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Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation To Unleash Developing Countries

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The Google “Library Project’s ultimate goal is to work with publishers and libraries to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers.”—Google, Inc.¹

“Eliminating the distinction between the information-rich and information-poor is . . . critical to eliminating economic and other

1. Google.com, Google Books Library Project, <http://books.google.com/googlebooks/library.html> (last visited Oct. 22, 2007).

inequalities between North and South, and to improving the life of all humanity.”—Nelson Mandela²

“Access to learning and knowledge . . . [are] key elements towards the improvement of the situation of under-privileged countries”—African Group statement to the WIPO Provisional Committee for a Development Agenda³

I. ACCESS TO KNOWLEDGE

Access to knowledge is a drama playing now on at least two distinct stages. In the United States, copyright holders are suing Google to stop the use of its digital database of words (Google Database) scanned from copyrighted works (Library Project).⁴ On the world stage, developing countries seek to obtain greater access to the literary works of the developed countries, but international copyright treaties and trade agreements so far present roadblocks.⁵ The roadblocks are not

2. ERNEST J. WILSON, III, *THE INFORMATION REVOLUTION AND DEVELOPING COUNTRIES* 1 (2004) (quoting Nelson Mandela).

3. WORLD INTELLECTUAL PROP. ORG., DRAFT REPORT OF THE PROVISIONAL COMMITTEE ON PROPOSALS RELATED TO A WIPO DEVELOPMENT AGENDA OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION 6, available at http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_4/pcda_4_3_prov_2.pdf (last visited Nov. 7, 2007) [hereinafter PCDA REPORT]. Access to knowledge is a concern of both courts and academics. The United States Court of Appeals for the Eleventh Circuit has said the “Copyright Act promotes public access to knowledge because it provides an economic incentive for authors to publish books and disseminate ideas to the public.” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001). In 2006, the Yale Information Society Project held an Access to Knowledge (A2K) conference committed “to building a broad conceptual framework of ‘Access to Knowledge’ that can foster powerful coalitions between diverse groups.” Yale Info. Soc’y Project, *Access to Knowledge Conference 2007 (A2K2)*, <http://research.yale.edu/isp/events/a2k2.html> (last visited Oct. 22, 2007). Yale’s 2007 A2K conference aimed to “further build the coalition amongst the institutions and stakeholders” from the 2006 conference. *Id.* The Consumer Project on Technology (CPT) says that A2K “takes concerns with copyright law and other regulations that affect knowledge and places them within an understandable social need and policy platform: access to knowledge goods. . . . The rich and the poor can be more equal with regard to knowledge goods than to many other areas.” Consumer Project on Tech., *Access to Knowledge Movement*, <http://www.cptech.org/a2k> (last visited Oct. 22, 2007). As the CPT indicates, A2K concerns include the effects of patent law on developing countries, but these laws are beyond the scope of this Article. For discussions of the effects of patent law on developing countries, see Debbie Collier, *Access to and Control over Plant Genetic Resources for Food and Agriculture in South and Southern Africa: How Many Wrongs Before a Right?*, 7 MINN. J.L. SCI. & TECH. 529 (2006); Food & Agric. Org. of the United Nations, *International Treaty on Plant Genetic Resources for Food and Agriculture* (June 29, 2004), available at <ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf>; United Nations, *Convention on Biological Diversity* (June 5, 1992), <http://www.cbd.int/doc/legal/cbd-un-en.pdf>.

4. Google.com, *About Google Book Search*, <http://books.google.com/googlebooks/about.html> (last visited Oct. 22, 2007).

5. See, e.g., Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763 (2003); Donald P. Harris, *Carrying a Good*

insurmountable on all issues, however, and on June 29, 2007, a committee of the World Intellectual Property Organization (WIPO) issued a report recommending using the flexibilities in intellectual property treaties to increase access to knowledge in developing countries.⁶

This Article discusses how the U.S. copyright fair use statute (1) should resolve the Google litigation and (2) could play an important role in increasing access to knowledge in developing countries.⁷ Some scholars have questioned whether the U.S. fair use doctrine conflicts with the applicable international treaties.⁸ One way to address that question

Joke Too Far: TRIPS and Treaties of Adhesion, 27 U. PA. J. INT'L ECON. L. 681 (2006); Brigitte Binkert, *Why the Current Global Intellectual Property Framework Under TRIPS Is Not Working*, 10 INTELL. PROP. L. BULL. 143 (2006); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613 (1996).

6. PCDA REPORT, *supra* note 3, at 32-36 (Annex I, including recommendations 14, 17, and 45).

7. This Article uses the term "developing countries" to include (1) countries with low levels of economic development and (2) the least developed countries that may, in fact, not be developing yet. There is no single recognized definition of a developing country. Under the World Bank's classification of countries by gross national income, a developing country corresponds to countries in the categories of low income, lower middle income, and upper middle income, and excludes only countries in the high income categories (\$10,726 or higher yearly per capita income). See World Bank, Country Classification, <http://go.worldbank.org/K2CKM78CC0> (last visited Oct. 22, 2007). Least-developed countries are those countries that have an estimated per capita income of approximately \$2 a day or less and are also designated as "least developed countries" by the United Nations (currently fifty). See World Trade Org., Membership List of Least-Developed Nations, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 22, 2007); United Nations, The Criteria for the Identification of the LDCs, <http://www.un.org/special-rep/ohrrls/ldc/ldc%20criteria.htm> (last visited Oct. 15, 2007). Under agreements administered by the World Trade Organization, developing countries and least developed countries can receive certain trade and other preferential treatment. See *infra* Part III.B; World Trade Org., Overview of Member Nations, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Oct. 22, 2007); World Trade Org., Work on Special and Differential Provisions, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Oct. 22, 2007); Wikipedia, *Developing Country*, http://en.wikipedia.org/wiki/Developing_country (as of Nov. 21, 2007, 01:46 GMT); World Trade Org., Membership List of Least-Developed Nations, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 22, 2007); World Trade Org., Overview of Member Nations, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Oct. 22, 2007). It is beyond the scope of this Article to analyze the "appropriate" income ceiling for a country to be considered a developing country.

8. Minnesota Law Professor Ruth Okediji concluded the exceptions in the Berne Convention may technically be flexible enough "to encompass the American fair use doctrine," but also pointed out that the doctrinal basis for the Berne Convention was "markedly different" than U.S. fair use, which is "an instrument of public policy designed first to allocate resources and then to redistribute those resources to facilitate the purposeful end of progress in the arts." Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 113-14 (2000). Professor Okediji suggested that American negotiators had sometimes abandoned the principle of progress of the arts, and she argued for an international fair use doctrine that "will provide negotiating boundaries for U.S. negotiators so that, fundamentally, the basis for copyright

would be to change international law, but that is a very cumbersome and impracticable process which this Article does not advocate.⁹ Instead, this Article argues that the U.S. fair use statute does not conflict with the international treaties and its use can be an important initial step to increase access to knowledge in developing countries.

Part II of this Article examines the Google litigation, reviews the development of U.S. copyright law, and shows that courts have recognized that increased access to otherwise unavailable works favors finding fair use.¹⁰ Part II argues that in spite of the duplication of complete copyrighted works to create the Google Database, the Library Project is a fair use, because the ultimate work (i.e., what the user sees after typing search requests) increases access to knowledge and is not substantially similar to the original works.

protection in the United States will remain consistent with its constitutional mandate.” *Id.* at 173-74; see also Tyler G. Newby, *What’s Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1662 (1999) (“As long as American courts are genuinely weighing the factors of section 107 of the Copyright Act, their fair use decisions should not be subject to the scrutiny of a WTO panel.”); Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 863 (2001) (“The potential challenge to U.S. [fair use] law, had the proposed language been adopted, was apparent. In the end, the proposed language was defeated, largely through the efforts of the U.S. delegation. Instead, a statement of purpose was added to the WIPO Treaties that is more hospitable to fair use in the digital environment.”).

9. Daniel J. Gervais, *Toward a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 4 (2005) (“[I]t is time to replace the existing set of copyright rights by focusing on its true policy objectives. . . . [A] new international copyright norm could be created based on the Berne Convention’s three-step test, in harmony with the U.S. fair use doctrine.”); see also Story, *supra* note 5, at 768. Story states:

Significant reform [of Berne] is extremely difficult, if not impossible: unanimity is required for amendment; compared to many other international legal instruments, the possibility of reservations is slight indeed; and the last serious attempt to reform Berne to better serve countries of the South during the 1960’s led to the near collapse of the entire global copyright system during a period labeled “a crisis in international copyright.”

Id.

10. There have been four Supreme Court decisions since the effective date of the Copyright Act of 1976 analyzing fair use: *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Stewart v. Abend*, 495 U.S. 207 (1990); and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). *Harper & Row* involved the unauthorized publication of an otherwise unpublished, but soon-to-be released commercial work for profit. See discussion of *Harper & Row*, *infra* note 103 and accompanying text. *Stewart* largely involved the question of who owned the copyright at issue and which copyright act controlled, the 1976 Act or the 1909 Act. See discussion of *Stewart*, *infra* note 103. Neither *Harper & Row* nor *Stewart* rejected increasing access as a factor favoring fair use. This Article discusses *Sony* and *Campbell* in detail. See discussion *infra* Part II.C.1-2. For a discussion of the above Supreme Court decisions, see Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 693-97 (2004).

Part III turns to the global stage, the divide between access to knowledge in developed and developing countries and the international treaties helping to maintain that divide. Part III argues that translation of copyrighted works into many of the native languages of citizens of developing countries¹¹ would be a fair use under U.S. law—and not prohibited by international law—because: (1) the translations would increase access to knowledge, and (2) publishers have exhibited no intent and taken no steps to create such translations.¹²

Part IV concludes that the United States should apply the fair use doctrine to cause the creation of native language translations for developing countries on a nonprofit basis. The United States should lead by this moral example.

11. This argument would not necessarily apply to native languages if a publisher had taken steps to produce translations for that market. Also, when referring to “native languages,” this Article excludes translations into languages that may be national languages as the result of former colonial rule, such as English, French, and Spanish. This Article does not take a position on whether copying without translation of English, French, or Spanish works on the Internet or in book format for educational purposes in developing countries would be a fair use. Such translations would present different fair use issues, due to the possibility of resale to the countries in which the works were originally published. The United Kingdom Commission on Intellectual Property Rights recommended that “[u]sers of information available on the Internet in the developing nations should be entitled to ‘fair use’ rights such as making and distributing printed copies from electronic sources in reasonable numbers for educational and research purposes.” U.K. COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 109 (Sept. 2002), http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf [hereinafter IPR COMM’N].

12. Having books printed in the native language of citizens of developing countries is only one facet of access. Actually getting those books to the people who need them, and making sure there are the educators in place to teach students to read and understand the knowledge, are separate issues beyond the scope of this Article and of copyright law. WILSON, *supra* note 2, at 300-04; IPR COMM’N, *supra* note 11, at 98 (“[F]actors such as the unpredictability of textbook purchasing by governments and donors, weak management skills in local firms, high costs for printing equipment and paper, and poor access to finance are likely to continue to act as very severe constraints in many countries for the foreseeable future.”). Yet if there is no solution to the copyright bottleneck of supply, there can be no solution to the other factors preventing meaningful access to knowledge in the developing countries. Under the acronym A2K, many persons and agencies are promoting access to knowledge worldwide. See *supra* note 3 and accompanying text; Access to Knowledge, <http://www.access2knowledge.org/cs> (last visited Oct. 22, 2007). If fair use can break the copyright bottleneck, then perhaps the A2K movement can progress more rapidly in providing needed translations than many would predict.

II. IN SPITE OF THE COPYING OF COMPLETE WORKS, THE PROVISION OF LIMITED INFORMATION FROM THE GOOGLE DATABASE MAKES THE LIBRARY PROJECT A FAIR USE

A. *The Google Library Litigation*

The litigation filed by book publishers against Google for the creation and use of the Library Project is a struggle between copyright holders' control over their works¹³ and access by third parties to those works.¹⁴ Users will be able to browse the full text of public domain materials by typing various search queries into the dialogue box for the Google Database. For books still protected by copyright, users will see "no more than two or three sentences of text surrounding the search term to help them determine whether they've found what they're looking for."¹⁵ The University of Michigan agreed to make available to Google, for Google's reproduction and limited display to the public, all the books in the University of Michigan's collection still protected by copyright law.¹⁶

13. William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Copyright protection—the right of copyright owners to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.").

14. Ruth Okediji, *Givers Takers and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 111 (2001) ("The careful balance between protecting rights of 'owners' and ensuring public benefit by facilitating access to protected works has been the framework within which the constitutional imperative to 'promote the progress of sciences and the useful arts has historically been pursued.'").

15. See Google.com, Google Book Search: News & Views, <http://books.google.com/googlebooks/newsviews/issue.html> (last visited Oct. 22, 2007). It is not clear how the Library Project will limit the displays to two or three sentences if the search terms are found on many pages of the book, but this Article assumes that the Library Project will so limit the displays.

16. Complaint at para. 28, *McGraw-Hill Cos. v. Google, Inc.*, 2005 WL 2778878 (S.D.N.Y. Oct. 19, 2005) (No. 05 CV 8881). For statements from librarians at participating libraries, see Google.com, Google Book Partners, <http://books.google.com/googlebooks/partners.html> (last visited Oct. 22, 2007). Some of the libraries participating with Google only authorized the scanning of works no longer protected by copyright, and some were not clear in statements to the public what scanning they had authorized. The Google Complaint listed five participating libraries: Harvard University, Stanford University, the University of Oxford, New York Public Library, and the University of Michigan. Google Complaint, *supra* note 16, para. 27. Presumably the libraries made clear to Google what scanning they had authorized and what scanning they had not authorized. As of October 2007, there were twelve additional participating libraries: the Bavarian State Library, Cornell University, Ghent University, Keio University, the University of Lausanne, Princeton University, the University of California, National Library of Catalonia, the University Complutense of Madrid, the University of Texas at Austin, the University of Virginia, and the University of Wisconsin-Madison. See Google.com, Google Book Search Library Partners, <http://books.google.com/googlebooks/partners.html> (last visited Oct. 22, 2007). Google also has a Book Search Partner Program, in which Google has obtained the permission of publishers/copyright holders to scan books and put a limited number of pages on the Internet with links to the publishers. Google Complaint, *supra* note 16, para. 30; Google.com, Google Books Partner Program, <https://books.google.com/support/partner/bin/answer.py?answer=17855&topic=>

On October 19, 2005, The McGraw Hill Companies, Inc. and other copyright holders (McGraw Plaintiffs) sued Google, Inc. in the United States District Court for the Southern District of New York, claiming that the implementation of the Library Project constituted copyright infringement (Google Complaint).¹⁷ Google responded that the Library Project is a fair use.¹⁸

The creation and use of the Google Database for the Library Project will involve three levels of copying. First, Google or some company acting under contract with Google has to scan all the paper books into digital format. Scanning each book will create a new copy of each book, without the affirmative consent of the copyright holder. Second, whenever a user searches the database, presumably the scanned works will be loaded into the RAM of a server or servers in order for the search engine to determine which works contain the words entered by the user.¹⁹ Loading a program and database into RAM constitutes making a copy under copyright law.²⁰ Third, the search engine will display the results of

321 (last visited Oct. 22, 2007). McGraw-Hill does not challenge the legality of the Partner Program referred to as the Print Program for Publishers (Google has since stopped referring to the Partner Program in this way).

17. Google Complaint, *supra* note 16, para. 2.

18. Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc., para. 8, *McGraw-Hill*, 2005 WL 3655631 (No. 05 CV 8881); *see also* Google.com, News and Views—Legal Analysis, <http://books.google.com/googlebooks/newsvIEWS/legal.html> (last visited Oct. 22, 2007). This Article refers to McGraw-Hill's complaint as the Google Complaint, even though on September 20, 2005, the Authors Guild and certain individual authors filed a complaint raising similar issues in the Southern District of New York. The complaint filed by the Authors Guild case was filed as a class action. Press Release, The Authors Guild, Authors Guild Sues Google, Citing "Massive Copyright Infringement" (Sept. 20, 2005), http://www.authorsguild.org/news/sues_google_citing.htm. La Martinière, a French publisher, also announced it was suing Google and its French subsidiary over the Library Project. *French Book Publisher Sues Google*, BBC News, June 7, 2006, <http://news.bbc.co.uk/1/hi/entertainment/5052912.stm>.

19. *See* SearchMobileComputing.com, What Is RAM?, http://searchmobilecomputing.techtarget.com/sDefinition/0,290660,sid40_gci214255,00.html (last visited Oct. 15, 2007) ("RAM (random access memory) is the place in a computer where the operating system, application programs, and data in current use are kept so that they can be quickly reached by the computer's processor. . . . However, the data in RAM stays there only as long as your computer is running. When you turn the computer off, RAM loses its data."); SearchNetworking.com, What Is a Server?, http://searchnetworking.techtarget.com/sDefinition/0,290660,sid7_gci212964,00.html (last visited Oct 22, 2007) ("In the client/server programming model, a server is a program that awaits and fulfills requests from client programs in the same or other computers. . . . Specific to the Web, a Web server is the computer program . . . that serves requested HTML pages or files.")

20. *See* Stenograph L.L.C. v. Bossard Assocs., Inc., 144 F.3d 96, 101 (D.C. Cir. 1998) ("[T]he loading of software from some permanent storage medium, such as a floppy disk or a computer's hard drive, to the computer's random access memory ('RAM') when the software is 'booted up' causes a copy to be made." (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993)); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995)).

the search, which constitutes a reproduction for the user of parts of the works in question.²¹

Google allows any publisher to opt out of having any of that publisher's copyrighted books scanned.²² The Google Complaint rejects this opt-out provision as unsatisfactory, stating that 17 U.S.C. § 106 "squarely put[s] the burden on Google either to obtain the permission from copyright owners to copy and make use of copyrighted books or exclude them from the Google Library Project."²³ The Google Complaint rejects Google's position that the scanning/copying is a fair use, "a necessary step to making them available for searching through www.google.com, where excerpts from the books retrieved through the search will be presented to the user."²⁴ The McGraw Plaintiffs distinguish between the Library Project and Google's general copying of Web pages for its search engines. The McGraw Plaintiffs suggest that the copying of Web pages may be justified, because "website owners have allowed their sites to be searchable via a Google (or other) search engine by not adopting one or more technological measures" that would block such copying by search engines.²⁵

The details of the Library Project are likely to change over time.²⁶ In addition, there are a variety of scanning projects by other entities that

21. Copyright holders have an exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." 17 U.S.C. § 106(5) (2000). It is not necessary for this Article to analyze whether the display by Google of the search results is a "public display" for purposes of § 106(5), because the exclusive right to reproduce or make copies in § 106(1) is not limited to public reproductions or copies. The display clearly will be a copy of some of the words in the copyrighted text, thus making it necessary to address the fair use question even in the absence of a public display. However, in *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit held that the display on the Web of cached images from Google's servers constituted a public display. 487 F.3d 701, 716-17 (9th Cir. 2007).

22. Google.com, Google Book Search Help Center, What Do I Do If I Don't Want My Book Scanned as a Part of the Library Project?, <http://books.google.com/support/bin/answer.py?answer=43786&top> (last visited Oct. 22, 2007).

23. Google Complaint, *supra* note 16, para. 33.

24. *Id.* para. 29.

25. *Id.* Among other forms of relief, the Google Complaint asked for an order enjoining "Google from, in any manner, reproducing, publicly distributing and/or publicly displaying all or any part of any publisher's copyrighted works as part of the Google Library Project, or otherwise, except upon the express prior authorization of the Publisher owning or controlling the copyrights in such works." Complaint, Prayer for Relief, para. 2, *McGraw-Hill*, 2005 WL 2778878 (No. 05 CV 8881).

26. For instance, as of the date of this writing, the number of participating libraries has increased to eighteen. *See supra* note 16 and accompanying text; Google.com, Google Book Search Library Partners, <http://books.google.com/googlebooks/partners.html> (last visited Oct. 22, 2007).

may raise similar issues or that may resolve some of the issues in the Google Complaint.²⁷ In this digital age, the copyright targets and responses will continue to move. The broad discussion of the fair use principles in this Article attempts to lay a groundwork for analyzing future projects and mechanisms to build on and transform existing content, where copyright owners will likely try to build more walls around their content and where others will push to provide the public with easier access to a wider variety of creative works.²⁸

27. Amazon.com put pages of certain books on its Web site and changed the displays in apparent response to concerns expressed by the Authors Guild. Press Release, The Authors Guild, Authors Guild and Association of American Publishers Press Amazon.com To Alter Its Marketing of Used Books, http://www.authorsguild.org/news/aap_press_amazon.htm (last visited Oct. 22, 2007); Press Release, The Authors Guild, Amazon's Blocking of Print Function Reduces Risk of Eroding Sales, http://www.authorsguild.org/news/10_03_amazon.htm (last visited Oct. 22, 2007). For an analysis of issues pertaining to Amazon's Search Inside! the Book Program, see Jonathan Kerry-Tyerman, *No Analog Analogue: Searchable Digital Archives and Amazon's Unprecedented Search Inside the Book Program as Fair Use*, 2006 STAN. TECH. L. REV. 1. The Open Content Alliance has announced it is "building a digital archive of global content for universal access," but nothing will be put into the archive without the consent of the copyright holders. Open Content Alliance, <http://www.opencontentalliance.org> (last visited Oct. 22, 2007). While the Open Content Alliance says it will be administered by a nonprofit entity, contributing members include for-profit entities such as Xerox and Yahoo!. Open Content Alliance, <http://www.opencontentalliance.org/contributors.html> (last visited Oct. 22, 2007).

