long term, advancement of knowledge. In addition, this public in-
terest factor, as mentioned previously, may be interpreted as concern-
ning the purpose and character of the use (the first listed statutory
factor). Still, courts have found a use to be fair by specifically relying
upon the public interest in having the fullest information available.
On the other hand, when no discernible public interest in the
dissemination of information by the particular allegedly infringing work
is found, the fair use privilege has been denied.

Another nonstatutory factor occasionally mentioned by the courts
is good faith use. The fact that intent to infringe is not essential to
a cause of action for copyright infringement has generally precluded
the recognition of good faith as a factor in the fair use determina-
tion. Nevertheless, when the alleged infringer has used the plaintiff's work

based on the film of President Kennedy's assassination were a fair use because of
the public interest in having the fullest information available concerning that event);
Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied,
385 U.S. 1009 (1967) (public interest in obtaining information about the life of Howard
Hughes outweighed possible damage to the copyright owner).
rev'd on other grounds, 551 F.2d 484 (2d Cir. 1977) ("It can scarcely be argued here
that the enduring fame of Rudolph Valentino or the intrinsic literary and historical
merit of 'The Son of the Sheik' (whatever it may be) serves any public interest suffi-
cient to endow these defendants with the privilege of fair use.").
125. Whitol v. Crow, 309 F.2d 777 (8th Cir. 1962) (incorporating entire copyrighted
hymn into new arrangement without intent to infringe not a fair use). Contra, New
with the obvious intent of fulfilling the demand for the original\textsuperscript{126} or with the desire to save the time and effort required for independent verification of facts contained in the original (bad faith use of the work),\textsuperscript{127} the courts have found such uses to be unfair. In addition, although intent to profit by the allegedly illegal use is not essential for a finding of unfairness and is expressly handled under the first statutory factor, the defendant's willingness to give his profit to the plaintiff was considered important in at least one fair use decision.\textsuperscript{128} The good faith factor can be read as being included within the purpose and character of the use, but as pointed out above, it has been regarded as a separate criterion in some fair use decisions.

Reproduction of a copyrighted work to use it for its "intrinsic purpose" rather than for a productive purpose ordinarily precludes application of the fair use doctrine.\textsuperscript{129} Thus, when ordinary use of a work is made, such as by the video tape recording of broadcasts for future viewing, the fair use doctrine has been held inapplicable.\textsuperscript{130}

\textit{Parody as Fair Use}

Use of a copyrighted work for purposes of parody or satire involves a factual pattern which has received substantial attention by the courts. Certain crystallized rules concerning such a use have developed and serve as one illustration of the problems involved in a fair use determination when the allegedly infringing work might be characterized as a specialized form of a derivative work.

The underlying rationale for applying the fair use doctrine to parody and satire is that these genres involve criticism, recognized in section 107 as a potentially protected purpose.\textsuperscript{131} Thus, it seems that these cases would focus upon the first fair use factor—the purpose and character of the use. The decisions, however, make clear that all the statutory factors may be considered in a parody case. In an important parody decision known as the \textit{Gaslight} case,\textsuperscript{132} for ex-

\begin{itemize}
\item \textsuperscript{126} Wainwright Sec., Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir.), \textit{cert. denied}, 434 U.S. 1014 (1977) (summaries of plaintiff's financial reports were described as "chiseling for personal profit," as distinguished from "true scholarship").
\item \textsuperscript{127} Schroeder v. William Morrow & Co., 566 F.2d 3 (7th Cir. 1977) (treating directly the question of infringement of plaintiff's compilation by defendants).
\item \textsuperscript{128} Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968).
\item \textsuperscript{129} Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 970 (9th Cir. 1981), \textit{cert. granted}, 102 S. Ct. 2926 (1982).
\item \textsuperscript{130} 659 F.2d at 970.
\item \textsuperscript{132} Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), \textit{aff'd by an equally divided Court}, 356 U.S. 43 (1958).
\end{itemize}
ample, the court focused upon the substantiality of the taking in finding an unfair use. The effect of the use on the plaintiff's potential market also has been considered important.\(^{133}\)

Still, the chief focus in the parody decisions is upon the use of the genre for purposes of criticism. Thus, the significant question is whether the allegedly infringing work serves as a type of literary criticism without unduly harming the copyright owner by taking more than is needed for the legitimate purpose of such criticism. To show fair use, therefore, something more than the unelaborated invocation of the term *parody* is required.\(^{134}\) If the court determines that the allegedly infringing work is a parody (or satire or burlesque),\(^{135}\) the fair use calculus, especially the substantiality of the taking factor, may be affected.

The purpose of criticism is not served unless the allegedly infringing work actually criticizes the copyrighted work. Thus, if the defendant is seeking to parody life by using the plaintiff's copyrighted work, the defense of fair use may be denied.\(^{136}\) The criticism allowed in parody, therefore, is a form of literary criticism of the copyrighted work.

If the court finds that defendant's work is an attempt at a parody of the plaintiff's work, the question of the suitability of the use to satisfy this legitimate purpose is raised, and although a parodized or burlesqued taking should be treated no differently from any other taking,\(^{137}\) a more substantial taking ordinarily is allowed if the purpose of literary criticism is served appropriately thereby. Thus, a limited taking to bring about the recalling or conjuring up of the

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\(^{133}\) Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc., 479 F. Supp. 351 (N.D. Ga. 1979) (harm to the potential market for or value of a derivative work by the copyright owner of *Gone With the Wind* produced by defendant's musical adaptation called *Scarlett Fever*).

\(^{134}\) Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979) (rejecting defendant's contention that partial nudity of women in defendant's poster which was otherwise copied from plaintiff's was a fair use merely because defendant labeled it parody).


\(^{136}\) MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976); Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975) (defendant used the song "Mickey Mouse March" as background music to a sex scene in the movie *The Life and Times of the Happy Hooker*).

\(^{137}\) Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), aff'd by an equally divided Court, 356 U.S. 43 (1958).
original is a fair use. However, if the parodist has appropriated a greater amount of the copyrighted work than is necessary to recall or conjure up the object of his satire, the use is unfair. Fair use in this context depends, therefore, on striking a balance between the parodist's desire to create the best parody and the copyright owner's interest in protecting his expression. The balance is achieved when only so much as is necessary to conjure up the original is taken. The parody example, therefore, serves as a specific judicial use of the fair use tool to achieve copyright equilibrium.

CONCLUSION

Socially useful conduct that does not result in undue harm to the individual arguably injured by such conduct will not be prevented by the copyright laws as long as Congress and the courts respond appropriately. The most useful judicial tool for making an appropriate response is the doctrine of fair use. That doctrine, however, cannot be used in the same manner as a legislative enactment because it is too flexible to be so precise. Nevertheless, if honestly applied, it can provide quick and fair adjustments to the copyright balance. Thus the fair use doctrine can be used effectively to maintain copyright equilibrium.

139. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).
140. Id. at 758 (defendants asserted that “the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, and upon closer examination is discovered to be quite something else”).