28. There have been many discussions of the Google Litigation by other lawyers, law students, and lay people, but not in the context of a broad access to knowledge approach for those deprived of meaningful access to knowledge. See, e.g., Celeste Bartos Forum, *The Battle over Books: Authors and Publishers Take on the Google Print Library Project* (Nov. 17, 2005), <http://www.nyp.org/research/calendar/imagesprog/google111705.pdf>; Kevin Kelly, *Scan This Book*, N.Y. TIMES, May 14, 2006, at 42, available at <http://www.nytimes.com/2006/05/14/magazine/14publishing.html>; JONATHAN BAND, AM. LIBRARY ASS'N, OFFICE FOR INFORMATION TECHNOLOGY POLICY BRIEF, THE GOOGLE LIBRARY PROJECT: THE COPYRIGHT DEBATE (Jan. 2006), available at <http://www.ala.org/ala/washoff/oitp/googlepaprfl.pdf>; see also Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP L. REV. 761, 764, 810, 814 (2006) (arguing for "rolling back copyright terms," "statutory licenses enabling the digital lending of books at reasonable rates," and "reversing the erosion of the fair use doctrine"); Emily Anne Proskine, *Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Library Project*, 21 BERKELEY TECH. L.J. 213, 232, 238 (2006) ("It is likely that the Google Library Project could be deemed a fair use," but arguing that a "copyright law should be rewritten to focus only on preventing distribution to the public, or to a 'substantial number of persons outside of a normal circle of a family and its social acquaintances' borrowing from the language defining 'to perform or display' a work 'publicly' in the Copyright Act itself."); Elisabeth Hanratty, *Google Library: Beyond Fair Use*, 2005 DUKE L. & TECH. REV. 10, 33, 36 (2005) (concluding that the fourth fair use factor would likely "push a court's analysis order into a finding of unfair use" and suggesting the "real alternative is to re-examine and revise the copyright law itself"); Michael Goldstein, *Google's Literary Quest in Peril*, 2005 B.C. INTELL. PROP. & TECH. F. 110301, 110312 (concluding that "Google did in fact infringe on [the Guild's] exclusive reproduction rights" but that Google "has a strong argument" that the Google Library Project is a fair use). These articles do not discuss increasing access to knowledge as a separate fair use factor or translations of works into native languages of citizens of developing countries.

B. Fair Use Is a Crucial Element of the Copyright Balance

The Copyright Clause of the United States Constitution authorizes Congress to grant authors and inventors the exclusive right to “their respective Writings and Discoveries” in order “to promote the Progress of Science and Useful Arts.”²⁹ The principle behind the Copyright Clause is that the prospect of receiving these exclusive rights will provide financial incentives for individuals to create literary works, and society will benefit as a result.³⁰ Of course, society will only benefit if individuals learn from those works, and “[l]earning requires access to the work in which the ideas to be learned are embodied.”³¹ In other words, access to literary works is a necessary condition for science and the useful arts to progress.³²

29. U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have 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.”). Article 1, section 8, clause 1, of the United States Constitution also authorizes the adoption of patent laws, but since this Article only discusses copyrights, this Article refers to the clause as the Copyright Clause, as the United States Supreme Court has referred to it. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.”). Contrary to what now might be the ordinary interpretation of the words, there is authority for the proposition that “science” refers to general knowledge and that “useful arts” refers to inventions subject to patents. MELVILLE NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 1.03 n.11.2 (2006); Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: *The Copyright Clause and Congress’s Power To Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 7-8 (2002) (citing *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5-6 (1966)). In *Graham*, the Supreme Court indicated that the issuance of patents was “limited to the promotion of advances in the ‘useful arts,’” implying that promoting science was the authority for copyright legislation. 383 U.S. at 5. However, in *Quality King Distributors v. L’Anza Research International, Inc.*, the Court said that the principal purpose of the copyright statutes “was to promote the progress of the useful arts.” 523 U.S. 135, 151 (1998). To the extent that “useful arts” instead of science is the authority for copyright legislation, courts have interpreted those words so that “*useful* has no meaningful operative effect.” 1 NIMMER & NIMMER, *supra*, § 1.03[B].

30. The Supreme Court has said progress of the science and arts, rather than economic reward, is the primary goal of the Copyright Clause. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“[C]opyright law, like the patent statutes, makes reward to the owner a secondary consideration.” (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948))). In *Twentieth Century Music Corp. v. Aiken*, the Supreme Court stated, “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” 422 U.S. 151, 156 (1975). However, in *Eldred*, the Court seemed to balance economic incentives and public purpose, saying the “two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.” 537 U.S. at 186 n.18.

31. L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 5 (1987).

32. Hamilton, *supra* note 5, at 621 (“Information and access are important to free speech values recognized by the U.S. Constitution’s First Amendment and the International Bill of Human Rights. . . . [A] failure of information access . . . leads to ignorance and the consequent decay of the democratic propensities of the state.”).

Courts and scholars have acknowledged this connection between access and copyright. In *Fogerty v. Fantasy, Inc.*, the United States Supreme Court said that “copyright law ultimately serves the purpose of enriching the general public through access.”³³ The United States Court of Appeals for the Eleventh Circuit said that the “Copyright Act promotes public access to knowledge because it provides an economic incentive for authors to publish books and disseminate ideas to the public.”³⁴ United States Court of Appeals for the Seventh Circuit Judge Richard Posner has written, “Striking the balance between access and incentives is the central problem in copyright law.”³⁵

The Copyright Clause, however, neither grants to, nor recognizes any rights in, authors.³⁶ The Copyright Clause instead is a grant of power to and a limitation on the power of Congress.³⁷ Because all works borrow from prior works to some degree,³⁸ “beyond some level, copyright

33. 510 U.S. 517, 527 (1994). The Court added that because of that purpose of “enriching the general public through access” to literary works, “it is particularly important that the boundaries of copyright law be demarcated as clearly as possible.” *Id.* The holding in *Fogerty* was that prevailing plaintiffs and defendants must be treated the same in evaluating whether to award attorney’s fees in copyright infringement claims, and that an award of attorney’s fees to the prevailing party was up to the discretion of the Court. *Id.* at 534.

34. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

35. Landes & Posner, *supra* note 13, at 326; see also JESSICA LITMAN, *DIGITAL COPYRIGHT 175* (2001) (“We can begin with the assertion that the public is entitled to expect access to the works copyright inspires.”).

36. *Wheaton v. Peters*, 33 U.S. 591, 661 (1834) (“That congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c ‘shall have the sole right and liberty of printing,’ &c. Now, if this exclusive right existed at common law, and congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted. . . . Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it.”).

37. *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5 (1966). There are different analytical models of copyright law. See, e.g., Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1293 (2003) (“Copyright law finds its basis in one of two discrete philosophies: the natural rights inherent in the law or the economic rights recognized by statute.”). In *Cable News Network, Inc. v. Video Monitoring Services of America, Inc.*, the Eleventh Circuit stated, “Copyright simultaneously has two aspects, one proprietary and the other regulatory.” 940 F.2d 1471, 1478 (11th Cir. 1991) (citing *Patterson*, *supra* note 31, at 5). Under any model, access is an important issue to consider. See Garon, *supra* note 37, at 1310 (“As Landes and Posner have stated, ‘[s]triking the correct balance between access and incentives is the central problem in copyright law.’” (quoting Landes & Posner, *supra* note 13, at 326)).

38. *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (“In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”). In the first sentence of the preface to his treatise, Stanford Law Professor Goldstein says, “All creative works build on

protection may actually be counterproductive by raising the cost of expression.”³⁹ Conversely, decreased copyright protection will not necessarily harm the copyright holder. For instance, “suppose that people who copy an operating system are mainly people who could not afford to, and would not, buy the operating system from the producer—maybe they live in the third world. . . . [T]he producer is not actually losing any sales as a result of this unauthorized copying.”⁴⁰ In short, copyright protection that is too strong can limit the creation of literary works, and weaker copyright protection may increase the use and access to of copyrighted works without harming the copyright holder.

The copyright protection balance chosen by the United States changed dramatically over time. For most of the nineteenth century, when the United States had much less literary content, U.S. law did not provide copyright protection for foreign authors of literary works.⁴¹ That allowed the United States to take the content of other countries.⁴²

the works and traditions that preceded them.” 1 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT*, at clix (2005).

39. Landes & Posner, *supra* note 13, at 332 (“The less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work. . . . The effect [of maximum copyright protection] would be to raise the cost of creating new works—the cost of expression, broadly defined—and thus paradoxically, perhaps lower the number of works created.”).

40. Richard A. Posner, *Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173, 179 (2005).

41. IPR COMM’N, *supra* note 11, at 98, 101 (“[D]uring the 19th century the U.S. sought to aid the development of its domestic publishing industry by not recognizing the rights of foreign copyright holders. . . . The U.S. . . . justified its persistent refusal to grant copyright protection to foreign authors on the grounds that this was a necessity to meet the nation’s needs for knowledge and enlightenment.”); 8 NIMMER & NIMMER, *supra* note 29, app. 7-41 (“[T]he author and authors of any map, chart, book, or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or resident therein . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years. . . .” (quoting Copyright Act of 1790 § 1)). In other words, citizens of a country other than the United States who resided in the United States could obtain a U.S. copyright, but if a foreign citizen did not reside in the United States, he could not obtain a U.S. copyright. Similarly, the U.S. Copyright Act of 1873 provided at section 4952:

Any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut print, or photograph or negative thereof, or of a painting drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts . . . shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same. . . .

Id. app. 7-74. In 1891, Congress passed the “International Copyright Act” that in theory allowed foreigners to obtain U.S. copyrights. *Id.* app. 7-82. However, section 4956 provided, in part:

U.S. copyright law now provides more protection for copyright holders than ever in its history.⁴³ In 1790, Congress only protected maps, charts, and books, but subsequently Congress protected photographs (in 1865), motion pictures (in 1912), sound recordings (in 1971), and computer programs (by 1980).⁴⁴ Among other things, the “law of copyright has developed in response to significant changes in technology.”⁴⁵ Congress has also made it easier to obtain federal copyrights for, and has increased the protections afforded to, covered works of authorship.⁴⁶ For instance, Congress gave copyright holders the

No person shall be entitled to a copyright unless he shall, . . . not later than the date of the publication thereof in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, . . . two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same: *Provided*, That in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom.

Id. app. 7-83.

42. William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 Hous. L. Rev. 749, 750 (2003) (“From 1791 until 1891, there was no federal protection available to works of foreign authors first published outside the United States, a situation that led the United States to be described as the ‘Barbary coast of literature,’ and its citizens as ‘buccaneers of books.’” (quoting S. REP. NO. 50-622, at 2 (1888))).

43. See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 127 (1999) (“We are . . . entering a time when copyright is more protected than at any time since Gutenberg.”); LAWRENCE LESSIG, THE FUTURE OF IDEAS 110 (2001) (“More content is controlled by law today than ever in our past.”); LITMAN, *supra* note 35, at 14 (“Copyright is now seen as a tool for copyright owners to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner’s control.”); Mark A. Lemley, *Property, Intellectual Property, and Free-Riding*, 83 TEX. L. REV. 1031, 1032 (2005) (“[A] legal regime for intellectual property . . . increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seek out and punish virtually any use of an intellectual property right by another.”); Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1274-75 (2003) (discussing the enclosure movement).

44. See *Mazer v. Stein*, 347 U.S. 201, 208-14 (1954); Patterson, *supra* note 31, at 48-53; 1 NIMMER & NIMMER, *supra* note 29, at 1-15; 8 NIMMER & NIMMER, *supra* note 29, app. 7-41. Whether copyright law protected computer programs before or immediately after the Copyright Act of 1976, it became clear with the addition of a definition of “computer program” in 17 U.S.C. § 101 (1980) as the result of the passage in 1980 of Public Law 96-517, 94 Stat. 3015, that copyright law protected computer programs. RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 1:9 (West 2002); H. REP. NO. 96-517, at 23 (1980), as reprinted in 1980 U.S.C.C.A.N. 5659, 6482.

45. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).

46. 17 U.S.C. § 102(a) now provides protection for eight categories of works:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed,

exclusive right to create derivative works in the Copyright Act of 1909.⁴⁷ As of January 1, 1978, authors for the first time could have federal copyrights in unpublished works.⁴⁸ After March 1, 1989, authors in the United States no longer had to put copyright notices on their works in order to gain federal copyright protection.⁴⁹ Also, from an initial copyright term of fourteen years in 1790, renewable once for a second fourteen-year term, Congress has now extended the general copyright term on new literary works to the life of the author plus seventy years.⁵⁰

U.S. copyright law also now gives copyright holders more tools to fight access to their digital content by third parties, as a result of the passage in 1998 of the Digital Millennium Copyright Act (DMCA).⁵¹ Among other things, the DMCA provides “[n]o person shall manufacture . . . or otherwise traffic in any technology . . . [that] is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”⁵²

from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and other choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

17 U.S.C. § 102(a) (2000).

47. Section 1 of that Act gave authors the exclusive right, among other things, “to translate the copyrighted work into other languages or dialects, or to make any other version thereof, if it be a literary work.” 8 NIMMER & NIMMER, *supra* note 29, app. 6-3. This enactment effectively rejected the nineteenth-century decision in *Stowe v. Thomas* that held translating a book did not constitute copyright infringement. 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (“A bona fide abridgment of a book is not an infringement of copyright. . . . 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.”); 2 GOLDSTEIN, *supra* note 38, § 7.3 nn.1-3.

48. 1 NIMMER & NIMMER, *supra* note 29, § 5.01[A].

49. *Id.* § 7.01[A].

50. *Id.* § 9.01.

51. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 674 (2000) (“In late 1998, the Congress enacted its most sweeping revisions ever to the Copyright Act of 1976.”); COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 2* (2000) (“[I]nformation in digital form . . . has arrived accompanied by contradictory powers and promises. . . . [I]t promises more—more quantity, quality, and access—while imperiling one means of rewarding those who create and publish. It is at once a remarkably powerful medium for publishing and distributing information, and the world’s largest reproduction facility.”). The Committee on Intellectual Property Rights addressed the issue of access throughout the work and said the “Constitution provides for intellectual property protection with the pragmatic goal of promoting the public interest in access to knowledge and innovation.” COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, *supra*, at 97.

52. 17 U.S.C. § 1201(a)(2) (2000). Other sections say the DMCA shall not affect fair use and provide limited exemptions for reverse engineering. *Id.* The DMCA has been the subject of

In spite of the increases in rights and remedies of copyright holders, the U.S. copyright scheme still does not protect all parts of a copyrighted work⁵³ or give authors the right to control all uses of their copyrighted works.⁵⁴ For example, although denominated exclusive, the six rights⁵⁵ do not prevent a purchaser of a book from reading that book multiple

much scholarly comment and criticism. See, e.g., Nimmer, *supra* note 51, at 739-40 (“The tension between property rights and user-access rights . . . has been a ceaseless part of the millennium now ending. . . . The user safeguards [in the DMCA] so proudly heralded as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals.”); LITMAN, *supra* note 35, at 144-45 (“There is no overarching vision of the public interest animating the Digital Millennium Copyright Act.”); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 557 (1999) (“Unless the anti-device provisions of the DMCA are modified, either by narrow judicial interpretation or by legislative amendments, they are likely to have harmful effects on competition and innovation in the high technology sector.”); Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 45 (2000) (“The tools the DMCA and copyright case law give copyright owners to confront copyright use on the Internet should be employed to promote broad distribution of works of authorship at reasonable, and variable prices. If copyright owners instead wield those tools to enhance control without facilitating dissemination, we can expect to see courts expand the zones of excused uses, whether or not the uses are doctrinally persuasive.”). While the provisions of the DMCA are not directly applicable to the specific analysis of the Google Litigation, the concern over preserving a balance between the interests of copyright holders and potential users expressed in the articles mentioned in this note is relevant to the issue of access discussed in this Article.

53. See also *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected.”). In fact the Copyright Act does not define “work.” See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005).

54. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (applying the Copyright Act of 1976 and stating copyright “protection has never accorded the copyright owner complete control over all possible uses of his work”); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-94 (1968) (discussing the Copyright Act of 1909).

55. 17 U.S.C. § 106 provides:

[T]he 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; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106. University of Michigan Law Professor Jessica Litman argues:

If we construe the language of § 106 to reflect the distinction between copyright owner exploitation and reader, listener, and viewer liberties, then it becomes clear that many personal uses should not be deemed reproductions, adaptations, or public distributions, performances or displays within the meaning of the statute.

Jessica Litman, *Lawful Personal Use*, 85 *TEX. L. REV.* 1871, 1918 (2007).

times.⁵⁶ Also, copyright law does not prevent someone from copying ideas, procedures, processes, systems or methods of operations reflected in a work,⁵⁷ or from making “fair use” of copyrighted works.⁵⁸ Fair use originated as an equitable doctrine⁵⁹ allowing certain uses of literary

56. 1 NIMMER & NIMMER, *supra* note 29, § 2.18[A] (“[O]nce a book or sound recording is purchased by a member of the public, the copyright owner may not control the number of times the buyer reads the book or listens to the recording.”). Also, if someone purchases a book, that purchaser can subsequently sell, give, or loan that book to any other person, without asking for the permission of the copyright holder. See, e.g., 17 U.S.C. § 109(a) (“Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. . . .”). However, the purchaser generally cannot copy the book without obtaining the permission of the copyright holder, because under § 106(1) copying/reproduction is one of the exclusive rights of a copyright holder.

57. 17 U.S.C. § 102(b) provides: “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.” In *Lexmark International, Inc. v. Static Control Components, Inc.*, the United States Court of Appeals for the Sixth Circuit said that § 102(b) “embodies the common-law idea-expression dichotomy that distinguishes the spheres of copyright and patent law.” 387 F.3d 522, 534 (6th Cir. 2004). Berkeley Law Professor Pamela Samuelson argues that § 102(b) reflects more than the idea/expression dichotomy and that

all eight words of exclusion . . . were put in the statute for a sound reason, and that those who read the other seven words out of the statute are mistaken. To be more consistent with § 102(b), courts would be well-advised to speak of the “protectable/unprotectable distinction” in copyright law.

Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921, 1923 (2007). The “other seven words” Professor Samuelson refers to are (1) procedure, (2) process, (3) system, (4) method of operation, (5) concept, (6) principle, and (7) discovery. *Id.* at 1921-24. This Article does not address what Professor Samuelson examines—the scope of the § 102(b) exclusion. In a decision on remand from the Sixth Circuit, the district court granted summary judgment for Static Control Components on Lexmark’s copyright infringement claim, holding that “Lexmark’s Toner Loading Programs are not sufficiently original to be copyrighted and SCC’s copying of Lexmark’s Toner Loading Program was fair use.” *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, Nos. Civ.A. 02-571, Civ.A. 04-84, 2007 WL 1485770, at *6 (E.D. Ky. Apr. 18, 2007).

58. See 17 U.S.C. § 107; *Sony*, 464 U.S. at 433 (“Any individual may reproduce a copyrighted work for a ‘fair use;’ the copyright owner does not possess the exclusive right to such a use.”). Fair use of a copyrighted work by a third party is not copyright infringement, whether fair use is characterized as a right, an affirmative defense, or a privilege. See *Bateman v. Mnemonics*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (“Although the traditional approach is to view ‘fair use’ as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.”).

59. *Sony*, 464 U.S. at 448 n.31 (referring to fair use as an “equitable rule of reason”); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 n.3 (1985).

works that copyright law would otherwise have prohibited, if prohibiting such uses “would stifle the very creativity which that law is designed to foster.”⁶⁰

The U.S. fair use statute, which provides that “the fair use of a copyrighted work . . . is not an infringement of copyright,” is an essential part of the copyright balance.⁶¹ The Supreme Court has explained, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, [t]o promote the Progress of Science and useful Arts.”⁶² The Eleventh Circuit recognized the important balancing role of fair use when it said that the “fair use right was codified to maintain the constitutionally mandated balance to ensure that the public has access to knowledge.”⁶³ Discussing fair use, Minnesota Law Professor Okediji stated, “The careful balance between protecting rights of ‘owners’ and ensuring public benefit by facilitating access to protected works has been the framework within which the constitutional imperative to ‘promote the progress of sciences and the useful arts’ has historically been pursued.”⁶⁴

What constitutes fair use is “one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all

60. *Harper & Row*, 471 U.S. at 550 n.3 (quoting *Iowa State Univ. Research Found. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)). In the first U.S. case recognized as applying the fair use doctrine, Justice Story said, “[W]e must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass 1841). In *Folsom*, the court said that a “fair and bona fide abridgement” did not constitute infringement. *Id.* at 345. The court added that for there to be such an abridgement, “there must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; not merely the facile use of scissors; or extracts of the essential parts, constituting the chief value of the original work.” *Id.*; see also 2 GOLDSTEIN, *supra* note 38, § 12.1 n.5.

61. See *supra* note 57 and accompanying text; 17 U.S.C. § 107 (“Notwithstanding the provisions of sections 106 and 106A, 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.”); Newby, *supra* note 8, at 1637 (“Courts and commentators have seen the [fair use] exception as a ‘safety valve’ that is an essential part of maintaining a proper balance between encouraging creative endeavors by giving authors quasi-monopolistic control over their works and providing broad, public access to these works.”). The “mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994). *Campbell* involved a parody of Roy Orbison’s song, “Oh, Pretty Woman.” *Id.*

62. *Campbell*, 510 U.S. at 575.

63. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001).

64. Okediji, *supra* note 14, at 111.

cases.”⁶⁵ The fair use statute lists four factors courts must consider in determining whether a particular use of a work is a fair use: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion of the work used, and (4) effect on the use of the new work on the potential market for the copyrighted work.⁶⁶ The four listed factors are “illustrative,” not definitive, “[n]or may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”⁶⁷ Scholars have suggested a variety of approaches to the application of fair use,⁶⁸ but the courts have applied fair use on a case-by-case basis, making predictability extremely difficult.⁶⁹

Legal scholars have explained the rationale for an expansive application of fair use. Harvard Law Professor Weinreb said that “copyright is itself set in a social context, and more general considerations of fairness may come into play” than just the four fair use factors.⁷⁰ Minnesota Law Professor Okediji said that “as owners’ rights are expanded to respond to the ease with which digital technology

65. *Folsom*, 9 F. Cas. at 344. In his dissent in *Sony*, Justice Blackmun said the “doctrine of fair use has been called with some justification, ‘the most troublesome in the whole law of copyright.’” 464 U.S. at 475.

66. 17 U.S.C. § 107.

67. *Campbell*, 510 U.S. at 577-78.

68. See, e.g., Wendy J. Gordon, *Fair Use as Market Failure, Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (“Where (1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner’s incentives would not be substantially impaired by allowing the user to proceed, courts have in the past considered, and should in the future consider, defendant’s use ‘fair.’”); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1664, 1744 (1988) (proposing as alternatives, “redesigning the fair use with a view to maximizing efficiency in the use of resources” or “advanc[ing] a substantive conception of a just and attractive intellectual culture”); Okediji, *supra* note 14, at 113 (“I would eliminate the traditional fourth factor, the effect of the use on the potential market or value of the copyrighted work, as an element of fair use and instead apply it as one of the measurement of damages.”). This Article does not propose elimination of the fourth fair use factor, but argues that whether the prospective plaintiff might theoretically license the desired use should not be a factor in the fair use balance of the dispute with the defendant. See *infra* Part III.D.

69. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (“[T]he courts must be free to adopt the doctrine [of fair use] to particular situations on a case by case basis.”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (“[F]air use analysis must always be tailored to the individual case.”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ([F]air use “calls for case-by-case analysis.”).

70. See Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152 (1990) (“Fairness is a particularly open concept, on which almost any of the facts in a concrete situation may have a bearing. . . . The statutory factors . . . are central to the question of fair use. But copyright is itself set in a social context, and more general considerations of fairness may come into play.”).

enables large scale infringement, users' rights should, correspondingly, be reconceived to reflect the variety of ways the Internet facilitates—indeed encourages—production, access and use of copyrighted content.”⁷¹ Michigan Law Professor Litman said that the “public is entitled to expect access to the works that copyright inspires.”⁷² Yale Law Professor Benkler said, “[I]t is central to our democratic processes that we secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”⁷³

Copyright and fair use reflect a regulatory scheme, in other words, not indivisible property rights or “natural rights” uniformly enforceable against all parties.⁷⁴ Indeed, the Supreme Court and Congress have recognized that courts are free to adopt the doctrine of fair use to particular situations on a case-by-case basis.⁷⁵ As discussed next, the

71. Okediji, *supra* note 14, at 113. At the time of publication, Professor Okediji was a professor at the University of Oklahoma. Professor Okediji concluded, “Fair use offers welfare maximizing efficiencies in the allocation of the most important resource of the global economy, namely, information.” *Id.* at 182.

72. LITMAN, *supra* note 35, at 175.

73. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U.L.R. 354, 358 (1999) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). At the time of publication of *Free as the Air to Common Use*, Professor Benkler was a professor at New York University Law School.

74. Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49, 116 (1993) (“The strict property-rights view of copyright for which Universal argued in *Sony* was rejected by the Court, which instead seemed to view copyright law as more of a regulatory regime aimed at achieving a balance among the interests of copyright owners, the consuming public and other commercial participants in the marketplace, such that the rights granted to authors under the statute should be construed as reaching no further than Congress has intended to achieve this balance.”). Even to the extent one considers copyright a type of property, it is significantly different from physical property. Posner, *supra* note 40, at 174-75 (“[I]ntellectual property rights tend to be limited in duration. . . . There are also significant scope limitations in intellectual property rights. . . . Fair use allows some appropriation of intellectual property without the permission of the owner—unlicensed copying that is nevertheless lawful. In these three respects intellectual property is really quite different from physical property.”); see also Garon, *supra* note 37, at 1306-07 (“The power to create a balance between the author and the public may be the most significant philosophical distinction between a natural rights theory of copyright and an economic rationale. Under the natural rights theory the power over one’s writing is a ‘sacred’ liberty that cannot be for the public good, whereas the economic rationale allows for a balancing between the interests of the public in accessing the good and the right of the author to receive an economic reward.”). Whether considered regulatory or property law, “[s]triking the correct balance between access and incentives is the central problem in copyright law.” Landes & Posner, *supra* note 13, at 326.

75. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984) (“[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.” (quoting H.R. REP. NO. 94-1476, at 65-66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5680)). The full statement of Congress quoted by the *Sony* court reads:

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

Supreme Court has also recognized that a factor not specifically mentioned in the fair use statute, increasing the public's access to literary works, is a factor favoring fair use.

C. Increasing Access Favors Fair Use

1. *Sony*: Time-Shifting Is a Fair Use

Increasing access to literary works favors a finding of fair use. This is a principle stated by the Supreme Court in its first fair use decision after the effective date of the Copyright Act of 1976, *Sony Corp. of America v. Universal City Studios, Inc.*⁷⁶ The case involved the use of Sony videotape recorders by consumers to record free television broadcasts for subsequent playing in their homes.⁷⁷ Universal argued that Sony was liable for contributory copyright infringement.⁷⁸ After trial the district court denied Universal any relief, but the United States Court of Appeals for the Ninth Circuit concluded Sony was liable for contributory infringement and reversed the district court.⁷⁹ In a 5-4 decision,⁸⁰ the

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. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. REP. NO. 94-1476, at 65-66, *as reprinted in* 1976 U.S.C.A.N.N. 5659, 5959.

76. 464 U.S. at 429.

77. *Id.* at 420.

78. *Id.* The courts have held that defendants can be liable for copyright infringement committed by third parties, even though the Copyright Act does not create such a cause of action. *Id.* at 434-35. A defendant can be liable for copyright infringement of a third party under the doctrine of contributory infringement if the defendant (1) had actual or constructive knowledge of the infringing activity and (2) induced, caused, or materially contributed to the infringing conduct of the third party. *MGM Studios v. Grokster, Ltd.*, 545 U.S. 913 (2006); *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1019 (9th Cir. 2001); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670 (JBS), 2006 WL 842883, at *13 (D.N.J. Mar. 31, 2006). A defendant can be liable for the copyright infringement of a third party under the doctrine of vicarious liability if the defendant (1) supervised or controlled the party or premises on which the infringement occurs and (2) received a direct financial benefit from the third party's infringing activities. *Napster*, 239 F.3d at 1022; *Arista*, 2006 WL 842883, at *9. For a critique of liability for persons who in some way facilitate infringement, see Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004).

79. In the decision leading ultimately to the *Sony* Supreme Court decision, the district court said, "Harm which 'imperils the existence of a publication' is more destructive of a fair use defense than is harm which would 'limit profits.'" *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 452 (C.D. Cal. 1979). The court also said that "[c]opyright law . . . does not protect authors from change or new considerations in the marketing of their products." *Id.* The Ninth Circuit reversed the district court, concluding that "when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1982). The Ninth Circuit exhibited concern about change when it said that "[n]ew

Supreme Court reversed the Ninth Circuit and held that even if Sony's Betamax users had infringed the copyrights of the studios by taping the broadcasts, there could be no contributory infringement because the Betamax equipment that Sony manufactured had substantial noninfringing uses.⁸¹

The Court also directly addressed whether unauthorized home time-shifting by the consumer was a fair use. The majority referred to the fair use doctrine as an equitable rule of reason for which "no generally applicable definition is possible" and discussed the four fair use factors listed in 17 U.S.C. § 107.⁸² The majority concluded that "the unauthorized home time-shifting of respondents' programs is legitimate fair use."⁸³

The Court considered the first factor, the commercial or nonprofit character of the activity, by focusing not on Sony's purpose in making the Betamax equipment, but on the use of the Betamax equipment by

technology, which makes possible the mass reproduction of copyrighted material (effectively taking control of access from author), places a strain upon the fair use doctrine." *Id.* at 971.

80. Justice Stevens delivered the opinion for the majority of Chief Justice Burger and Justices Stevens, Brennan, White, and O'Connor. Justice Blackmun filed the dissenting opinion and was joined by Justices Marshall, Powell, and Rehnquist.

81. 464 U.S. at 456. For instance, Fred Rogers (of the public television program *Mt. Rogers' Neighborhood*) testified that "he had absolutely no objection to home taping for noncommercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times." *Id.* at 445. This was one example of the authorized uses of the Betamax. The Court held that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is likely used for legitimate unobjectionable purposes." *Id.* at 442. The Court also found in *Sony* that Sony had done nothing to encourage infringing uses (other than making the product). *Id.* at 438-39. In *Grokster*, the Supreme Court unanimously held "that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." 545 U.S. at 918. This "inducement theory" of contributory infringement applied even if "the product [was] capable of both lawful and unlawful use." *Id.* The decision in *Grokster* is not inconsistent with the decision in *Sony*. In *Sony*, the majority said the "seller of the equipment that expands those [TV] producers' audience cannot be a contributory infringer if, as is true in this case, it has had no direct involvement with any infringing activity." 464 U.S. at 446-47. In *Grokster*, the Court concluded *Grokster* had direct involvement with the infringement. 545 U.S. at 941.

82. *Sony*, 464 U.S. at 448-50. It may strike some as ironic that years later, Sony Computer Entertainment, Inc. sued Connectix Corp. for copyright infringement for reverse engineering (and thus temporarily copying) Sony's BIOS software to develop software that would allow a user to play Sony video game cartridges on computers rather than Sony game consoles. See *Sony Entm't Inc. v. Connectix Corp.*, 48 F. Supp. 2d 1212 (N.D. Cal. 1999), *rev'd*, 203 F.3d 596 (9th Cir. 2000). The district court preliminarily enjoined Connectix, but the Ninth Circuit reversed, concluding that Connectix's copying was fair use. *Id.*; see discussion of Ninth Circuit's *Connectix* decision *infra* Part III.B.4.

83. 464 U.S. at 442.

consumers.⁸⁴ There had been no evidence introduced in the litigation that the persons making tapes transferred them to other persons, that home recorded tapes were subsequently used for public performances, or that persons copied programs transmitted on pay or cable television systems.⁸⁵ Nevertheless, the studios argued that Betamax users were engaged in commercial uses, because home taping would mean those users would not buy tapes of those programs sold by the copyright holder.⁸⁶ The Court rejected that argument, concluding “the live viewer is no more likely to buy prerecorded videotapes than is the timeshifter.”⁸⁷

The Court only referred to the second and third fair use factors in passing.⁸⁸ The Court said that since “time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its ordinary affect [sic] of militating against the finding of fair use.”⁸⁹

The Court gave primary attention to the fourth factor and concluded, “a use that has no *demonstrable effect* upon the potential market for, or the value of, the copyrighted work need not be prohibited

84. *Id.* at 425, 448-51. It does not follow from *Sony* that the courts should always look at the use of products by consumers. In *Sony*, the claim was that the consumer directly infringed and that *Sony* contributed to that infringement. The Court in *Sony* had to consider whether the uses of the consumer infringed, because there could be no contributory infringement by *Sony* if there was no direct infringement. In the Google Litigation, the McGraw plaintiffs argue that Google is directly infringing their copyrights. See Google Complaint, *supra* note 16, paras. 39-40.

85. 464 U.S. at 425.

86. *Id.* at 450 n.33.

87. *Id.* The Court cited no evidence for this conclusion. Laurence Tribe, in testimony before Congress in 1982, argued that since a theft of jewels was consumptive even if the jewels were only worn rather than sold by the thief, making a Betamax copy of a television show was also consumptive, even if the copy was not sold. *Id.* The majority rejected Tribe’s analogy, reasoning that a theft of jewels would deprive the jewel owner of the right to sell those jewels to any individual, but “[t]imeshifting does not even remotely entail comparable consequences to the copyright owner.” *Id.* In dissent, Justice Blackmun said one issue was time-shifting, and a “second is ‘library-building,’ in which the user records a program in order to keep it for repeated viewing over a long term.” *Id.* at 458-59 (Blackmun, J., dissenting). For discussions of the limited importance after *Sony* of the “commercial use” issue as part of the first fair use factor, see *infra* notes 108, 111 and accompanying text; 4 NIMMER & NIMMER, *supra* note 29, § 13.05[A][1][c]; 2 GOLDSTEIN, *supra* note 38, § 12.2.2 (“On principle, it is far from clear that the commercial-noncommercial distinction should receive any weight at all, except perhaps as a court subsidy to worthy nonprofit enterprises such as schools and universities.”).

88. 464 U.S. at 449-50.

89. *Id.* Professor Samuelson wrote that Justice Stevens’s decision reflects the view of “copyright as a limited monopoly right” in contrast to Justice Blackmun’s dissenting view of copyright as an “exclusive property right.” Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1849 (2006).

in order to protect the author's incentive to create."⁹⁰ The Court added that there must be a "*showing* by a preponderance of the evidence that some *meaningful likelihood of future harm* exists."⁹¹ In other words, it is not sufficient to simply argue that there is an adverse economic effect because a use could in theory become widespread. The plaintiff must present *proof* that adverse effect on the copyright holder's market resulting from the copying is a realistic possibility.⁹²

In addition to the four statutory factors, the Court said that increasing access was a factor that favored a finding of fair use. The Court noted the district court found that time-shifting "served the public interest in increasing access to television programming, an interest that 'is consistent with the First Amendment policy of providing the fullest possible access to information through the public airways.'"⁹³ The Court added that the conclusions of the district court were "buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits."⁹⁴ The Court said this public benefit supported an interpretation of "fair use that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law."⁹⁵

90. 464 U.S. at 450 (emphasis added).

91. *Id.* at 451 (emphasis added). The dissent took a different position on economic harm by stating:

[A]t least when the proposed use is an unproductive one, a copyright owner need prove only a potential for harm to the market for or the value of the copyrighted work. . . . Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative. . . .

Id. at 482.

92. Professor Samuelson says that "perhaps the most important impacts of *Sony* have been in mitigating the significance of 'non-transformative copying of whole works made routinely in today's digital network environments.'" Samuelson, *supra* note 89, at 1875.

93. 464 U.S. at 425 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 454 (D.C. Cal. 1979) (quoting *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) (emphasis added))). The Ninth Circuit in *Universal City Studios, Inc. v. Sony Corp. of America* discounted access in the fair use calculation, noting that "the statute does not list 'convenience' or 'entertainment' or 'increased access' as purposes within the general scope of fair use." 659 F.2d 963, 970 (9th Cir. 1982). This statement was referring to the examples of "criticism, comment, news reporting, teaching . . . , scholarship, or research" provided in the first sentence of § 107 as purposes that may constitute fair use. 17 U.S.C § 107 (2000).

94. *Sony*, 464 U.S. at 454 (emphasis added).

95. *Id.* Citing *Sony*, Professor Fisher said, "The fair use doctrine enables the judiciary to permit unauthorized uses of copyrighted works in particular situations when doing so will result in wider dissemination of those works without seriously eroding the incentives for artistic and intellectual innovation." Fisher, *supra* note 68, at 1687.

The Supreme Court distinguished between increased access and personal convenience. The Court said that “access is not just a matter of convenience, as plaintiffs have suggested. Access has been limited not simply by inconvenience but by the basic need to work.”⁹⁶

The dissent in *Sony* did not reject increased access as a factor favoring fair use in all situations. The dissent instead said that an extension of “fair use so as to permit unfettered use of this new technology in order to increase access” risked “eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.”⁹⁷ Yet the dissent also said one of the two risks in the copyright balance was “that granting authors a copyright monopoly will reduce the creative ability of others.”⁹⁸ The dissent concluded that “[w]hen the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so.”⁹⁹ In other words, it appears the dissent believed that if increased access benefited the public, such increased access would favor fair use. As did the majority, the dissenting justices discussed access as a separate factor in determining the fair use balance, not as one of the four factors listed in the statute.¹⁰⁰

Since a consumer can now buy from the applicable copyright holder a DVD of episodes of a television series, would the Supreme Court today conclude that the home taping of television shows for future home use constituted a fair use? The decision should remain that home taping is a

96. 464 U.S. at 425 n.8 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 454 (1979)). Professor Litman suggests *Sony* is an acknowledgment that the exclusive right to control reproductions in § 106(1) does not cover certain reproductions for personal use. Litman, *supra* note 55, at 1897.

97. 464 U.S. at 480-81 (Blackmun, Marshall, Powell & Rehnquist, JJ., dissenting). The dissent also said, “Copyright gives the author a right to limit or even to cut off access to his work.” *Id.* at 480. While that is true for unpublished works, fair use is a limitation on the rights of authors. In other words, the right to prevent access is subject to the fact that the copyright holder does not have the right to control all uses of their work, including the right to fair use. *Id.* at 432-33. Thus, the fair use statute begins by stating, “Notwithstanding the provisions of sections 106 and 106A. . . .” 17 U.S.C. § 107. Indeed, § 107 now expressly provides that unpublished works may be the subject of fair use by third parties by the last sentence in the section: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” *Id.*

98. 464 U.S. at 479. The dissent said the second risk was “that depriving authors of their monopoly will reduce their incentive to create.” *Id.* The dissent, however, appeared to be referring to access to mean the possible access by authors who would revise or creatively incorporate the work in their own work, not to access by consumers who would simply use the work.

99. *Id.* at 482 (referring to taping of a broadcast as an “unproductive use”).

100. *Id.* at 480-81.

fair use. When consumer taping started, there was no market for tapes/DVDs of the shows with the commercials deleted. The market for tapes/DVDs developed in spite of home taping. If home taping helped create the market for tapes/DVDs of such shows, why should the copyright holder—someone who did not create that market—benefit?¹⁰¹ As Stanford Law Professor Lemley has argued, “The question is whether an extension of intellectual property rights is necessary to permit the intellectual property owners to cover their average fixed costs. . . . If not, [the extension of intellectual property rights] is not necessary, and the likelihood that it will impose costs on future competition or future innovation should incline us to oppose it.”¹⁰² In other words, even if the Supreme Court decided *Sony* for the first time today, the outcome should not change.¹⁰³

101. Professor Goldstein might disagree. He suggests that a use that might initially be a fair use by a third party could develop into a market that the copyright holder should be able to exploit exclusively, and he argues that online access to works will significantly reduce the number of fair uses: “For the great bulk of uses previously excused because of transaction costs, fair use doctrine will simply become irrelevant, as consumers pay for what they previously used free, or it will be judicially deemed inappropriate, as in the *American Geophysical* case.” 2 GOLDSTEIN, *supra* note 38, § 12.1.1; see discussion of *American Geophysical*, *infra* Part III.D. Presumably, however, many copyright holders will not place their works on the Internet and make them available for per-use licensing, and in those cases, transaction costs for obtaining consent to use would not decrease. Moreover, “people’s reading, listening, viewing, watching, playing and using works is at the core of the copyright system” and should be protected. Litman, *supra* note 55, at 1879 (arguing that the control of certain personal uses is not within the scope of a copyright holder’s exclusive rights). The Goldstein argument also appears to overlook the argument of Professor Lemley that “increases in intellectual property protection that restrict more innovation than they encourage cannot be economically justified.” Lemley, *supra* note 43, at 1068.

102. Lemley, *supra* note 43, at 1068.

103. The second Supreme Court decision on fair use, *Harper & Row Publishers, Inc. v. Nation Enterprises*, might on first glance appear to discount increasing access as a favorable factor. 471 U.S. 539, 542 (1985). Unauthorized verbatim quotes from the then soon to-be-released memoirs of President Ford were the challenged work in *Harper & Row*. *Id.* The Supreme Court held that the publication of the excerpts was not a fair use. *Id.* The Court’s treatment of “out of print” books and unpublished works showed that it still believed access could be a factor favoring fair use. Quoting from a Senate Report on copyright law reform, the Court said, “If the work is ‘out of print’ and unavailable for purchase through normal channels, the user may have more justification for reproducing it.” *Id.* at 553 (quoting S. REP. NO. 94-473, 64 (1975), as reprinted in 1976 U.S.C.C.A.N. 5659, 5763). More favorable copyright protection for unpublished works than for out of print works made sense to the Court, since “not being published is the result of a deliberate choice on the part of the copyright owner,” whereas the copyright holder may not have planned to be out of print. *Id.* (quoting S. REP. NO. 94-473, 64 (1975), as reprinted in 1976 U.S.C.C.A.N. 5659, 5763). The Court said that “[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work.” *Id.* at 569. In fact, in *Harper & Row* the claim of increasing access seemed patently false, because the copyright holder was shortly going to publish the memoirs. In *Harper & Row*, *The Nation* had not increased access to parts of President Ford’s memoirs, but had simply sped up that access. Speeding up access is significantly different from creating a work that the copyright holder could not, or will not produce, and that consumers would not otherwise be able to access.

2. *Campbell*: Increasing Access Through Transformative Works Favors Fair Use

In some circumstances, the creation of a derivative work by a defendant that the copyright holder would not produce can be a fair use, even though the derivative work may harm the market for the original work.¹⁰⁴ In *Campbell v. Acuff-Rose Music, Inc.*, the rap group 2 Live Crew wrote a parody, “Pretty Woman,” of Roy Orbison’s song, “Oh, Pretty Woman,” and told Acuff-Rose that they had written the parody.¹⁰⁵ 2 Live Crew offered to pay Acuff-Rose a fee for the use of “Oh, Pretty Woman” and to give credit to Acuff-Rose and the original authors; Acuff-Rose refused to give permission and sued.¹⁰⁶ The district court granted summary judgment for 2 Live Crew, but the United States Court of Appeals for the Sixth Circuit reversed, concluding that 2 Live Crew’s “blatantly commercial purpose . . . prevents this parody from being a fair use.”¹⁰⁷

A unanimous Supreme Court reversed and discussed “transformative use” in its analyses of the first, third, and fourth statutory

In *Stewart v. Abend*, Alfred Hitchcock’s film *Rear Window* was the challenged work. 495 U.S. 207, 238 (1995). Although at the time of the initial production of *Rear Window* the producers had a license from the copyright holder of the original story “It Had To Be Murder” for the creation/distribution of a derivative work, that license lapsed upon the death of the copyright holder. *Id.* at 207. Then, without the permission of the copyright holder, the producers caused the re-broadcast of *Rear Window* on television, and the holder of the copyright renewal term sued the film’s producers. *Id.* at 212. There are no longer copyright renewal rights for new copyrights. 3 NIMMER & NIMMER, *supra* note 29, § 9.02, app. 9-6. The majority opinion of Justices O’Connor, Brennan, Marshall, Blackmun, and Kennedy held that under either the 1909 Act or the 1976 Act, “the owner of the pre-existing work possessed the right to sue for infringement even after the incorporation of the pre-existing work in the derivative work.” *Id.* at 226. The Court rejected the fair use argument of the producers of *Rear Window*. *Id.* at 227. However, the Court recognized that access was a fundamental consideration in copyright law, saying that “although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.” *Id.* at 228. There was no lack of public access to the type of derivative work at issue, since the defendants interfered with the copyright owner’s attempt to market to HBO a derivative work of “It Had To Be Murder,” had distributed *Rear Window* itself in 1954 and then had *Rear Window* broadcast on ABC television in 1971. *Id.* at 212-13.

104. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994) (recognizing a fair use exception to the presumption of market harm in cases of copying involving commercial use of the copied work).

105. *Id.* at 572-73. Justice Souter wrote the opinion for a unanimous Court and Justice Kennedy filed a concurring opinion. Roy Orbison and William Dees had written the rock ballad “Oh Pretty Woman” and assigned their rights to Acuff-Rose Music, Inc. *Id.* at 572.

106. 510 U.S. at 572. The Supreme Court noted 2 Live Crew’s request for permission did “not necessarily suggest that they believed their version was not fair use; the offer may singly have been made in a good-faith effort to avoid this litigation.” *Id.* at 585 n.18. The Court added, “being denied permission to use a work does not weigh against a finding of fair use.” *Id.*

107. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992).

fair use factors.¹⁰⁸ For the first factor, the Court said that the important issue was whether the new work simply superseded the objects of the original work or added something new, “with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”¹⁰⁹ The Court said that the goal of copyright law to promote science and arts was “generally furthered by the creation of transformative works.”¹¹⁰

The Court in *Campbell* discussed the role parody plays in the fourth statutory fair use factor and did not repeat its previous statements in *Harper & Row* that the fourth statutory factor was the most important factor.¹¹¹ It acknowledged that a parody may harm the market for the

108. 510 U.S. at 578-83, 588, 591. In a concurring opinion, Justice Kennedy said, “As future courts apply our fair use analysis, they must take care to ensure that not just any commercial takeoff is rationalized *post hoc* as a parody.” *Id.* at 600 (Kennedy, J., concurring). Although the Court had said in *Sony* that “every commercial use of copyrighted material is presumptively . . . unfair,” the Court explained in *Campbell* that this was not a “hard evidentiary presumption.” *Id.* at 584. The Court added that *Sony* simply stood for the proposition that the existence of a commercial use was simply one factor that tended to weigh against a finding of fair use. *Id.* at 585. The Court noted that the illustrations of possible fair use in § 107 such as news reporting and teaching were commercial endeavors, but that fact did not preclude findings of fair use. *Id.* at 584. Determining fair use was not a process “to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Id.* at 577. The Court seemed to equate “commercial” with profit-seeking by contrasting “commercial” with “non-profit,” stating, “Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.” *Id.* at 584.

109. *Id.* at 579.

110. *Id.* The Court drew a distinction between parody, which needed to mimic (copy) an original to make its point, and satire, which the Court said could “stand on its own two feet.” *Id.* at 580-81. The Court said that the threshold question for a parody raising fair use as a defense was “whether a parodic character may reasonably be perceived,” and that whether the parody was in bad taste or good taste did not matter for purpose of determining fair use. *Id.* at 582. The Court agreed that fair use was more difficult to establish with works at the “core of intended copyright protection” (such as fictional works) and that “Oh, Pretty Woman” fell within that core. *Id.* at 586. However, that fact might never “help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.” *Id.* With respect to the third factor, the Court said that once “enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.” *Id.* at 588.

111. As a result, the Ninth Circuit concluded that the Supreme Court has abandoned the idea that the fourth factor is the most important fair use factor. See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (“[A]pparently abandoning the idea that any factor enjoys primacy, *Campbell* instructs that “[a]ll [four factors] are to be explored and the results weighed together, in light of the purposes of copyright.” (quoting *Campbell*, 510 U.S. at 578)). The Sixth Circuit was not sure. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (“We take it that this factor . . . is at least *primus inter pares*, figuratively speaking, and we shall turn to it first.”). Emphasizing not the fourth but the first

original work, but explained that “when a lethal parody, like a scathing theatre review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”¹¹² Although recognizing that the fourth fair use takes into account not only harm to the original work, but harm to the market for derivative works, the Court said that the “market for potential derivative uses include[s] *only those that creators of original works would in general develop or license others to develop.*”¹¹³ In other words, theoretical economic harm should not factor into the fair use balance, and increasing access to transformative works favors fair use.

The Court in *Campbell* said, “The unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”¹¹⁴ Put another way, if a copyright holder would not produce or license a certain type of derivative work, a third party’s creation of that derivative work would increase the public’s access to literary works. Increased access should favor a finding of fair use.¹¹⁵

factor, Judge Leval argued that “Factor One is the soul of fair use.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

112. 510 U.S. at 591-92.

113. *Id.* at 592 (emphasis added). The Court stated, “Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.” *Id.* at 590 (citing *Harper & Row*, 471 U.S. at 561). However, the Court also said that “[n]o ‘presumption’ or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes.” *Id.* at 591.

114. *Id.* at 592.

115. Generally two works derivative of the same original work—one by the copyright owner and one by a third party—would not be identical, but the third party should not be able to defend the legality of those differences on the ground that they would provide the public access to a different work. The work by the third party should be a different type of derivative work than the one the author of the original work would prepare in order to favor fair use. As a hypothetical, a third party should not be allowed to create the next *Mission Impossible* movie simply because it is different from the original *Mission Impossible*. Lower court cases have confirmed that the allegedly harmed market for derivative works must not be a hypothetical one. For instance in *Leibovitz v. Paramount Pictures Corp.*, the Second Circuit said, “Leibovitz has not identified any market for a derivative work that might be harmed by the Paramount ad. In these circumstances, the defendant had no obligation to present evidence showing lack of harm in a market for derivative works.” 137 F.3d 109, 116 n.6 (2d Cir. 1998). In *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, the Ninth Circuit held that Bleem’s use of screenshots from Sony’s video games to advertise Bleem’s “software emulator” was a fair use. 214 F.3d 1022, 1026 (9th Cir. 2000). The software emulator allowed consumers to play Sony video games on PCs instead of the Sony PlayStation. *Id.* at 1024. The Ninth Circuit said, “Certainly screen shots are a standard device used in the industry to demonstrate video game graphics, but there is not a market for them, or at least not one in which Bleem may participate given Sony’s refusal to license to it.” *Id.* at 1029; see also *infra* Part III.D.

3. Summary

In *Sony* and *Campbell*, the Supreme Court concluded that increasing access to literary works favored a finding of fair use.¹¹⁶ Stanford Law Professor Goldstein says that there is a fair use when “the social benefit of the use outweighs the loss to the copyright owner and increasing access to literary works is one of those social benefits.”¹¹⁷ A former Dean of Columbia Law School said the principle that “greater emphasis should be placed on the public’s interest in the free accessibility of ideas is particularly appropriate in an era when freedom of expression is frequently under attack and when the means of dissemination of ideas are increasingly concentrated in fewer hands.”¹¹⁸

Access to knowledge and fair use, moreover, support free speech.¹¹⁹ For instance, in *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, Triangle claimed that the copying by the defendant of a cover page of Triangle’s publication for purposes of comparative advertising constituted copyright infringement.¹²⁰ The United States Court of Appeals for Fifth Circuit said, “The fair use doctrine frequently serves to eliminate potential conflicts between copyright and free speech.”¹²¹ The court described fair use as “a ‘rule of reason’ fashioned by Judges to balance the author’s right to compensation of his work, on the one hand, against the public’s interest in the widest possible dissemination of ideas

116. See *supra* notes 91-93, 107-109, 114 and accompanying text.

117. 2 GOLDSTEIN, *supra* note 38, § 12.1.2. Professor Goldstein added that there can also be a fair use when “the copyright owner refuses to license a proposed use on any terms at all.” *Id.* § 12.1.3. This second situation cited by Goldstein reflects the reasoning of the Supreme Court in *Campbell*. In contrast, Leval has argued that the four statutory factors are the only valid factors. See Leval, *supra* note 111, at 1125 (“The more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that direct the inquiry from the goals of copyright.”). Leval’s argument is not consistent with the *Sony*, *Harper*, and *Campbell* decisions discussed above in Part II.B, the lower court cases discussed in this section, or the necessary implication of the language of § 107 that since the factors to consider “include” the four express factors, there can be additional factors to consider. To try to shoehorn all relevant factors into the four specified categories in § 107 seems to confuse, rather than clarify, fair use analysis.

118. William C. Warmin’s *Foreword* to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967), *quoted in* *Cable News Network v. Video Monitoring Servs.*, 940 F.2d 1471, 1479 (11th Cir.), *vacated*, 949 F.2d 378 (11th Cir. 1991), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992).

119. In addition to *Triangle Publications* discussed in this paragraph, see *infra* notes 210-211 and accompanying text.

120. 626 F.2d 1171, 1172-73 (5th Cir. 1980).

121. *Id.* at 1174 (citing Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 299, 303-04 (1979)). For more detailed discussion of *Triangle*, see Case Note, *Copyright and the First Amendment*, *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978), 1979 WISC. L. REV. 242, 246 n.26.

and information, on the other.”¹²² Noting the benefits to the public of comparative advertising, the Fifth Circuit concluded that the comparative advertising constituted fair use, regardless of any adverse market effect the advertising could have had on Triangle.¹²³

Recognizing that increasing access to literary works and to the expression of ideas favors fair use is one step. A second, important step is recognizing that in the fair use balance, courts should consider the ultimate effect of the various fair use factors together.¹²⁴

D. It Is the End Result that Counts in Determining Fair Use

1. Fair Use Seeks a Balanced Result

Fair use acts as a balance to the economic theory that provides a foundation for U.S. copyright law.¹²⁵ Fair use seeks to balance “the author’s need for remuneration and control” with the “social need for access and use.”¹²⁶

The market analysis of copyright law argues that “[o]nly when the desired transfer of resource use is unlikely to take place spontaneously, or where special circumstances such as market flaws impair the market’s ordinary ability to serve as a measure of how resources should be allocated, is there an economic need for allowing nonconsensual

122. 626 F.2d at 1174 (quoting Lionel Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 51 n.1 (1971) (quoting ALAN LATMAN, SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, U.S. SEN., 86TH CONG., 1ST SESS., FAIR USE OF COPYRIGHTED WORKS, REPORT ON COPYRIGHT LAW REVISION 14 (Comm. Print 1960))). In *Triangle*, some of the alleged infringements occurred before the effective date of the Copyright Act of 1976, and one occurred after the effective date. The Fifth Circuit concluded the outcome would be the same under both the Act of 1909 and the 1976 Act, and limited its discussion to the 1976 Act. 626 F.2d at 1173 n.6.

123. 626 F.2d at 1177-78. The Fifth Circuit did note that no adverse economic effect was shown. The district court had held that fair use did not apply, but denied injunctive relief on the grounds of First Amendment protection. *Id.* at 1173. In light of its holding that fair use applied, the Fifth Circuit concluded it should not reach the First Amendment issue and affirmed the decision of the district court on the alternate ground of fair use.

124. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 659, 578 (1994) (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, the results weighed together, in light of the purposes of copyright.”). The Court pointed out in *Campbell* that fair use was designed to foster creativity, and “to stimulate the creation and publication of edifying matter.” *Id.* at 577-78 n.10 (quoting Leval, *supra* note 111, at 1134). Whether increasing access to knowledge is a separate fair use factor or a part of the first fair use factor is not determinative of the outcome, since ultimately courts consider all the factors together.

125. See *Garon*, *supra* note 37, at 1307 (“[T]he economic rationale for copyright serves as the central guiding theme for U.S. jurisprudence, which both expands and limits copyright.”); *Gordon*, *supra* note 68, at 1601; *Landes & Posner*, *supra* note 13, at 326.

126. *Gordon*, *supra* note 68 at 1602.

transfer.”¹²⁷ A classic example of the need for fair use under the economic model is when the costs of obtaining consent for the use would be “so high relative to the benefits that no such exchange is feasible between a user of a copyrighted work and its owner.”¹²⁸ For instance, if it would take \$1,000 to locate and obtain the consent from the owner of a work to copy that work, but the owner would only want \$100 in return for the owner’s consent, it would make no economic sense to require the person desiring to create the additional work to ask for and obtain consent.

Scholars recognize that situations other than market failures can justify a finding of fair use. One example is when the copyright holder has the motive of preventing competition or preventing the creation of works that will in some way diminish the demand for the copyright holder’s work.¹²⁹ Another example is when the social benefits of the use outweigh any loss to the copyright holder. Minnesota Law Professor Okediji has argued, “If copyright’s goal is to encourage production, access, and use then it seems self-defeating to preclude another party from engaging in creative expression based on the first work, while also giving the first author the right to restrict access to the work.”¹³⁰

These examples consider the balance achieved in the ultimate result, not interim effects on the scale as the separate weights are added. A discussion of several lower court cases will provide support for the argument that in the fair use balance, interim effects do not count as much as final results.¹³¹

127. *Id.* at 1615. Gordon argues that “[f]air use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner.” *Id.* at 1614. As one example, Gordon suggests that “out-of-print status of a copyrighted work may help to justify fair use. This is consistent with a market approach, since markets cannot form where goods are unavailable.” *Id.* at 1627-28.

128. Landes & Posner, *supra* note 13, at 357; *see also* Gordon, *supra* note 68, at 1627-30.

129. Gordon, *supra* note 68, at 1632-35. Of course, one could call any factor justifying fair use a “market failure,” but antidissemiation motives have nothing to do with the actual structure of the market. The antidissemiation motive corresponds to what Professor Goldstein calls “Abuse of Right.” *See* 2 GOLDSTEIN, *supra* note 38, § 12.1.3.

130. Okediji, *supra* note 14, at 127. Professor Okediji believes copyright’s goal is to encourage production, access, and use. “Copyright envisions use by members of the public” and there is a “constitutional imperative to ‘promote the progress of science and the useful arts.’” *Id.* at 111, 117.

131. Two cases, *Sega Enterprises, Ltd. v. Accolade, Inc.*, and *Atari Games Corp. v. Nintendo, Inc.*, cited by Professor Okediji, *supra* note 14, at 132 n.125, 133 n.133, are discussed *infra* Part II.D.4.

2. Interim Scanning of a Picture and Then Modifying It

In *Kelly v. Arriba Soft Corp.* and *Bill Graham Archives v. Dorling Kindersley Ltd.*, the courts analyzed as a factor favoring fair use the benefit of providing the public with a transformative use that increased the public's access to protected works.¹³² In both cases the plaintiffs held copyrights to only a small portion of the copyrighted works the defendants had used, so the plaintiffs—using only their copyrighted works—could not have created the works the defendants created. The public would not have had access to the works absent the activities of the defendants, and the courts held that the actions of both defendants constituted fair uses.

a. *Kelly v. Arriba Soft Corp.*

In *Arriba*, the Ninth Circuit held that copying images from other Web sites and then using “these copies to generate smaller, lower-resolution thumbnails of the images” for a visual search engine constituted a fair use.¹³³ The Ninth Circuit noted that once *Arriba*¹³⁴ had created the thumbnails, the program developed by *Arriba* deleted “the full-sized originals from the server.”¹³⁵ *Kelly*'s images were among thousands of images that *Arriba* displayed through its search engine database.¹³⁶ The Ninth Circuit held that the display of the thumbnail images by *Arriba* constituted a fair use.¹³⁷ The court said that fair use “permits courts to avoid rigid application of the copyright statute when,

132. 336 F.3d 811, 820 (9th Cir. 2003) (“They benefit the public by enhancing information-gathering techniques on the [I]nternet.”); 448 F.3d 605, 609-10 (2d Cir. 2006) (“[I]mage display enhances the reader's understanding of the biographical text.”).

133. 336 F.3d at 815. The district court granted summary judgment for *Arriba Soft Corp.* on the grounds of fair use on both the challenged thumbnail images and on *Arriba*'s practice of displaying *Kelly*'s full-size images for a certain period of time through in-line linking. 77 F. Supp. 2d 1116, 1117 (C.D. Cal. 1999). Initially the Ninth Circuit affirmed in part, reversed in part and remanded, concluding, among other things, that the display of the thumbnail images was a fair use but that the use of *Kelly*'s full-size images through in-line linking was not a fair use. 280 F.3d 934, 949 (9th Cir. 2002). A motion for rehearing was filed, and in denying the motion for rehearing, the Ninth Circuit held that the use of the thumbnails was a fair use but that the district court should not have granted summary judgment on the issues relating to the full-size images. 336 F.3d 811, 815 (9th Cir. 2003).

134. After the commencement of the litigation and before the Ninth Circuit's decision, *Arriba* changed its name to “Ditto.com.” 336 F.3d at 815 n.1.

135. 336 F.3d at 815. The court later added that “[a]nyone who downloaded the thumbnails would not be successful selling full-sized images enlarged from the thumbnails because of the low resolution of the thumbnails. There would be no way to view, create, or sell a clear, full-sized image when going to *Kelly*'s web sites.” *Id.* at 821-22.

136. *Id.* at 818.

137. *Id.* at 815.

on occasion, it would stifle the very creativity which that law is designed to foster.”¹³⁸

The Ninth Circuit’s treatment of the first and fourth fair use factors shows the importance the court gave to increasing access to literary works. Kelly’s images were artistic works “to engage the viewer in an aesthetic experience,” whereas Arriba’s use of the thumbnails was “unrelated to any aesthetic purpose” and was “a tool to help index and improve access to images on the [I]nternet.”¹³⁹ The transformative nature of Arriba’s thumbnail images gave the public access to a different type of work than the original work. The court said that the fourth factor also favored Arriba, concluding that “Arriba’s creation and use of the thumbnails does not harm the market for or value of Kelly’s images.”¹⁴⁰ In other words, Arriba’s actions gave the public access to a type of work the public would not otherwise have had and was thus a fair use.

The Ninth Circuit discounted the interim copying of the original work, saying the “extent of permissible copying varies with the purpose and character of the use.”¹⁴¹ The court concluded that the interim copying did not weigh in favor of or against the finding of fair use, “because, although Arriba did copy each of Kelly’s images as a whole, it was reasonable to do so in light of Arriba’s use of the images.”¹⁴²

In considering the fourth fair use factor, the court did not discuss the possibility of Kelly developing or licensing derivative works

138. *Arriba*, 336 F.3d at 817 n.11 (quoting *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997)). *Dr. Seuss* involved a poem about the O.J. Simpson double murder trial that was written in the style of Dr. Seuss and titled “The Cat NOT in the Hat! A Parody by Dr. Juice.” 109 F.3d at 1396. The Ninth Circuit affirmed the district court’s grant of a preliminary injunction against Penguin Books on copyright infringement in large part because Penguin Books was not holding the distinctive style of Dr. Seuss up to ridicule, but was using the title and style merely to get attention. *Id.* at 1400. The court in *Dr. Seuss* also noted that the defendants had not presented “evidence about relevant markets,” and that the “good will and reputation associated with Dr. Seuss’ work is substantial.” *Id.* at 1400-01. Of course, *Dr. Seuss* involved a derivative work that was a commercial use. A distinction between *Dr. Seuss* and *Campbell* is that the Ninth Circuit concluded “The Cat NOT in the Hat” was not a true parody holding the original work up to ridicule, whereas “Pretty Woman” was trying to ridicule Roy Orbison’s song, “Oh Pretty Woman.”

139. 336 F.3d at 818. Although the use of the thumbnail images was commercial, the court concluded that Arriba was not using Kelly’s images to directly promote its Web site and was not trying to make money by selling Arriba’s images, so “the commercial nature of the use weighs only slightly against a finding of fair use.” *Id.* Although the Ninth Circuit said that the second factor favored Kelly slightly, the court added that published works are more likely to qualify as fair use, because the artist’s expression has already appeared. *Id.* at 820.

140. *Id.* at 822.

141. *Id.* at 820.

142. *Id.* at 821. For another discussion of the Ninth Circuit’s decision, see Adam B. Olson, *Why Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), *Does and Doesn’t Matter*, 44 JURIMETRICS J. 487 (2004).

(thumbnail images) similar to the thumbnails Arriba created. The court did say that “Arriba does not sell or license its thumbnails to other parties,” so it believed Arriba was not attempting to compete with Kelly’s full-size images by licensing the thumbnails.¹⁴³ The court did not consider whether Arriba’s actions would “harm” Kelly by making it more difficult for Kelly to enter into a market for thumbnail images. However, the absence of such discussion supports the position that in a fair use analysis, courts should only consider current market activities of the copyright holder—whether for an original or a derivative work.

b. *Bill Graham Archives v. Dorling Kindersley Ltd.*

Similarly, the copying of complete pictorial works that the defendant then modified slightly and put into a larger work constituted a fair use, the United States Court of Appeals for the Second Circuit held in *Bill Graham Archives v. Dorling Kindersley Ltd.*¹⁴⁴ The challenged work was a 480-page book by Dorling Kindersley, *Grateful Dead: The Illustrated Trip*, that contained reduced-size copies of artistic concert posters. The court said a typical page in the book had a collage of images, text and graphic art.¹⁴⁵ Plaintiff Bill Graham Archives claimed copyright ownership of 7 of over 2,000 images in the book.¹⁴⁶ Dorling Kindersley had sought permission unsuccessfully from Bill Graham Archives to reproduce the images, but Dorling Kindersley nevertheless published the book.¹⁴⁷ The district court granted summary judgment for the defendants.¹⁴⁸ The Second Circuit affirmed on the ground that Dorling Kindersley’s reproduction of the images was a fair use, observing that the overall test for fair use was whether allowing or preventing the use would further the progress of science and useful arts.¹⁴⁹

In contrast to *Arriba*, the Second Circuit in *Bill Graham* did directly address possible licensing fees and concluded that possible fees from markets for transformative products do not count in the fourth fair use factor.¹⁵⁰ The court agreed that lost licensing revenue could be part of the

143. *Arriba*, 336 F.3d at 821.

144. 448 F.3d 605, 606 (2d Cir. 2006).

145. *Id.* at 607.

146. *Id.*

147. *Id.*

148. 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005).

149. *Bill Graham Archives*, 448 F.3d at 607-08 (citing *Castle Rock Entm’t v. Carroll Publ’g Group*, 150 F.3d 132, 141 (2d Cir. 1998) (affirming a finding of copyright infringement for defendants’ publication of a book containing trivia questions about a copyrighted television series)).

150. *Id.* at 614-15.

fair use consideration, but added, “were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.”¹⁵¹ Instead, the court said the fourth fair use factor should only consider lost licensing fees for “traditional, reasonable or likely to be developed markets.”¹⁵² The concluding sentence in the section on the fourth fair use factor suggests that a market for transformative products was not a market a court should consider in evaluating the fourth fair use factor: “Since DK’s use of BGA’s images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.”¹⁵³

In considering the first three fair use factors, the court also focused on the “transformative purpose” of the poster copies in the book and discounted the fact that Dorling Kindersley had made complete copies of the posters initially. The court concluded that the images constituted “an inconsequential portion” of the book, and noted that Dorling Kindersley had not used any of the images in question in its commercial advertising.¹⁵⁴ Addressing the transformative nature of the book, the court said Bill Graham had used the posters as expressive advertisements for an upcoming concert, but Dorling Kindersley had used the copied images in the book as part of an historic timeline.¹⁵⁵ The defendant had

151. *Id.* at 614 (quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 n.7 (2d Cir. 1994) (citing Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1387 (6th Cir. 1996))); Leval, *supra* note 111, at 1124; 4 NIMMER & NIMMER, *supra* note 29, § 13.05[A][4].

152. 448 F.3d at 614.

153. *Id.*

154. *Bill Graham Archives*, 448 F.3d at 611-12. The use of the images was “tailored to further its transformative purpose because DK’s reduced size reproductions of BGA’s images in their entirety displayed the minimal image size and quality necessary to ensure the reader’s recognition of the images as historical artifacts of Grateful Dead concert events.” *Id.* at 613. Although the court agreed that the second factor favored the copyright holder, it did not put much weight in this factor. It said, “[W]e hold that even though BGA’s images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK’s use was to emphasize the images’ historical rather than creative value.” *Id.* at 612-13. With respect to the third factor, the court indicated that if the extent of use was consistent with the transformative purpose, the fact that the whole work was displayed did not weigh against fair use. *Id.* at 613.

155. *Id.* at 609. The court said the original purpose of the poster was “to generate public interest in the Grateful Dead and to convey information to a large number [of] people about the band’s forthcoming concerts.” *Id.* The court said Dorling Kindersley used the same pictures in the book “as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*’s timeline.” *Id.*

“significantly reduced the size of the reproductions and thus their expressive value.”¹⁵⁶

c. Distinguishing Certain Copying

In both *Arriba* and *Bill Graham*, the courts determined whether there was infringement based on the ultimate use of the derivative work. Making the interim copies did not preclude a finding of fair use, since the public would not have otherwise had access to the types of works at issue. This would contrast with a hypothetical series of *Mission Impossible* movies, where the copyright holders apparently intend to develop additional movies of the same type as long as the public wants them.¹⁵⁷ Clearly the public would have access to the series of movies without the intervention of third parties, so if a third party created new versions of the *Mission Impossible* movies without a license, the new movies would not constitute fair uses.

3. Duplicating a Copyrighted Work and Then Extracting Unprotected Data

Courts also have held that it is a fair use to duplicate a copyrighted database in order to extract the factual parts of the database and then discard the rest of the database.¹⁵⁸ For instance, in *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, the owner of copyrighted software used to compile and store real estate tax assessment data from governmental records sued for copyright infringement a company that copied the data in the database for use by real estate brokers.¹⁵⁹ Although the United States Court of Appeals for Seventh Circuit indicated the defendant did not need to copy the whole software program in order to obtain the raw data, it added that the plaintiff would have lost the case “even if the raw data were so entangled with Market Drive that they could not be extracted without making a copy of the program.”¹⁶⁰ The intermediate copying of the software in that situation would be a fair use, since “the only purpose of the copying would be to extract non-copyrighted material and not to go into competition with [Assessment

156. *Id.* at 611. The court said the reduced size was “inadequate to offer more than a glimpse of their expressive value. . . . DK used the minimal image size necessary to accomplish its transformative purpose.” *Id.*

157. See *supra* note 115 and accompanying text. And perhaps after the public wants them.

158. Assuming the person had the right to access the database.

159. 350 F.3d 640 (7th Cir. 2003).

160. *Id.* at 644.

Technologies] by selling copies of Market Drive.”¹⁶¹ In other words, the interim copying was justified because it was the only way to gain access to unprotected elements of the work/database.¹⁶²

Copying in order to gain access to unprotected information was also a key supporting issue in the finding of fair use in *Nautical Solutions Marketing, Inc. v. Boats.com*.¹⁶³ *Nautical Solutions* involved (1) use of a robot to extract the hypertext markup language (HTML) from Web pages of Boats.com and (2) entering facts from that copied Web page into a database searchable by the public.¹⁶⁴ The district court said that the “momentary copying of Yacht World’s public [W]eb pages in order to extract from Yacht listings facts unprotected by copyright law constitutes a fair use.”¹⁶⁵ The court addressed the initial copying of the HTML as part of the third fair use factor, explaining that “because Yachtbroker.com’s final product—the searchable database—contained no infringing material, the ‘amount and substantiality of the portion used’ is of little weight.”¹⁶⁶

In both *Assessment Technologies* and *Nautical Solutions*, the plaintiffs attempted to prevent the defendants from accessing plaintiffs’ works because plaintiffs did not want competition. As long as the ultimate work of the defendants did not infringe the copyrights of plaintiffs, the interim copying of the copyrighted works was a fair use.

161. *Id.* at 645. The court also said that the copyright “owner is trying to secrete the data in its copyrighted program—a program the existence of which reduced the likelihood that the data would be retained in a form in which they would have been readily accessible. It would be appalling if such attempt could succeed.” *Id.* at 641-42.

162. In *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 83 (D.D.C. 2007), defendant Convera copied the database created by DSMC, and “Convera not only wanted to extract raw data but also wanted to create a product similar to DMAS [the product of DSMC] that contained many of the same features as DMAS” and competed with DSMC. *Id.* The decision in *DSMC* does not challenge or limit the holding in *WIREdata* discussed in the accompanying text or other cases discussed in this Article finding interim copying to be a fair use when the final version does not infringe. *See id.*

163. *Nautical Solutions Mktg., Inc. v. Boats.com*, No. 8:02-CV-760-T-23TGW, 2004 WL 783121, at *3 (M.D. Fla. Apr. 1, 2004).

164. *Id.* at *1. The district court noted that *Nautical Solutions Marketing* ultimately discarded the HTML code. *Id.*

165. *Id.* at *2.

166. *Id.*; *see also* *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at *5 (C.D. Cal. Mar. 7, 2003) (“Taking the temporary copy of the electronic information for the limited purpose of extracting unprotected public facts leads to the conclusion that the temporary use of the electronic signals was ‘fair use’ and not actionable.”).

4. Copying of Software To Develop Compatible, Noninfringing Products

Courts have also held that the interim copying of an original software program to learn how to develop a different software program compatible with the original program constitutes a fair use. This process, known as reverse engineering,¹⁶⁷ can include the “use of a program known as a ‘disassembler’ to translate the ones and zeros of binary machine-readable object code into the words and mathematical symbols of source code” and “copying of the program into RAM every time the computer is booted up.”¹⁶⁸ Assuming a defendant acquires the computer program legally, running that program (and thus causing a copy to be loaded into RAM) many times should not constitute copyright infringement, disregarding the purpose of the use.¹⁶⁹ Reverse engineering of software, however, can include reproducing from the object code of the original software the source code of the original software.¹⁷⁰ That reproduced source code would be an infringing derivative work of the object code, unless fair use protected the creation of the source code.

A number of cases have in fact found reverse engineering to be a fair use, on the grounds that this reverse engineering gives the public access to works they would not otherwise have had.¹⁷¹ The Ninth Circuit,

167. The Supreme Court referred to reverse engineering as the process of “starting with the known product and working backward to divine the process which aided in its development or manufacture.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).

168. *Sony Computer Entm’t v. Connectix Corp.*, 203 F.3d 596, 600-01 (9th Cir. 2000).

169. First, a person acquires a program in order to run the program, so the person acquiring the program must have the consent of the copyright holder, unless the argument is that the use violates a license prohibition on reverse engineering, which is typical in a software license. Second, 17 U.S.C. § 117 provides a safe harbor for owners of a copy of a computer program to use that software. *See, e.g., Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005) (holding that 17 U.S.C. § 117 permits the owner of computer program to copy or modify the program without incurring liability for copyright infringement).

170. For a detailed discussion of software reverse engineering, see Andrew Johnson-Laird, *Software Reverse Engineering in the Real World*, 19 U. DAYTON L. REV. 843, 846 (1994).

There are only four ways to perform software reverse engineering: (1) read about the program; (2) observe the program in operation by using it on a computer; (3) perform a static examination of the individual computer instructions contained within the program; or (4) perform a dynamic examination of the individual computer instructions as the program is being run on a computer.

Id. Only methods (3) and (4) involve the reproduction of object or source code outside of the software. *Id.* at 863-87. As a result, only these two methods raise the possibility of copyright infringement.

171. *See also* Pamela Samuelson & Susanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002); Derek Prestin, Case Comment, *Where To Draw the Line Between Reverse Engineering and Infringement: Sony Computer Entertainment, Inc. v. Connectix Corp.*, 3 MINN. INTELL. PROP. REV. 137 (2002); Robert V. Donohoe, *Does Intermediate*

for instance, examined the fair use doctrine extensively in *Sega Enterprises, Ltd. v. Accolade, Inc.*, which involved “reverse engineering” of Sega software by Accolade in order for Accolade to make its game cartridge software compatible with the Sega video game machines.¹⁷² Accolade had copied the object code “solely in order to discover the *functional requirements for compatibility* with the Genesis console— aspects of Sega’s programs that are not protected by copyright.”¹⁷³ The court in *Sega* concluded that since there was no other method for studying the requirements for compatibility of the software in question, and there was “no evidence in the record that Accolade sought to avoid performing its own creative work,” the first factor (purpose and character of use) weighed in favor of Accolade on the issue of fair use.¹⁷⁴

The court concluded that the fourth factor (effect of use on market) weighed in favor of Accolade, even though Sega could suffer some economic loss as a result of the copying.¹⁷⁵ The court said the identification of the functional requirements for Genesis’ compatibility resulted in increased numbers of video game programs, and it was “precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote.”¹⁷⁶ The court in *Sega* rejected the argument of Sega that Accolade was improperly “free-

Copying of Computer Software for the Purpose of Reverse Engineering a Non-Infringing Product Infringe the Copyright in Software?, 2001 B.C. INTELL. PROP. & TECH. F. 111301.

172. 977 F.2d 1510 (9th Cir. 1992). The fact that the copying was for a commercial purpose weighed against the finding of fair use. *Id.* at 1522.

173. *Id.* (emphasis added).

174. *Id.* In examining the second factor (the nature of the copyrighted work), the court in *Sega* noted that works of fiction receive greater protection than works that have strong functional elements. *Id.* at 1524. The court, however, said that computer programs were utilitarian articles that accomplished tasks, and concluded that since the video game program in question contained unprotected aspects which could not be examined without at least temporary copying, the copyright law afforded the program a lower degree of protection than more traditional literary works and ruled that the second statutory factor weighed in favor of Accolade. *Id.* at 1524-26.

175. *Id.* at 1524. As to the third factor, the court noted that Accolade disassembled the entire program written by Sega, so the third factor weighed against Accolade. *Id.* at 1526. However, the court noted that when the ultimate use was as limited as it was in that case, the third factor was of very little weight. *Id.* at 1526-27.

176. *Id.* at 1523 (citing *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)). On the other hand, the Supreme Court said, “[T]o negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 451 (1984)). In *Harper & Row*, the Supreme Court added that the consideration of the effect of a use on the market “must take account not only of harm to the original but also of harm to the market for derivative works.” 471 U.S. at 568. However, in *Harper & Row* the plaintiff was pursuing an acknowledged derivative market.

riding” on the efforts of Sega and held Accolade’s disassembly/copying of the computer program to be fair use of the copyrighted work.¹⁷⁷

The United States Court of Appeals for the Federal Circuit similarly said that “reverse engineering object code to discern the unprotectable ideas in a computer program is a fair use” in *Atari Games Corp. v. Nintendo of America, Inc.*¹⁷⁸ The Federal Circuit added, however, that any “reproduction of protectable expression must be strictly necessary to ascertain the bounds of protected information within the work.”¹⁷⁹

More recently, in *Sony Computer Entertainment Corp. v. Connectix Corp.*, Connectix used the operating system of a Sony PlayStation to develop a program (the PlayStation emulator) for individuals to use with computers rather than the Sony PlayStation to play games published for use with the PlayStation.¹⁸⁰ Before it started marketing its PlayStation emulator, Connectix substituted its own operating system—which did not contain any of Sony’s copyrighted material—for Sony operating systems.¹⁸¹ The district court preliminarily enjoined Connectix from selling or distributing its software for Macintosh or Windows-based computer systems.¹⁸²

Relying on its earlier decision in *Sega*, the Ninth Circuit in *Connectix* reversed the decision of the district court and dissolved the injunction.¹⁸³ The foundation of the Ninth Circuit’s opinion was that (1) “[c]opyrighted software ordinarily contains both copyrighted and unprotected or functional elements,” and (2) for an internal program which did not produce a screen display, the only way to gain access to the program’s functional (unprotectable) elements was through copying and reverse engineering the program.¹⁸⁴ The Ninth Circuit said that when only intermediate copying was involved, the amount and substantiality of the use was afforded “very little weight.”¹⁸⁵

The Ninth Circuit concluded that the nature of the copyrighted work favored Connectix, noting that because Sony’s operating system contained unprotected functional aspects that could not be examined

177. 977 F.2d at 1527-28.

178. 975 F.2d 832, 843 (Fed. Cir. 1992).

179. *Id.*

180. 203 F.3d 596, 599 (9th Cir. 2000).

181. *Id.*

182. *Id.* at 601-02.

183. *Id.* at 609-10.

184. *Id.* at 599.

185. *Id.* at 606 (quoting *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1526-27 (9th Cir. 1992)). Of course, as indicated *supra* note 53 and accompanying text, at some level (e.g., the individual words in a book, the different specks of paint in a painting), all works contain unprotected elements.

without copying, the operating system had a “lower degree of protection than more traditional literary works.”¹⁸⁶ The Ninth Circuit rejected Sony’s argument that the reverse engineering was unnecessary, and said the “necessity” it “addressed in *Sega* was the necessity of the method, i.e., disassembly, not the necessity of the number of times that method was applied.”¹⁸⁷

5. Summary of Interim Copying Cases

In the reverse engineering and database cases discussed in Part II.D.3-4 above, copyright holders wanted to deny access to third parties to prevent competition, an antidissemation motive inappropriate for fair use.¹⁸⁸ In *Arriba* and *Bill Graham*, discussed in Part II.D.2 above, the plaintiffs could not have created from their original copyrighted works the works the defendants created. In all of the cases discussed in Part II.D.2-4, the courts concluded that interim copying not seen by the ultimate consumer did not preclude a finding of fair use, because the plaintiffs would not have caused the creation of works of the type produced by the defendants. In other words, the challenged works gave the public access to types of works to which they had previously not had access.

A recent case from the Second Circuit elaborated upon the reasons why interim copying can be a fair use.¹⁸⁹ In that case, Andrea Blanch sued Jeff Koons for copyright infringement after Jeff Koons scanned

186. *Sony Computer Entm’t Corp. v. Connectix*, 203 F.3d 596, 606 (9th Cir. 2000) (quoting *Sega*, 977 F.2d at 1526). Of course, as discussed *supra* note 57 and accompanying text, all copyrighted works have elements that copyright law does not protect.

187. *Sony*, 203 F.3d at 605; see *Bateman v. Mnemonics, Inc.* 79 F.3d 1532, 1539-40 n.18 (11th Cir. 1996) (“And although there has been some uncertainty as to whether reverse engineering constitutes copyright infringement, the one federal circuit court that has squarely addressed the issue has concluded that reverse engineering may be a fair use.”); see also *Sega*, 977 F.2d at 1527-28; *Atari Games Corp. v. Nintendo Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (concluding that “reverse engineering object code to discern the unprotectable ideas in a computer program is a fair use,” but denying the defendant’s fair use claim, based on the fact that the defendant was wrongfully in possession of the source code).

188. See, e.g., *Landes & Posner*, *supra* note 13, at 359 (“The suppression of an unfavorable review would be comparable to concealment by an ordinary seller of a defect in his goods.”); *Gordon*, *supra* note 68, at 1632-33 (“Section 107 places first among the purposes for which fair use is appropriate ‘criticism’ and ‘comment’, uses that a copyright owner might be reluctant to license. . . . Even if money were offered, the owner of a play is unlikely to license a hostile review or a parody of his own drama; a publicity-shy tycoon who owns the copyright on magazine articles discussing his life is unlikely to license a biographer to use those articles; a candidate for governor is unlikely to license his copyrighted campaign music to be utilized in his opponent’s televised advertisement; and the publisher of a periodical is unlikely to license his competitor to use his copyrighted magazine covers in comparative advertising.”).

189. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

Andrea Blanch's copyrighted photograph and transformed parts of that copy into a painting, but the district court granted summary judgment for Koons.¹⁹⁰ The Second Circuit affirmed and said that excessively broad copyright protection would stifle the law's objective of benefiting the public.¹⁹¹ The court added, "Monopoly protection of intellectual property that impeded referential analysis would strangle the creative process."¹⁹² Before addressing the fair use factors set forth in § 107, the court concluded that fair use mediates between the rights copyright law grants to copyright holders and "the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others."¹⁹³ The court held that "copyright law's goal of 'promoting the Progress of Science and useful Arts' . . . would be better served by allowing Koon's use of 'Silk Sandals' than by preventing it."¹⁹⁴ The initial copying of the complete Blanch photograph was not significant to the court.¹⁹⁵

190. *Id.* at 246. The Second Circuit described the copying and transformation process in detail:

Koons scanned the image of "Silk Sandals" into his computer and incorporated a version of the scanned image into "Niagara." He included in the painting only the legs and feet from the photograph, discarding the background of the airplane cabin and the man's lap on which the legs rest. Koons inverted the orientation of the legs so that they dangle vertically downward above the other elements of "Niagara" rather than slant upward at a 45-degree angle as they appear in the photograph. He added a heel to one of the feet and modified the photograph's coloring.

Id. at 248. Quoting *Campbell*, the Second Circuit said that the "market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." *Id.* at 258 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994)).

191. 467 F.3d at 250.

192. *Id.* (quoting Leval, *supra* note 111, at 1108).

193. *Id.* The court also said that "the public exhibition of art is widely and we think properly considered to 'have value that benefits the broader public interest,'" even though such exhibitions may be commercial. *Id.* at 254 (quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

194. *Blanch*, 467 F.3d 259. In discussing the first fair use factor, the court said the use was transformative, explaining:

Koons is . . . using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media . . . [through] the use of a fashion photograph created for publication in a glossy American "lifestyles" magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space.

Id. at 253.

195. In *UMG Recordings, Inc. v. MP3.com, Inc.*, MP3.com purchased thousands of CDs and—without the authorization of the copyright owners of the sound recordings—copied the sound recordings onto MP3.com's servers to replay for subscribers. 92 F. Supp. 2d 349, 349 (S.D.N.Y. 2000). A subscriber could only access the recordings from MP3.com by first proving that the subscriber owned the CD in question. *Id.* at 350. Once that hurdle was crossed, the user could—anyplace in the world that had Internet access—listen to, but not download, that recording via

In short, if the ultimate work is not infringing, and as a practical matter the only feasible way to create the ultimate work is through the interim copying of another work that the consumer never sees, that interim copying should not prevent a finding of fair use.¹⁹⁶ Such interim copying is necessary in at least three situations. First, the copyright holder may not be able—from her copyrighted works—to create the new work, such as in *Arriba* and *Bill Graham*. Second, as in the database and reverse engineering cases, the copyright holder may not want to allow third parties to have access to and copy the copyrighted works because the third parties would compete with the original copyright holder or otherwise harm the public perception of the original work.¹⁹⁷ Third, the

computer. *Id.* For background on the *MP3.com* case, see Sara Steetle, *UMG Recordings, Inc. v. MP3.com, Inc.: Signaling the Need for a Deeper Analysis of Copyright Infringement of Digital Recordings*, 21 LOY. L.A. ENT. L. REV. 31 (2000). There are a number of factual distinctions between *UMG* and *Sony*. First, in *Sony* the allegedly infringing use (the consumers' copying of the broadcasts) was not for-profit, whereas in *UMG* the allegedly infringing use (MP3.com's copying and broadcasting of the CDs) was for profit. Second, in *UMG*, MP3.com distributed exact copies of the original sound recordings to the public, whereas the home viewers in *Sony* did not distribute to the public. The court's decision that MP3.com's activities did not constitute a fair use does not support an argument that the Google Library Project involves copyright infringement, because the final product that reaches the consumer for the Library Project is substantially different from the books themselves.

196. Sections 108-122 of the Copyright Act contain certain exemptions on the "exclusive rights" of copyright holders listed in § 106. These exemptions include certain reproductions of works by libraries and archives. 17 U.S.C. § 108 (2000). In order to fall within one of the permitted uses in § 108, the library or archive must meet three preconditions. *Id.* The first precondition in § 108—that the reproduction/distribution be performed without any purpose of commercial advantage—would exclude the Library Project from exemption under § 108. Google is creating the database with the purpose of commercial advantage. However, the fact that the Google Library Project does not fit within the § 108 exemption should not preclude a finding of fair use with respect to the Library Project. In fact, § 108(f) says, "Nothing in this section . . . (4) in any way affects the right of fair use as provided by section 107." *Id.* § 108(f); *cf. Am. Geophysical Union*, 60 F.3d at 931 ("[S]ection 108 of the Copyright Act narrowly circumscribes the conditions under which libraries are permitted to make copies of copyrighted works Though this section states that it does not in any way affect the right of fair use, . . . the very fact that Congress restricted the rights of libraries to make copies implicitly suggests that Congress views journal publishers as possessing the right to restrict photocopying, or at least the right to demand a licensing royalty from nonpublic institutions that engage in photocopying. Second, Congress apparently prompted the development of CCC by suggesting that an efficient mechanism be established to license photocopying."). For critiques of the § 108 guidelines, see Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001); Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right To Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998).

197. Even without attributing an improper antidissemation motive to a plaintiff, when a "defendant has 'filled a market niche that the [copyright owner] simply had no interest in occupying,'" a finding of fair use is appropriate. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (quoting *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993)). In *Princeton*, the Sixth Circuit added, "Only 'traditional, reasonable, or likely to be developed markets' are to be considered in this connection, and even the availability of an existing system for collecting licensing fees will not be conclusive." *Id.*

author of the original work simply may have no interest in or expectation of pursuing some market. In each situation, third parties would create works of a type the copyright holder would not create. Allowing third parties to create such works that the public could use would further the purpose of copyright laws to stimulate creative activity. That brings this Article to an analysis of the Google Library Project.

E. The Google Library Project Is a Fair Use

The Google Library Project will result in a digital card catalog that tells anyone with Internet access where she can find books of interest and perhaps purchase those books. While the Library Project does not target an underserved population, it does provide a new type of information to all consumers with access to the Internet. It creates a new type of market, not a derivative work that targets the same market as the original work.

It is reasonable to conclude that the Library Project will actually increase demand for copyrighted works, without any harm to copyright holders. It is unreasonable to believe that when authors created copyrighted works years ago they would not have created such works if they had thought they would not be able to earn some miniscule licensing fee from Google to list their works in the Google Database. Moreover, as a practical matter there is no other way to create the Google Database than scanning all the works. Finally, the ultimate work viewed by the consumer does not infringe any copyrighted work, due to the limited displays of words from the books.

In short, the Library Project will increase the public’s access to knowledge of where to find the books, benefiting the public through that knowledge. Moreover, the Library Project will not harm copyright holders. Therefore, the Library Project constitutes a fair use.

Table 1. Fair Use Factors Applied to the Library Project

		What Google User Views
1.	Character and purpose of allegedly infringing use	a. Commercial—favors copyright holders, but commercial nature generally not considered important when third party transforms purpose in end result of work. b. Transformative purpose is to educate individuals on where books on specific subjects are located. What consumer sees of

(quoting *Am. Geophysical Union*, 60 F.3d at 930-31). In *Princeton*, because there was a functioning market, the Sixth Circuit concluded that the copying was not a fair use. *Id.* at 1393.

	What Google User Views
	any individual book is not substantially similar to the specific book— <i>favors Google</i>
2. Nature of copyrighted work	Favors copyright holders slightly, but since amount shown to users fits with the transformative, educational purpose of work, this factor is not significant
3. Amount and substantiality of portion of copyrighted work copied	Minor pieces of works shown to viewer— <i>favors Google</i>
4. Effect on markets for copyrighted work and derivatives	Realistically copyright holder could not create the market (but could only license individual book titles)— <i>favors Google</i>
5. Increasing access to knowledge through changed works serving a different market than the original work	Gives users throughout the world access to knowledge of which libraries hold books on huge variety of subjects and some few sentences in the books, to help user determine if she wants to try to obtain a copy of that book from the library holding the book or from the publisher. Individual copyright holders cannot provide that knowledge with only their copyrighted works— <i>favors Google</i>

An index such as the Google Database that identifies the location of books written in English, however, will not provide meaningful access to knowledge for individuals who only speak Kikuyu, the language of the largest ethnic group in Kenya, or who speak one of the other native languages of millions of citizens of developing countries.¹⁹⁸ To meaningfully increase access to knowledge, there must be access to works in the native language of the readers: “The potential user in a developing country will find all these other forms of access [such as content on the Web] quite hollow if when she goes to the Web, the Internet, or the television, she finds nothing available in her language.”¹⁹⁹ To address better the full scope of fair use, the next Part of this Article considers the question of translations as a fair use under 17 U.S.C. § 107.

198. Technically, everyone with Internet access will have access to the Google Database, but to those who do not speak English, that access will not be meaningful. Of course, an index in Kikuyu and books in Kikuyu will not directly help those who can speak but not read Kikuyu. That only emphasizes the enormity of the problem of the digital divide. See discussion *infra* Part III.A.

199. WILSON, *supra* note 2, at 302.

III. TRANSLATING A LITERARY WORK INTO THE NATIVE LANGUAGE OF CITIZENS OF A DEVELOPING COUNTRY SHOULD BE A FAIR USE

A. *Decreasing the Digital Divide Is a Factor Favoring Fair Use*

The “benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies.”²⁰⁰ A “significant ‘knowledge gap’ as well as a ‘digital divide’ continue to separate the wealthy nations from the poor.”²⁰¹ Duke Law Professor Reichman says that “the knowledge gap separating advanced from developing countries remains a cardinal fact of international economic life.”²⁰²

This gap is not a new phenomenon. In 1980, UNESCO’s McBride Report recommended a leveling of the playing field by “simultaneous interpretation and automated translation facilities . . . for cross-cultural communication to bridge linguistic divides.”²⁰³ A 1999 United Nations report concluded that “the ability to move into the Information Age depends on the capacity of the whole society to be educated, and to be

200. World Summit on the Information Society, Declaration of Principles 2 (Dec. 12, 2003), available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf. Ohio State Law Professor Chow and George Washington Law Professor Schoenbaum state, “Developed countries dominate in the creation of knowledge and advanced technology; developing nations tend to be importers and consumers of knowledge and technology created in developed countries.” DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS—PROBLEMS, CASES AND MATERIALS 21 (2005).

201. World Intellectual Prop. Org. Gen. Assembly, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO 2 (Aug. 27, 2004), available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/doc/wo_ga_31_11.doc [hereinafter WIPO Development Proposal]; see Allen S. Hammond, *The Digital Divide in the New Millennium*, 20 CARDOZO ARTS & ENT. L.J. 135 (2002); Colin Darch, *Digital Divide or Unequal Exchange? How the Northern Intellectual Property Rights Regime Threatens the South*, 32 INT’L J. LEGAL INFO. 488 (2004); Mia K. Garlick, *Locking Up the Bridge in the Digital Divide—A Consideration of the Impact of the U.S. Anti-Circumvention Measures for the Participation of Developing Countries in the Digital Economy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 941 (2004). The digital divide does not only appear when comparing developed and developing countries. See Therese Bissell, Note, *The Digital Divide Dilemma: Preserving Native American Culture While Increasing Access to Information Technology on Reservations*, 2004 U. ILL. J.L. TECH. & POL’Y 129 (2004).

202. J.H. Reichman & David Lange, *Bargaining Around The TRIPS Agreement: The Case for Ongoing Public—Private Initiatives To Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT’L L. 11, 18 (1998). The reference to “advanced” and “developing” refers to economically advanced and not a distinction in the level of cultures between countries.

203. UNITED NATIONS ECON. & SOC. COUNCIL, MANY VOICES, ONE WORLD, THE MACBRIDE REPORT 255 (1980), available at <http://unesdoc.unesco.org/images/0004/000400/040066eb.pdf>.

able to assimilate and process complex information.”²⁰⁴ The report added that “cultural and educational development conditions technological development, which conditions economic development, which conditions social development, and this stimulates cultural and educational development once more.”²⁰⁵

In 2001, the Secretary-General of the United Nations Economic and Social Council said that “the concentration of technological know-how in a few firms from a few countries . . . exposes many countries of the developing world to technological dependence, to monopolistic pricing of technology and knowledge products and services.”²⁰⁶ The Secretary-General added that there is a large body of knowledge available in developed countries that “is potentially useful to developing countries, and a deliberate effort needs to be pursued in order to harness this knowledge and transfer it to developing countries.”²⁰⁷ In 2005, a United Nations task force said that “[r]egardless of how we measure it, there is an immense information and communication technology (ICT) gap, a ‘digital divide,’ between developed and developing countries.”²⁰⁸

As a step in decreasing this divide, citizens of developing countries need more meaningful access to literary works, since “[e]ducation is fundamental to the capacity-building upon which all further progress is made.”²⁰⁹ Among other things, developing countries need increased “access to relevant programming, stories and reports. . . . Especially critical here is access to materials in the user’s own language, whether Swahili or Tamil.”²¹⁰ In order to create such access, society must “foster

204. Manuel Castells, *Information Technology, Globalization and Social Development* 3 (United Nations Research Institute for Social Development (UNRISD) Discussion Paper No. 114, 1999), available at <http://www.unrisd.org/80256B3C005BCCF9/httpPublications?OpenForm&view=publicationdate&count=1000&expandview> (follow “Information Technology, Globalization and Social Development” hyperlink).

205. *Id.* at 4.

206. The Secretary-General, *The Role of the United Nations in Promoting Development, Particularly with Respect to Access and Transfer of Knowledge and Technology, Especially Information and Communication Technologies, Inter Alia, Through Partnership with Relevant Stakeholders, Including the Private Sector* 4 (May 2, 2001), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/359/80/pdf/N0135980.pdf>.

207. *Id.*

208. United Nations Conference on Trade & Dev., *The Digital Divide Report: ICT Diffusion Index 2005* iii (2006), available at http://www.unctad.org/en/docs/iteipc20065_en.pdf. Wilson says the “information gap between rich and poor countries is growing.” WILSON, *supra* note 2, at 334.

209. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2894 (2006) (“Although copyright is only one of many factors that go into the provision of basic education, it is an essential policy lever for educational development generally.”).

210. WILSON, *supra* note 2, at 302.

the creation of varied local and national content, including that available in the language of users.²¹¹

Broad access to literary works is also necessary for a free, viable democracy. For instance, the Supreme Court said, “[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”²¹² Stanford Law Professor Lessig has stated, “Free resources have always been central to . . . democracy.”²¹³ In the same vein, Yale Law Professor Fiss said that “freedom to speak depends on the resources at one’s disposal.”²¹⁴

George Washington Law Professor Barron stated:

If freedom of expression cannot be secured because entry into the communication media is not free but is confined as a matter of discretion by a few private hands, the sense of justice of existing institutions, which freedom of expression is designed to assure, vanishes from some section of our population as surely as if access to the media were restricted by the government.²¹⁵

If it were clear that translations of English language works could be prepared in other countries with impunity, there might be no need to analyze whether the creation in the United States of native language translations for developing countries would be a fair use under U.S. copyright law.²¹⁶ However, the applicable international treaties require all

211. See World Summit on the Info. Soc’y, Plan of Action 10 (Dec. 12, 2003), available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf.

212. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); see also discussion of *Associated Press*, *supra* note 73, at 366-67.

213. Lessig, *supra* note 43, at 12. The resources Lessig refers to include, but are not limited to, copyrighted works.

214. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986). Yale Law Professor Benkler has said that concentrated systems of information “are likely to exclude challenges to prevailing wisdom that are necessary for robust political discourse.” Benkler, *supra* note 73, at 377-78. He added that “concentrated commercial systems tend to translate unequal distribution of economic power in society into unequal distribution of power to express ideas and engage in public discourse.” *Id.* at 378.

215. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1650 (1967). Of course, many countries do not have democratic forms of government and do not have the same free speech values recognized in this country. That fact should not mean that free speech and democratic values should not be considered in applying the fair use statute in the United States.

216. There appears to be the ability to translate works into the native languages of citizens of developing countries, at least in part through the use of computer programs. For instance, Google allows individuals to use programs displayed on Google to translate text submitted by the individuals into many different language. See Google.com, Google Language Tools, http://www.google.com/language_tools (last visited Oct. 22, 2007). Separately, software

member countries—developing countries and the United States—to grant copyright holders the exclusive right to create translations, with certain exceptions. As a result, developing countries that have executed the treaties are not in a better legal position than the United States on the issue of translations, and clearly the developing countries do not have the economic resources available to them that the United States has to create the translations. The remainder of this Article therefore considers the international treaties and how the well-established U.S. fair use doctrine can be an important first step within these treaties to the creation of native language translations for developing countries.²¹⁷

programs are available for sale to automatically translate literary works into many other languages. See, e.g., Translution-Translation Software, <http://www.translution.com> (last visited Oct. 22, 2007); Translation Software and Services Company, <http://translation.net> (last visited Oct. 22, 2007); Translation Software, Translation Dictionary, OCR, Spell Check, Electronic Dictionary, <http://www.smartlinkcorp.com/translation-software/about.html> (last visited Oct. 22, 2007). While these programs undoubtedly are not perfect and would result in translations not as clearly or correctly expressed in the second language as in the original language, they could make the preparation of effective translations much less time-consuming than individual word by word translations, especially if the purpose was not so much to provide the same artistic message but to communicate the basic knowledge in the works. Many organizations appear to have the will to translate English works into the native languages of citizens of developing countries, if such translations were legal. As one example, Aluka is a non-profit organization with a mission of creating a sustainable digital library for developing countries. Its Web site states, “the Aluka collections link materials that are physically scattered and difficult to access, opening up new possibilities for research and teaching.” Aluka, History and Mission, <http://www.aluka.org/page/about/historyMission.jsp> (last visited Oct. 22, 2007). However, the Web site also says, “Aluka is committed to respecting the rights of authors and to securing appropriate permission from the holders of copyrights. . . .” *Id.* If permission were not a requirement, organizations such as Aluka might then devote time and resources to creating needed translations. For other Web sites interested in reducing language barriers, including language barriers in computer software, adversely affecting Africa, see Bisharat.net, <http://www.bisharat.net/why1.htm> (last visited Oct. 22, 2007), and Kabissa.org, http://kabissa.org/our_charter.html (last visited Oct. 22, 2007).

217. See also IPR COMM’N, *supra* note 11, at 96 (“It is the cost of access, and the interpretation of ‘fair use’ and ‘fair dealing’ exemptions that are particularly critical for developing countries, made more so by the extension of copyright to software and digital material.”). Although some have argued that increased protection for intellectual property in developing countries would assist economic development in those countries, others have argued that “higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment [in] and licensing” to developing countries. WIPO Development Proposal, *supra* note 201, at 4. There is no reason to believe that the creation of native language translations would lessen foreign direct investment in the developing countries.

B. Treaties Promoted by the Developed Countries, Including the United States, Have Required the Adoption by Developing Countries of Copyright Laws and Thus Have Limited Access to Knowledge in Developing Countries

1. The History of Berne and TRIPS

The most comprehensive international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works,²¹⁸ was “animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”²¹⁹ This contrasts with the Copyright Clause of the United States Constitution, in which promotion of the progress of science and useful arts is the stated goal.²²⁰ Initially adopted effective December 5, 1887 by nine countries,²²¹ the Berne Convention has been amended a number of times since then.²²² As a result of the Stockholm Conference of 1967, the World Intellectual Property Organization (WIPO) was formed and became the Secretariat for the administration of the Berne Convention.²²³ The current version of the Berne Convention was adopted as a result of the 1971 Paris Conference.²²⁴ The United States only acceded to the Berne Convention effective March 1, 1989.²²⁵

218. 1 NIMMER & NIMMER, *supra* note 29, § 5.07[B] (“The pre-eminent multilateral copyright treaty is the Berne Convention.”). Referring to the incorporation of the Berne Convention into the Treaty on the Trade-Related Aspects of Intellectual Property, *infra* Part III.B.2, Nimmer says, “With the emergence of the Berne Convention as the governing instrument in the world of international trade, the current subject matter arguably eclipses in importance all else in the copyright world.” 4 NIMMER & NIMMER, *supra* note 29, § 117.01.

219. Preamble to Berne Convention (Paris Text), *reprinted in* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 app. 1 (1987).

220. See *supra* note 30 and accompanying text.

221. Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Switzerland, and Tunisia. France declared that its accession covered all of its colonies and foreign possessions, and the United Kingdom “acceded to the Convention on behalf of her principal self-governing dominions, namely the Australian colonies, New Zealand, Canada and Nova Scotia, the Cape Colony and Natal, and India.” RICKETSON, *supra* note 219, §§ 2.51-2.52. The Berne Convention was signed by ten countries on September 9, 1886, but Liberia did not ratify the Convention until approximately twenty years later. *Id.*

222. For a detailed history of modifications in the Berne Convention, see RICKETSON, *supra* note 219, ch. 3.

223. RICKETSON, *supra* note 219, § 3.65.

224. *Id.* §§ 3.66-67, ch. 11.

225. 3 GOLDSTEIN, *supra* note 38, § 18.9.1. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-56, § 3, provided that the Berne Convention “shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself;” apparently because the United States did not adopt the provisions of the Berne Convention on the moral rights of authors. 3 *id.* § 18.9.1. While the United States remained outside of the Berne Convention, the Universal Copyright Convention (UCC) was created in 1952 with less rigorous standards than the Berne Convention, to entice the United States and other countries that maintained copyright

The Berne Convention sets minimum standards that member countries agree to follow in protecting the works of authors of other countries.²²⁶ For instance, article 8 provides: "Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works. . . ."²²⁷ There is flexibility in the Berne Convention, however. For instance, article 10(2) provides:

It shall be a matter for legislation in the countries of the Union . . . to permit the utilization, to the extent justified by the purpose, of literary and artistic works by way of illustration in publications, broadcasts, or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.²²⁸

Also, article 9(2) allows member countries to adopt legislation permitting "the reproduction of such works [1] in certain special cases, provided that such reproduction [2] does not conflict with a normal exploitation of the work and [3] does not unreasonably prejudice the legitimate interests of the author."²²⁹

Since the early 1960s, international treaty negotiations have highlighted the conflicting views between many developed and developing countries on copyright.²³⁰ The 1971 Paris Conference adopted an appendix to the Berne Convention (Appendix), specifically negotiated

notice requirements, to join. The United States ratified the UCC in 1955, and there are currently eighty countries that have joined the UCC. The UCC gives priority to the Berne Convention when countries are members of the Berne Convention. The UCC is not discussed further in this Article. See discussion of the UCC, *supra* note 29, § 17.01[B][2]; 3 GOLDSTEIN, *supra* note 38, § 18.9.2.

226. See discussion of the Berne Convention, *supra* note 219; Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 15-16 (1988) ("The Convention also established the concept of authors' exclusive rights, which functioned as minimum standards that all member countries were required to recognize. The translation right was the first exclusive right established by the 1886 Convention. Over the course of five revisions, the contracting states added nine more exclusive rights.").

227. 4 GOLDSTEIN, *supra* note 38, annex 84. Article 9(1) gives authors "the exclusive right of authorizing the reproduction of these works, in any manner or form." *Id.* annex 84.

228. *Id.* annex 84. Article 10(3) requires mention of the source and sometimes the author. *Id.* annex 85.

229. *Id.* annex 84. This Article added the bracketed numbers to the text. This test in section 9(2) is sometimes referred to as the "three-step-test." Daniel J. Gervais, *Towards a New International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 13 (2005).

230. CHOW & SCHOENBAUM, *supra* note 200, at 21 ("Many developing nations believe that intellectual property rights are unduly restricting their access to technology by denying access altogether or only through the payment of burdensome royalty and licensing fees. Developed nations argue that intellectual property rights protect their substantial investments in research and development and offer a fair return for their efforts.").

between developed and developing countries.²³¹ The Appendix allowed developing countries that followed the procedures in the Appendix “to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses,”²³² but “only for the purpose of teaching, scholarship or research.”²³³ In order for the Appendix to be applicable, however, the developing country must, “by a notification deposited with the Director General [of the Union] . . . declare that it will avail itself of the faculty provided for” in the Appendix.²³⁴ The applicant must establish “either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation . . . or that, after due diligence on his part, he was unable to find the owner of the right.”²³⁵ Article IV also provides that “due provision” must be made at the national level “to ensure . . . that the license provides . . . for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned.”²³⁶ Further, Article IV requires, “Due provision shall be made by national legislation to ensure a correct translation of the works.”²³⁷ In part due to the multiple conditions in the Appendix, it has not assisted developing countries to any significant degree.²³⁸

231. For detailed discussions of (1) the 1967 Stockholm Conference, in which developing countries negotiated a relaxation of copyright requirements for developing countries; (2) the refusal of developed countries to adopt the Stockholm Protocol; and (3) the subsequent adoption of the Appendix at the Paris Conference in 1971, see RICKETSON, *supra* note 219, ch. 11; Robert D. Hadl, *Toward International Copyright Revision: Report on the Meetings in Paris and Geneva*, 18 BULL. COPYRIGHT SOC'Y 183 (1970); Dorothy M. Schrader, *Analysis of the Protocol Regarding Developing Countries*, 17 BULL. COPYRIGHT SOC'Y 160 (1970); Nora Maija Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 BULL. COPYRIGHT SOC'Y 402 (1982).

232. 4 GOLDSTEIN, *supra* note 38, annex 111 (reprinting Berne Convention, app. art. II(1)).

233. *Id.* annex 112 (reprinting Berne Convention, app. art. II(5)).

234. *Id.* annex 109 (reprinting Berne Convention, app. art. I(1)).

235. *Id.* annex 116 (reprinting Berne Convention, app. art. IV(1)).

236. *Id.* annex 117 (reprinting Berne Convention, app. art. IV(6)(a)).

237. *Id.* (reprinting Berne Convention, app. art. IV § 6(b)).

238. Ricketson said, “It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix.” RICKETSON, *supra* note 219, § 11.06. A report for the Commission on Intellectual Property Rights (United Kingdom) said that the “least developed countries urgently require access to a wide range of educational and other hard copy materials to assist in fulfilling a number of their educational, literary, economic and social development objectives” and added that the provisions of the Appendix “have failed to meet these requirements and any attempts to revise the Appendix to take account of these needs would likely require at least a decade of deliberation given that, as an initial matter, any changes to the Berne Convention requires the unanimous consent of all signatories.” Alan Story, *Study on Intellectual Property Rights, the Internet, and Copyright* 57 (World Trade Organization Commission on Intellectual Property Rights, Study Paper 5, 2001), available at http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf; see also Okediji, *supra* note 8, at 106-09; Story,

There was no effective mechanism to enforce the provisions of the Berne Convention, either for the main text or the Appendix, but countries addressed this omission in 1994.²³⁹ On April 15, 1994, at a meeting in Marrakesh, Morocco, 111 countries marked the close of the Uruguay Round of multilateral trade negotiations by executing the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)²⁴⁰ and agreeing to the creation of the World Trade Organization (WTO).²⁴¹ The developed countries wanted the intellectual property protection provided by the developing countries to increase (the developing countries resisted), whereas the developing countries wanted the developed countries to lower trade barriers to imports from developed countries (the developed countries resisted).²⁴² In order to gain better access to the markets of the developed countries, the developing countries agreed to adopt and enforce greater protection of intellectual property, including most of the protections provided for in the Berne Convention.²⁴³

supra note 5, at 768-69 (“The one addition made to Berne during that era which purported to improve the situation of poor countries—incorporation of the Paris Appendix—has certainly not done so.”). The WIPO Copyright Treaty, *see infra* Part III.B.2, also has a provision for compulsory licenses for certain works under certain conditions. *See* 10 NIMMER & NIMMER, *supra* note 29, app. 50-24/25.

239. Reichman referred to “a purely theoretical possibility of litigation before the International Court of Justice” under the Berne Convention. J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335, 339 (1997).

240. 10 NIMMER & NIMMER, *supra* note 29, app. 42.

241. *Id.* § 18.06; World Trade Org., Understanding the WTO, The Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Oct. 22, 2007); World Trade Org., Understanding the WTO, What Is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Oct. 22, 2007).

242. Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505, 506-08, 510 (2005) (“The multinational companies that successfully lobbied to establish a linkage between IP and trade . . . did so because of their need to increase profits and markets or, to put it differently, to maximize rent extraction and increase the number of foreign territories into which they could consider expanding.”); J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT’L LAW. 345, 346 (1995) (“Market access for developing countries thus constituted a bargaining chip to be exchanged for greater protection of intellectual goods within a restructured global marketplace.”); Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT’L L. 735, 739 (1996) (“The relationship of developing countries to the TRIPs Agreement thus may be regarded as a bargained-for-exchange—intellectual property protection for fair trade rules in specific industries. . . .”). There were of course other negotiating sides than simply developing countries vs. developed countries, such as the negotiations between the United States and the European Union on various issues. *See* 4 NIMMER & NIMMER, *supra* note 29, § 18.05[c][2]. Nimmer said, “Probably, few types of loose coalitions and shifting alliances were absent from the progression” of negotiations. *Id.*

243. Article 9(1) of TRIPS provides, “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto,” except “in respect of rights conferred under Article 6 bis of that Convention or the rights derived therefrom.” 10 NIMMER & NIMMER, *supra* note 29, app. 42-8. Article 6 *bis* of the Berne Convention, excluded from TRIPS, pertains

Unlike the Berne Convention's distinct focus on protecting the rights of authors, the stated purpose of TRIPS was economic: "to reduce distortions and impediments to international trade . . . and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."²⁴⁴ The TRIPS preamble also recognizes "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base."²⁴⁵ TRIPS also provides:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.²⁴⁶

As indicated in the preceding paragraph, TRIPS does not require copyright laws of the member countries to be identical or inflexible.²⁴⁷

to the moral rights of authors. 4 GOLDSTEIN, *supra* note 38, annex 82. The adoption of TRIPS "provided broader protections for intellectual property rights by granting most favored nation treatment for all signatories, establishing minimum terms of protection, imposing significant local enforcement and dispute settlement requirements, and authorizing trade sanctions against noncompliant nations." Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 324-25 (2006) (BRIC refers to Brazil, Russia, India, and China); *see also* CHOW & SCHOENBAUM, *supra* note 200, at 360-61, 626-28. Countries that have approved TRIPS include the following least developed countries: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, and Zambia. *See* World Trade Org., Least-Developed Countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 22, 2007). Developing countries that have approved TRIPS include Botswana, Cameroon, Kenya, Nigeria, and South Africa. *See* World Trade Org., Member and Observer List, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, (last visited Oct. 22, 2007).

244. 10 NIMMER & NIMMER, *supra* note 29, app. 42-2 (reprinting Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, pmbl.). In contrast to the focus of the Berne Convention on authors' rights and the focus of TRIPs on increasing copyright protection to promote international trade, the historical view in China of copying was almost the opposite:

In traditional China, copying was not condemned as improper but commended as a method of showing the proper deference to the past. . . . As a result of the veneration of the past in traditional China, copying did not suffer from the same type of social stigma and condemnation that created the basis for intellectual property laws in western nations.

DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 410-11 (West 2003).

245. 10 NIMMER & NIMMER, *supra* note 29, app. 42-3 (reprinting TRIPS, *supra* note 244, pmbl. ¶ 6).

246. *Id.* app. 42-7 (reprinting TRIPS, *supra* note 244, art. 7).

247. *See* Gervais, *supra* note 242, at 505.

For instance, “[m]embers may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development provided that such measures are consistent with the provisions of this Agreement.”²⁴⁸ In addition, there are certain transitional provisions in TRIPS that allowed developing countries and do allow the least developed countries additional years before implementing certain of the required copyright rights.²⁴⁹ TRIPS also states, “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”²⁵⁰

There is a detailed procedure for the resolution of disputes between countries about the application of TRIPS.²⁵¹ The procedure involves attempts to resolve a dispute before any hearing and the presentation of the dispute to a panel of members appointed from different countries. If the dispute is not ultimately resolved by agreement between the parties, the complaining country may impose trade sanctions against the party violating TRIPS.²⁵²

There has been a great deal of debate over TRIPS. Some say it is very harmful to developing countries, whereas others say the developed countries conceded too much to the interests of developing countries.²⁵³

248. 10 NIMMER & NIMMER, *supra* note 29, app. 42-7 (reprinting TRIPS, *supra* note 244, art. 8, ¶ 1). This provision is similar to article 9(2) of the Berne Convention, but in contrast to the Berne Convention, article 13 of TRIPS applies to all the exclusive rights of a copyright holder, not just the right of reproduction, and article 13 is a limitation on what member countries can adopt, rather than a permissive provision. See Okediji, *supra* note 8, at 125; Neil W. Netanel, *The Next Round: The Import of the WIPO Copyright Treaty in TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 459 (1997).

249. 10 NIMMER & NIMMER, *supra* note 29, apps. 42-42, 42-43. Article 65 applies to developing countries, and article 66 applies to least developed countries.

250. *Id.* app. 42-9 (reprinting TRIPS, *supra* note 244, art. 13).

251. *Id.* app. 42-41 (reprinting TRIPS, *supra* note 244, art. 64); see also World Trade Org., Understanding the WTO, Settling Disputes: A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Oct. 22, 2007).

252. See World Trade Org., Dispute Settlement Understanding, http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Oct. 22, 2007).

253. Hamilton, *supra* note 5, at 614-16 (“If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history TRIPS imposes a Western intellectual property system across-the-board—which is to say that it imposes presuppositions about human value, effort, and reward.”); Harris, *supra* note 5, at 686 (“TRIPS is a treaty of adhesion.”); John H. Barton, *The Economics of TRIPS: International Trade in Information Intensive Products*, 33 GEO. WASH. INT'L L. REV. 473, 474 (2001) (“The debate over TRIPS has been unusually sharp, ranging from those who view the failure to view U.S.—style intellectual property arrangements as piracy to those who see TRIPS as a form of neo-imperialism.”).

Others argue TRIPS is here to stay, and developing countries should learn to take advantage of the flexibility built into TRIPS.²⁵⁴ However, it is indisputable that flexibilities in TRIPS exist, so the next Part of this Article considers the increasing recognition of these flexibilities.

2. The Trend Toward Recognition of Flexibility in Berne and TRIPS

Negotiations among countries since TRIPS support the view that WTO members consider TRIPS to be flexible with respect to the needs of developing countries. In 1996, delegates of countries attending the WIPO Diplomatic Conference on Certain Copyright and Related Rights Questions adopted the WIPO Copyright Treaty that addressed certain copyright issues pertaining to computer programs and databases.²⁵⁵ Among other issues, the United States initially sought approval for (1) granting copyright owners greater rights to control the temporary reproduction of works in the random access memory of computers and (2) curtailing “the power of states to adopt exceptions and limitations on the exclusive rights of copyright owners, including fair use and first sale privileges.”²⁵⁶ However, domestic and international pressure caused the United States to change its position, and ultimately the language on permitted exceptions under the laws of member countries tracked the language of TRIPS on exceptions.²⁵⁷ In addition, delegates included as part of the Preamble to the Treaty recognition of “the need to maintain a balance between the rights of authors and the larger public interest,

254. Reichman, *supra* note 239, at 356 (“I end this article with a plea for patient and cooperative forms of persuasion rather than costly and confrontational forms of international litigation. . . . If the developed countries push too hard and fast, the developing countries and the least developed countries will find ways to push back. Developing countries will look to the safeguards embodied in articles 7 and 8 of the TRIPS Agreement, and LDCs will invoke the additional safeguards allowing exceptions for hardship (beyond the transitional periods) in the framework WTO Agreement.”).

255. 4 GOLDSTEIN, *supra* note 38, annex 176-187; Mihály Ficsor, *The WIPO “Internet Treaties:” The United States as the Driver; The United States as the Main Source of Obstruction—As Seen by an Antirevolutionary Central European*, 6 J. MARSHALL REV. INTELL. PROP. L. 17 (2006); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369 (1997).

256. Samuelson, *supra* note 255, at 372-73.

257. *Id.* at 406-07. The database treaty proposed by the United States was rejected. *Id.* at 418-26. Samuelson noted:

[T]he national delegations attending the diplomatic conference in Geneva included not only officials who had previously attended the Committee of Experts meetings, but also other government officials who were not necessarily copyright specialists. This may have made it more difficult for U.S. and E.U. negotiators to command the deference to which they had become accustomed during prior WIPO meetings.

Id. at 433.

particularly education, research and access to information, as reflected in the Berne Convention.”²⁵⁸

The trend toward recognition of flexibility in TRIPS continued after the WIPO Copyright Treaty. On November 14, 2001, the Doha Ministerial Conference of the WTO “[d]etermined to take concrete action to address issues and concerns that have been raised by many developing-country members regarding the implementation of some WTO Agreements and Decisions,” and agreed to another round of trade negotiations that would examine many issues of interest to developing countries, including “improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions.”²⁵⁹ On June 27, 2002, as the result of pressure from developing countries and others, the Council for TRIPS granted an extension “until the beginning of 2016 in regard to the protection and enforcement of patents and rights in undisclosed information with respect to pharmaceutical products.”²⁶⁰

On February 17, 2006, fourteen countries submitted a Proposal for the Establishment of a Development Agenda that included as one of the issues, “what measures are needed within WIPO to . . . facilitate access to knowledge generally around the world and specifically in developing countries.”²⁶¹ On July 20, 2005, Morocco, on behalf of the African Group, submitted a proposal that states, “WIPO should examine the flexibilities under the TRIPS Agreement and Doha with a view to giving practical advice to developing and least developed countries on how to enable them gain access . . . to information and knowledge for education and research.”²⁶²

On June 15, 2007, at a meeting of the Provisional Committee on Proposals Related to a WIPO Development Agenda, ninety-three member countries approved recommendations to be presented to the

258. WIPO Copyright Treaty, pmbl., Dec. 20, 1996, *available at* http://www.wipo.int/external/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

259. *See* World Trade Org., Ministerial Conference, Implementation-Related Issues and Concerns, Decision of 14 November 2001, at 1, 8, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.pdf.

260. Robert D. Anderson & Hannu Wager, *Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy*, 9 J. INT'L ECON. L. 707, 728 (2006).

261. World Intellectual Prop. Org., Proposal for the Establishment of a Development Agenda for WIPO: A Framework for Achieving Concrete and Practical Results in the Near and Longer Terms 5 (Feb. 17 2006), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/peda_1/peda_1_5.pdf.

262. World Intellectual Prop. Org., Proposal By Morocco on Behalf of the African Group, The African Proposal for the Establishment of a Development Agenda for WIPO 5 (July 18, 2005), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/iim_3/iim_3_2.pdf.

September 2007 WIPO General Assembly. These recommendations included, “WIPO should take into account the flexibilities in International IP agreements, especially those which are of interest to developing countries and LDCs” and should “initiate discussions on how, within WIPO’s mandate, to further facilitate access to knowledge and technology for developing countries and LDCs.”²⁶³ As discussed next, this flexibility in the international treaties also provides leeway for U.S. copyright law.

3. The Next Step for U.S. Fair Use

Discussing the WIPO Copyright Treaty, Stanford Law Professor Samuelson concluded that the “endorsement of balancing principles in copyright law, in particular, the importance of considering the impact of copyright rules on education, research, and access to information, is consistent with longstanding principles of U.S. copyright law” and “preserves the U.S. fair use defense.”²⁶⁴ Consistent with the U.S. principles of fair use, Texas Law Professor Netanel concluded that as a result of the WIPO Copyright Treaty, “WTO panels will have to resolve disputes over TRIPS’s copyright provisions in consonance” with the goals of fostering “creative expression and the free flow of information.”²⁶⁵

The reasonable conclusion is that U.S. fair use is consistent with the Berne Convention and TRIPS.²⁶⁶ U.S. fair use does not list any specific permitted uses that deprive authors of any of their exclusive rights, but is limited to decisions on a case-by-case basis. Both the first and fourth fair use factors are geared to prevent any fair use from conflicting with the normal exploitation of an original work and from prejudicing the legitimate interests of a copyright holder. Also, the United States acceded to the Berne Convention with the understanding that its fair use

263. PCDA REPORT, *supra* note 3, annex 1, at 2. On September 28, 2007, the WIPO General Assembly approved the development agenda. See Press Release, World Intellectual Prop. Org., Member States Adopt a Development Agenda for WIPO (Oct. 1, 2007), http://www.wipo.int/pressroom/en/articles/2007/article_0071.html.

264. Samuelson, *supra* note 255, at 436.

265. Netanel, *supra* note 248, at 497.

266. See J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U.J. INT’L L. & POL. 11, 46 (1996-1997) (“Against this background, the developed countries cannot use Article 13 of the TRIPS Agreement to prevent developing countries from applying limitations and exceptions parallel to those already recognized in state practice, with a view to encouraging price discrimination and other concessions in favor of research, education, libraries and other public-good uses. On the contrary, it is the participation of developing countries in future discussions about these issues that should help to determine the outer limits of the ‘fair use’ doctrine in international law.”).

doctrine was consistent with the Berne Convention.²⁶⁷ Moreover, as a practical matter, because ninety-three WIPO member countries have agreed that increasing access to knowledge in developing countries is one purpose of WIPO, it is unlikely that those member countries would challenge application of the U.S. fair use statute to promote access to knowledge in developing countries as proposed in this Article.

For these reasons, because it is the strongest country in the world economically, and because of the numerous court decisions applying the U.S. fair use statute, the United States is best suited to argue for the proposition that fair use permits native language translations for developing countries. Indeed, developed countries have pressured developing countries to adopt greater copyright protections than those required by TRIPS, so it might be more effective for a developed country such as the United States to take the position that the copyright policies it has adopted (policies it argues other countries should adopt) allow for fair use native language translations of copyrighted works.²⁶⁸ A developing country taking the same position might appear to be biased

267. Okediji, *supra* note 8, at 146. Also, in his statement transmitting the Uruguay Trade Agreements, President Clinton declared that the U.S. fair use statute was consistent with TRIPS. *Id.* at 77. Professors Dreyfuss and Lowenfeld argue for deference under TRIPS to the interpretation by countries of their fair use or analogous statutes: "There ought to be a presumption that these issues are for individual member states, with intervention by the international community only on the basis of a showing of a pattern of discrimination or failure to grant protection without defensible reasons." Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 307 (1997). They also argue that the practices of member countries are relevant because they reflect the understanding of the countries when TRIPS was signed. *Id.* at 290; *cf.* Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 363 (1997) ("It would be highly inappropriate for panelists in TRIPS cases . . . to import the differential standard [for judging the practices of member countries] established only for antidumping cases."). Of course, if the U.S. government supported such translations as fair uses, it is not clear that any other country would care about challenging the translations before the WTO. Professor Okediji says, "None of these arguments [that the U.S. fair use statute violates the Berne Convention], however, is likely to foster international challenge of the doctrine. . . ." Okediji, *supra* note 8, at 117; *see also* Bello, *supra*, at 360-61 (discussing the factors that might persuade the U.S. government to file or not to file a WTO Complaint and concluding that many of the same factors, including geopolitics, could be considered by other countries).

268. Gervais, *supra* note 242, at 535 ("IP developments in bilateral and regional trade agreements mirror the so-called 'maximalist' approach."); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 24 (2004) ("The United States and the EC . . . pressur[ed] developing countries to sign 'TRIPS-plus' bilateral agreements . . . [and] . . . [t]hese agreements contained intellectual property protection standards that exceeded those found in TRIPS and required developing countries to implement their treaty obligations before the end of TRIPS transition periods."); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 383 (SPECIAL ISSUE) 1 (2006) ("Many developed countries have sought to ratchet up their protection by negotiating around the TRIPS Agreement, seeking what commentators have called 'TRIPS-plus' protection."); IPR COMM'N, *supra* note 11, at 162-64; Chon, *supra* note 209, at 2871-72.

and acting only in its self-interest. This Article next looks at arguments supporting native language translations of copyrighted works as a fair use under U.S. copyright law.

C. A Derivative Work Can Be a Fair Use

1. Fair Use of Derivative Works

Under U.S. law, copyright holders have the exclusive right under 17 U.S.C. § 106(2)²⁶⁹ to create a derivative work, defined as a “work based upon one or more preexisting 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 adapted.”²⁷⁰ Although a copyright holder has the “exclusive” right to make derivative works under § 106(2), a derivative work prepared by a third party without the consent of the copyright holder can be a fair use. Title 17 U.S.C. § 107 provides, “[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.” This qualification makes the right to create derivative works in § 106(2) subject to the fair use provisions of § 107, just as the Supreme Court held in *Harper & Row* that this qualification made the right to first publication in § 106(3) subject to § 107.²⁷¹ In *Campbell*, for instance, the Court recognized that 2 Live Crew’s song was a derivative work and said that it “would be an infringement of Acuff-Rose’s rights in ‘The Pretty Woman’ . . . but for a finding of fair use through parody.”²⁷²

269. 17 U.S.C. § 106 (2000) provides that “the owner of copyright under this title has the exclusive rights to do and authorize any of the following: . . . (2) to prepare derivative works based upon the copyrighted work.” Cf. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1017 (1997) (“It is not clear precisely how a derivative work differs from a nonliteral copy, or what section 106(2) adds to the provisions of 106(1).”).

270. 17 U.S.C. § 101. The Copyright Act of 1909 gave the copyright holder the exclusive right to “translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work.” 6 NIMMER & NIMMER, *supra* note 29, app. 6-3 (quoting section 1(b) of the 1909 Act). Prior to that time, at least one federal court had held that making a translation of a copyrighted work was not an infringement. See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 207-08 (C.C.E.D. Pa. 1853) (“To make a good translation of a work, often requires more learning, talent and judgment than was required to write the original. . . . A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.”).

271. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (“[T]he right of first publication, like the other rights enumerated in § 106, is expressly made subject to the fair use provision of § 107.”).

272. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-75 n.4 (1994).

As discussed above, the Court held that 2 Live Crew's song, a derivative work, was a fair use under § 107.²⁷³

A more recent case showing that a derivative work by a third party can constitute a fair use is *Ty, Inc. v. Publications International Ltd.*²⁷⁴ In *Ty*, the United States Court of Appeals for the Seventh Circuit addressed a claim that books described as collectors' guides to "Beanie Babies" were illegal derivative works of Beanie Babies.²⁷⁵ The district court granted summary judgment for Ty and enjoined Publications from selling any of the Beanie Babies guides. The Seventh Circuit agreed the photographs of the Beanie Babies in the books were derivative works.²⁷⁶ However, because of the possibility of fair use, the Seventh Circuit reversed the district court's injunction and said the issue on remand was whether "the use of the photos is a fair use because it is the only way to prepare a collectors' guide."²⁷⁷ In other words, even though the photographs were derivative works, they may have been fair uses.²⁷⁸ Similarly, the mere fact that a translation into Kikuyu of a copyrighted book in English would constitute a derivative work would not mean the translation constituted copyright infringement.²⁷⁹

On the other hand, differences in content alone between substantially similar works cannot make the second work "transformative" in the sense that the differences favor a finding of fair

273. See *supra* Part II.C.2.

274. 292 F.3d 512 (7th Cir. 2002).

275. *Id.* Ty had registered copyrights in "Beanie Babies" as sculptural works. *Id.*

276. *Id.* at 520.

277. *Id.* at 522.

278. In contrast, the Seventh Circuit said that the textual portions of a collectors' guide "are not among the examples of derivative works listed in the statute, and guides don't recast, transform, or adapt the things to which they are guides." *Id.* at 520. The court said that a "derivative work thus must either be in one of the forms named [in the definition in § 101] or be 'recast, transformed, or adapted.'" *Id.* (quoting *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997)). The court added that "a collectors' guide is very much like a book review, which is a guide to a book and which no one supposes is a derivative work. Both the book review and the collectors' guide are critical and evaluative as well as purely informational." *Id.* at 520-21. However, the definition of a derivative work begins with the statement that it is a "work based upon one or more preexisting works," so the books in *Ty* were derivative works. The basic question of the court-whether the books were fair uses of the original works even though the books were derivative works-does not change.

279. See, e.g., Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 595 (2006) ("Paradoxically, while the 'transformative' quality of a defendant's use of a copyrighted work bolsters the defendant's claim of fair use, the derivative works right reserves to the copyright owner the right to make any work 'in which the copyright work may be recast, transformed, or adopted.' There is an obvious conflict between Congress's use of the word 'transformed' in the definition of 'derivative work' and the Court's use of the word 'transformative' in the elaboration of the fair use defense." (citing Okediji, *supra* note 14, at 124-28)).

use, or else all translations would be transformative fair uses.²⁸⁰ In *Campbell*, Justice O'Connor did not use "transformative" to refer to changes in content alone, but said the "central purpose of this [fair use] investigation is to see . . . whether the new work *merely* 'supersede[s] 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."²⁸¹ In other words, there must be something more than changes in content to cause a court to consider a second work a fair use rather than an infringing derivative work. The second work must have a change in function or be a complementary product.²⁸²

2. Translations

Courts have rejected fair use defenses in two cases involving translations. In *Radji v. Khakbaz*, the district court directly considered the fair use defense to a claim of copyright infringement for Khakbaz's translation into Farsi of a work originally published in English.²⁸³ Excerpts of that book had been published in a London newspaper with

280. See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books*, 109 F.3d 1394, 1401 (9th Cir. 1997) (finding that the defendant's work was an infringing derivative work and not a transformative fair use even though there were significant differences between the original and derivative works, because the derivative was not a true parody). The court stated, "Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold *his style* up to ridicule . . . [but it does] use the Cat's stove-pipe hat, the narrator ('Dr. Juice'), and the title (*The Cat NOT in the Hat!*) to 'get attention' Because there is no effort to create a transformative work with 'new expression, meaning, or message,' the infringing work's commercial use further cuts against the fair use defense." *Id.*; see also *supra* note 138 and accompanying text. The following hypothetical may illustrate the point: If someone made *Mission Impossible IV* without the consent of the copyright holder of *Mission Impossible*, the fact that there were significant changes in the plot from earlier *Mission Impossible* movies would not make *Mission Impossible IV* a fair use. The copyright holder of the original *Mission Impossible* would have the exclusive right to make *Mission Impossible IV*, even though it was "transformative" in the sense that there was a new plot.

281. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (emphasis added).

282. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) ("Generalizing from this example in economic terminology that has become orthodox in fair-use case law, we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work . . . is not fair use."). Nimmer prefers to use a "functional test," not "complementary" or "transformative". See 6 NIMMER & NIMMER, *supra* note 29, § 13.05[A][1][b]-[B].

283. 607 F. Supp. 1296 (D.D.C. 1985), *amended by Radji v. Khakbaz*, No. 84-0641, 1987 WL 11415 (D.D.C. May 15, 1987) ("[P]unitive damages may not be awarded in a statutory copyright infringement action."). The book described Radji's service as Iran's ambassador to Great Britain, and plaintiff had registered copyrights for the book in the United Kingdom not the United States. 607 F. Supp. at 1298.

the permission of Radji, the copyright holder. However, without the permission of Radji, Khakbaz translated large portions of those excerpts into Farsi, which the *Iran Times* then published and distributed.²⁸⁴

The district court rejected the fair use defense. The court said, "Defendants' reprinting of the 80 days of diary entries in a commercial publication was presumably intended to boost sales and thus was for commercial rather than non-profit educational purposes."²⁸⁵ The second and third factors also favored a finding of infringement, because the book was a "highly subjective and introspective account" of the author's service in Great Britain, and because the defendants had copied the large majority of the excerpts published in the London newspaper.²⁸⁶ Even if the articles in Farsi increased interest in and thus sales of the book, the fourth factor favored a finding of infringement, because the articles in Farsi "certainly prejudiced the sale of a serialization of his book in Farsi in a different magazine or newspaper."²⁸⁷ The sale of the work in Farsi by the copyright holder was not speculative, because (1) Radji was Iranian and would reasonably have been expected to sell his book in Farsi in Iran and (2) in fact Radji "translated his book into Farsi in late 1983."²⁸⁸

The Second Circuit's decision in *Nihon Keizai Shimbun, Inc. v. Comline Business Data* also held that the translations of plaintiff's copyrighted works by the defendant were not fair uses.²⁸⁹ In *Nihon*, the plaintiff was a Japanese corporation that published financial news and made many of its articles available in English. The defendant separately translated the articles from Japanese into English and sold the abstracts—rough translations of the articles—to its customers.²⁹⁰ The Second Circuit held that the abstracts were for commercial purposes and were not transformative, weighing in favor of a finding of

284. 607 F. Supp. at 1299. *The Sunday Times* of London paid the copyright holder 15,000 pounds for that permission. *Id.* The court described the *Iran Times* as "a newspaper printed in English and Farsi which is published here in the District of Columbia and distributed throughout the United States, Canada and various other countries." *Id.* at 1298.

285. *Id.* at 1300. The court rejected the argument that the articles were newsworthy and that fact favored fair use: "[A]n argument of newsworthiness can always be made where the author of the original work is a well-known person or where the book or article described political or other events of significance, but that is not *per se* a defense to an infringement action." *Id.*

286. *Id.* at 1301-02.

287. *Id.* at 1303 n.21.

288. *Id.* at 1302. The court added that by the time plaintiff had translated his work into Farsi, "defendants' articles had already been circulated in Farsi in marketplaces where plaintiff wished to sell his book, and this was bound to injure substantially many of the same marketplace sales of plaintiff's own Farsi version." *Id.*

289. 166 F.3d 65, 73 (2d Cir. 1999).

290. *Id.* at 69.

infringement.²⁹¹ The Second Circuit also said that “Comline’s abstracts compete with and supersede” the *Nihon* articles, a factor that “weighed strongly against fair use” and affirmed the district court’s finding of no fair use.²⁹²

3. Summary

Neither *Radji* nor *Nihon* suggests that an unauthorized translation of a literary work is always an infringement. In *Radji*, the plaintiff did have a translation made, so the case did not present a situation where the defendant had created something the plaintiff would never create. Similarly, in *Nihon*, the plaintiff translated many of its works into English prior to the commencement of the litigation.²⁹³ In both *Radji* and *Nihon*, in other words, the translations of defendants were sold commercially and were substitutes for the translations of the plaintiffs. There was a concrete threat of economic harm to the plaintiff for works in the same language as the works of the defendants.²⁹⁴ There was no lack of meaningful access to the works of the type the defendants produced for the individuals in the markets in question, so there was no reason to conclude that access to knowledge favored a finding of fair use.

291. *Id.* at 72-73.

292. *Id.* at 73. The Second Circuit concluded that the second factor may have been neutral, and the third factor favored the plaintiff. *Id.* at 72-74; *cf.* *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 97 (2d Cir. 2002) (“We reject Otsar’s assertion that the translation [of a Hebrew prayerbook in the public domain into English] is not copyrightable The translation process requires exercise of careful literary and scholarly judgment.”). *Merkos* involved the translation of a public domain work, so it does not answer the question of whether a translation of a copyrighted work can be a fair use. However, *Merkos* does support the position that a translation is a creative work.

293. The plaintiff in *Nihon* “also makes many of its Japanese articles available in English through wire services, an English language website, and a licensing agreement with LEXIS/NEXIS.” 166 F.3d at 69.

294. U.S. courts have generally held that U.S. copyright law does not prohibit acts of infringement outside of the United States. *See* *Palmer v. Braun*, 376 F.3d 1254, 1260 (11th Cir. 2004); *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1095-98 (9th Cir. 1994); *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988); *Illustro Sys. Int’l, LLC, v. IBM Corp.*, No. 3:06-CV-1969-L, 2007 WL 1321825, at *12 (N.D. Tex. May 4, 2007). However, in the fair use analysis, the court in *Radji* did not limit its analysis to markets in the United States. 607 F. Supp. at 1302 (“By that time defendants’ articles had already been circulated in Farsi in marketplaces where plaintiff wished to sell his book, and this was bound to injure substantially many of the same marketplace sales of plaintiff’s own Farsi version.”). Similarly, the court in *Nihon* referred to the fact that “Nikkei sells these newspapers around the world, in their original language and in translation.” 166 F.3d at 69. Just as courts do not limit fair use analysis to harmful effects in the United States, courts should not limit its analysis of beneficial effects to the United States. On the other hand, if a court did not consider effects outside the United States, then the fair use analysis for native language translations should not change. After all, the creation of most native language translations should have no effect on market holders in the United States.

The two cases above contrast with situations where translations are provided to persons in developing countries in desperate need of such literary works that the publisher of the original works did not intend to provide. As discussed in the remainder of this Article, fair use should be a bridge to create meaningful access.

D. Courts Should Not Consider Potential Licensing Income from All Sales of Works Bound for Developing Countries

The Supreme Court in *Campbell* recognized that a parody could hurt the market for an original work, but concluded the parody did not “produce a harm cognizable under the Copyright Act.”²⁹⁵ The Supreme Court suggested that a court should only take into consideration a license fee for markets that the “creators of original works would in general develop or license to others.”²⁹⁶ In other words, courts may not interpret the fourth fair use factor—effect on markets—to take into account all potential lost license revenue.²⁹⁷

Lower court decisions in fact have not considered speculative economic harm in the fair use balance. In *Williams & Wilkins Co. v. United States*, the plaintiff alleged that the copying of articles in medical journals by the National Institute of Health (NIH) to distribute to employees of NIH and other research and education oriented institutions was copyright infringement.²⁹⁸ Although decided before the Copyright Act of 1976, the United States Court of Claims looked at the same factors called for by the current fair use statute.²⁹⁹ The court said that “the law gives copying for scientific purposes a wide scope” and that the copying was not an “attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research.”³⁰⁰ The court said that without such copying, medical researchers realistically would not be able

295. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

296. *Id.*

297. Gregory Duhl has argued that “[o]nly when a market for such licensing exists and the copyright holder is able and willing to exploit that market should lost royalties be considered in measuring the effects of the unlicensed use on the copyright holder’s market.” Duhl, *supra* note 10, at 734. Duhl suggests that a key issue should be whether the allegedly infringing work is a private use or a public use. *Id.* at 729-30. He suggests that public uses are transformative uses and “include non-transformative uses satisfying other governmental objectives, such as education and public adjudication.” *Id.* at 735. This would support the position that translations into the native languages of citizens of developing countries are fair uses.

298. 487 F.2d 1345 (Ct. Cl. 1973), *aff’d without opinion*, 420 U.S. 376 (1975) (4-4 decision).

299. *Id.* at 1349-62.

300. *Id.* at 1354.

to gain access to the articles, since many did not have wide circulation, and that “medical science would be seriously hurt if such library photocopying were stopped.”³⁰¹ Since plaintiff had not proved actual economic harm from the copying, the court concluded the copying at issue was a fair use.³⁰²

Subsequent circuit court decisions have also only considered “traditional, reasonable or likely to be developed markets.”³⁰³ In *American Geophysical Union v. Texaco, Inc.*, the Second Circuit held that copying of articles in scientific and medical journals by employees of Texaco—when there was an ongoing market for licensing such articles—was not a fair use.³⁰⁴ The court stated, “Only an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use’s ‘effect upon the potential market for or value of the copyrighted work.’”³⁰⁵ The court noted that Congress had specifically encouraged the particular licensing market and added, “We do not decide how the fair use balance would be resolved if a photocopying license for *Catalysis* articles were not currently available.”³⁰⁶

The Sixth Circuit also only looked at existing licensing markets in *Princeton University Press v. Michigan Document Services, Inc.*³⁰⁷ In *Princeton*, a “copy shop” made copies of parts of textbooks that

301. *Id.* at 1356.

302. *Id.* at 1363. *Williams* is a controversial decision. Copies are now made much easier than at the time of the decision in *Williams*, and in *Williams* there was no established licensing market for articles from periodicals. *Id.* at 1359-60. In *Williams*, moreover, at least many of the authors of the specific works did not object to the copying of those articles. *Id.* at 1359. The split vote in the Supreme Court in *Williams* reflects the fact that how to balance access in the fair use “equation” has often been disputed. Even though four Justices voted to affirm the decision of the Court of Claims in *Williams*, the Ninth Circuit in *Sony* referred to the decision in *Williams* as the “Dred Scott decision of copyright law,” quoting from the dissent in *Williams*. 659 F.2d at 970. Of course, the Supreme Court reversed the Ninth Circuit in *Sony*. 464 U.S. at 448. Moreover, in *Triangle Publications, Inc.*, 626 F.2d at 1177, the Fifth Circuit cited *Williams* favorably a number of times.

303. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 931 (2d Cir. 1994).

304. *Id.* at 926.

305. *Id.* at 930. The Second Circuit noted that “a copyright holder can *always* assert some degree of adverse effect on its potential licensing revenue as a consequence of the secondary use at issue simply because the copyright holder has not been paid a fee to permit that particular use.” *Id.* at 929 n.17. *American Geophysical Union* involved copying by researchers at Texaco of articles from scientific journals for use in their research “without Texaco having to purchase another original journal.” *Id.* at 919. The court found it important that publishers had “created, primarily through the CCC [Copyright Clearance Center, Inc.], a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying.” *Id.* at 930.

306. *Id.* at 931. The periodical at issue was *The Journal of Catalysis*. *Id.* at 914.

307. 99 F.3d 1381, 1385-86 (6th Cir. 1996).

university professors wanted to use in their courses, without paying any fees to the publishers of the textbooks. Other copy shops had paid fees to the publishers amounting to \$500,000 a year.³⁰⁸ Exact copies of the excerpts were made, and there was no evidence the students would otherwise not have had access to the works.³⁰⁹ The Sixth Circuit said a “licensing market already exists here, as it did not in *Williams*.” Quoting *American Geophysical*, the court noted that “a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use, while such an unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for it.”³¹⁰

Applying the holdings in *American Geophysical* and *Texaco* would not preclude a finding of fair use for translations of English literary works into the native languages of citizens of developing countries. In neither *American Geophysical* nor *Texaco* had an identifiable population been unable to gain access to the works in question at the time of the litigation in question. Also, in *American Geophysical* and *Texaco* the challenged uses were in connection with profit-making enterprises, and licensing markets existed for the exact derivative works. In *Blanch v. Koons*, the Second Circuit distinguished *American Geophysical*, stating that “Koon’s use of her photograph did not cause any harm to her [Blanch’s] career or upset any plans she had for ‘Silk Sandals’ or any other photograph, and . . . the value of ‘Silk Sandals’ did not decrease as the result of Koon’s alleged infringement.”³¹¹

The Eleventh Circuit referred only to the effect of a third party’s work on existing markets in *Suntrust Bank v. Houghton Mifflin Co.*, a case involving a claim that the book *The Wind Done Gone* (TWDG) infringed the copyright of *Gone with the Wind* (GWTW).³¹² The author

308. *Id.* at 1387.

309. *Id.* at 1388-89 (“This kind of mechanical ‘transformation’ bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case,” and “none of these affidavits shows that the professor executing the affidavit would have refrained from assigning the copyrighted work if the position taken by the copyright holder had been sustained beforehand.”).

310. *Id.* at 1387 n.4 (quoting *Am. Geophysical Union*, 60 F.3d at 931).

311. 467 F.3d 244, 249 (2d Cir. 2006); see *supra* notes 189-194 and accompanying text. Compare *Am. Geophysical Union*, 60 F.3d at 931, with *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614, 617 (9th Cir. 1996) (“[Section 107] allows the fair use of a copyrighted work in such instances as for nonprofit educational purposes and where the effect of the use upon the potential market for or value of the protected work is limited. . . . AGLOA tournaments are held not for profit, but for encouraging education among young students.”).

312. 268 F.3d 1257, 1274-75 (11th Cir. 2001) (“Several derivative works of GWTW have been authorized, including the famous movie of the same name and a book titled *Scarlett: The Sequel*. . . . Suntrust has negotiated an agreement with St. Martin’s Press permitting it to produce

of TWDG had “appropriated the characters, plot and major scenes from GWTW into the first half of TWDG” in order to create “a critique of GWTW’s depiction of slavery and the Civil-War era American South.”³¹³ Although recognizing that the fourth fair use factor considered adverse economic effect on the original and derivative works, the court, quoting *Campbell*, noted that the “only harm to derivatives that need concern us is the harm of market substitution.”³¹⁴ The court’s decision reflected only an interest in existing licensed derivatives, not potential licensed derivatives, when it said that Suntrust “fails to address and offers little evidence or argument to demonstrate that TWDG would supplant demand for Suntrust’s licensed derivatives.”³¹⁵ The court held it was unlikely the plaintiff would prevail against the defendant’s fair use defense and vacated the preliminary injunction issued by the district court.³¹⁶ The court did not mention possible derivative works the copyright holder might have licensed.

A copyright holder could always license any part of her work to another person to create a derivative work, so the creation of a derivative work by a third party without permission and the payment of a fee to the copyright holder necessarily will have some theoretical adverse economic effect on the copyright holder.³¹⁷ In *Field v. Google, Inc.*, the District Court for the District of Nevada effectively rejected the argument that a copyright holder could sue a defendant for copyright infringement, then license to a third party that use of the copyrighted work, and

another derivative work . . . [Suntrust] fails to address and offers little evidence or argument to demonstrate that TWDG would supplant demand for Suntrust’s licensed derivatives.”).

313. *Id.* at 1259.

314. *Id.* at 1274 (quoting *Campbell v. Acuff-Rose*, 510 U.S. 569, 593 (1994)).

315. *Id.* at 1275.

316. *Id.* at 1277. The court concluded that “the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech because the public had not had access to Randall’s ideas or viewpoint in the form of expression that she chose.” *Id.* The court separately suggested that even without the fair use defense, damages would be more appropriate than an injunction, in light of the speech issues involved. *Id.*

317. See 4 NIMMER & NIMMER, *supra* note 29, § 13.05[A][4] (“[I]t is a given in every fair use case that plaintiff suffers a loss of a *potential* market that if that potential is defined as the theoretical market for licensing the very use at bar. . . . [T]he plaintiff can always allege that she wished to reserve the future right to enter that niche—even to the extent of parodying her own work at some future time.”); see also LITMAN, *supra* note 35, at 13 (“The ubiquity of digital technology in the information and entertainment industries and the rapid penetration of the Internet into Americans’ lives have enabled the dissemination of an increasing amount of information on a pay-per-view basis.”); Bohannon, *supra* note 279, at 597 (“The copyright owner could always argue that she has suffered some market harm because the defendant could have paid a fee for the very use at issue in the case. This argument is circular, however, because if the defendant’s use is a fair use, then the copyright owner had no right to compensation from the defendant in the first place and there would be no harm to a legally recognized market.”).

successfully claim economic harm.³¹⁸ The court explained that the plaintiff's argument for harm to a market for its products was syllogistic, because "[u]nder [the plaintiff's] view, the market for a copyrighted work is always harmed by the fair use of the work because it deprives the copyright holder of the revenue it could have obtained by licensing that very use."³¹⁹ The court held that if "there is no likely use of the plaintiff's works, the fourth fair use factor favors the defendant."³²⁰

Similarly, in *Perfect 10, Inc. v. Amazon, Inc.*, the Ninth Circuit recently rejected consideration of hypothetical markets in considering fair use and said "market harm cannot be presumed."³²¹ *Perfect 10* involved, among other things, a copyright challenge to Google's use of thumbnail images copied by Google's web crawlers from other Web sites and displayed in response to user searches in Google Image Search.³²² When the litigation started, Perfect 10 had not licensed thumbnail images at all, but, after the litigation commenced, Perfect 10 entered into a license agreement with another company for the distribution of Perfect 10's reduced-size images on cell phones.³²³ Balancing actual harm against benefits, the Ninth Circuit said that "we must weigh Google's superseding and commercial uses of thumbnail images against Google's significant transformative use, as well as the extent to which Google's search engine promotes the purpose of copyright and serves the interest of the public," and concluded that "the transformative nature of Google's use is more significant than any incidental superseding use."³²⁴ The Ninth Circuit said that the fourth factor favored neither party and held that Perfect 10 was "unlikely to be able to overcome Google's fair use defense".³²⁵

Regardless of occasional loose references to "potential markets" in opinions, the majority of courts have in fact only considered existing

318. 412 F. Supp. 2d 1106, 1121 n.9 (D. Nev. 2006).

319. *Id.*

320. *Id.* (citing *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003)). The Ninth Circuit in *Mattel* and the district court in *Field* relied on the holding in *Campbell* that "the market for potential derivative uses includes only those that creators or original works would in general develop or license others to develop." *Campbell v. Acuff-Rose*, 510 U.S. 569, 592 (1994).

321. 487 F.3d 701, 724 (9th Cir. 2007).

322. *Id.* at 711. The suit also involved a challenge to Google's in-line linking to other Web sites, so that when the user clicked on the link, she saw a display from the other Web site's server. *Id.* at 712. The Ninth Circuit concluded that in-line linking did not constitute a display or distribution by Google, so did not constitute copyright infringement. *Id.* at 716-17.

323. *Id.* at 713; see also *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 849 (C.D. Cal. 2006) (this case became *Perfect 10, Inc. v. Amazon, Inc.* on appeal).

324. 487 F.3d at 722-23.

325. *Id.* at 725.

markets and uses the original creator was likely to pursue directly or through licensing.³²⁶ If actual harm has not been material, courts have not given weight to such harm in the fair use analysis.³²⁷ With these points in mind, this Article next looks at the application of the fair use factors to native language translations.

E. Translations of Works into the Native Languages of Citizens of Developing Countries Would Be Fair Uses

Unlike the sale of books originally written in English in this country, where a significant consideration presumably was the prospect of profit from the sales of books, the purpose of translations into many native languages would often be for nonprofit educational purposes, a transformative purpose favoring fair use under § 107(1).³²⁸ Presumably

326. See *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1029 (9th Cir. 2000). In a case involving comparative advertising, the Ninth Circuit said, "Bleem responds by contending that there is no market in screen shots. Certainly screen shots are a standard device used in industry to demonstrate video game graphics, but there is not a market for them, or at least not one in which Bleem may participate given Sony's refusal to license it." *Id.* In *Leibovitz v. Paramount Pictures Corp.*, the court said that because the plaintiff had "not identified any market for a derivative work that might be harmed by the Paramount ad . . . the defendant had no obligation to present evidence showing lack of harm in a market for derivative works." 137 F.3d 109, 116 n.6 (2d Cir. 1998). Although the court in *Leibovitz* also said that "Leibovitz all but concedes that the Paramount photograph did not interfere with any potential market," the discussion of the evidence involved actual markets, not theoretical ones. *Id.* at 116-17. Although the Supreme Court in *Sony* referred to "effect upon the potential market," the Court there was referring to potential market for the original work. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984). In other words, there was an existing product. For a derivative work, there also should be an existing derivative work. Moreover, in *Sony*, the Court made clear that with respect to a noncommercial use by a third party, the copyright holder had a greater burden of proving harm. *Id.* at 451. In *Princeton*, the court said fair use was appropriate when the copyright holder "simply had no interest in occupying" the market. *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996). If the copyright holder has not created or previously licensed a party to create the translations in question, that is evidence the copyright holder does not intend to occupy the market. That evidence becomes stronger each year a book is on the market in the United States and not sold in translations in other countries.

327. See *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003) ("We determine whether the defendants' introductions of the manuscript in evidence would *materially impair* the marketability of the work and whether it would act as a market substitute for it." (emphasis added)); *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 213 (D. Mass. 1986) ("[T]he evidence does not establish that there is a reasonable probability of a textbook market for the disputed photographs or that any such market has been materially impaired by the alleged infringement.").

328. The courts have held that the preliminary reference in § 107 to certain types of works that might be fair uses, such as educational works, does not create a presumption of fair use. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) ("News reporting is one of the examples enumerated in § 107 to 'give some idea of the sort of activities the courts might regard as fair use under the circumstances' This listing was not meant to be exhaustive . . . or to single out any particular use as presumptively a 'fair' use." (quoting at S. REP. NO. 94-473, at 61 (1975), as reprinted in 1976 U.S.C.C.A.N. 5659, 5763)). Arguably textbooks in the United States would have the same purpose as textbooks in Kenya, but there is an established

for many native languages, there will be no evidence that a copyright holder has attempted to develop a market for such translations, and these markets would be severely underserved. The fact that copyright holders would be willing to license the creation of native language translations for some fee should not give the copyright holders the right to prevent the creation of such translations by third parties for developing countries, markets that U.S. copyright laws do not even reach directly.³²⁹

The increased access to knowledge should turn the balance in favor of fair use. A court should find that translation of books into the native languages of citizens of developing countries is a fair use.³³⁰

Table 2: Fair Use Factors Applied to Native Language Translations

		TRANSLATIONS
1.	Character and purpose of allegedly infringing use	a. Unlikely to be profit-making— <i>favors translations, or at least neutral</i> b. Educational purpose is different from purpose of U.S. publishers, to make a profit, and U.S. law recognizes that different countries have different interests and factors to consider than the United States— <i>favors translations</i>
2.	Nature of copyrighted work	Favors copyright holders, to varying degrees depending on types of works (less for factual works)
3.	Amount and substantiality of portion of copyrighted work copied	Since whole works would be copied, this would favor copyright holders, but only slightly, because copying is only what is necessary for the transformative purpose.

market and ability to pay for them in the United States, perhaps in contrast to Kenya. To the extent textbooks are translated, moreover, the “law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.” 471 U.S. at 563.

329. See 4 NIMMER & NIMMER, *supra* note 29, § 17.02; 3 GOLDSTEIN, *supra* note 38, § 18.01. One U.S. court concluded that as long as an act of infringement occurred in the United States, a plaintiff can “recover damages flowing from exploitation abroad of domestic acts of infringement committed by defendants.” L.A. News Serv. v. Reuters Television Int’l, Ltd., 149 F.3d 987, 990-92 (9th Cir. 1998). However, in a subsequent decision, with one judge dissenting, the Ninth Circuit said that in its earlier decision it had used “‘damages’ as a short hand either for both the forms of relief that 17 U.S.C. § 504(b) makes available, i.e., actual damages and defendants’ profits, or only the recovery of defendants’ profits.” L.A. News Serv. v. Reuters Television Int’l (USA) Ltd., 340 F.3d 926, 929-930 (9th Cir. 2003). The Ninth Circuit then held that for extraterritorial effects of domestic copyright violations, the Copyright Act only authorized the recovery of profits of defendants and not actual damages of plaintiffs. *Id.*

330. See Chon, *supra* note 209, at 2900 (“[T]here is a lot of ‘room for manoeuvre’ both for intellectual property protection in the form of copyright, on the one hand, and for limitations and exceptions to copyright in order to access knowledge goods for essential education, on the other.”). There may be markets for translations of U.S. movies and songs into the native languages of citizens of developing countries, so this analysis may not apply in the same way to movies and songs.

		TRANSLATIONS
4.	Effect on markets for copyrighted work and derivatives	No realistic possibility that for-profit publishers would translate works into Kikuyu, publishers will not be harmed, and U.S. copyright law was not enacted to regulate foreign markets— <i>favors translations</i>
5.	Increasing access to knowledge through derivative works serving a different market than the original work	Whether considered as a separate factor or part of the first fair use factor— <i>favors translations</i>

Is there any evidence that copyright holders intend to translate books or similar literary works into Kikuyu or Swahili? The answer seems apparent. Copyright holders see no such market, or they would already have developed it. Creating Kikuyu or Swahili translations for developing countries will have no adverse economic effect that U.S. law should recognize in a fair use analysis. To encourage such translations without having to ask the copyright holders for permission will benefit the public, and not simply the public in developing countries. The United States and its citizens will benefit from the growth of vibrant and stable democracies resulting from increased access to knowledge and will ultimately benefit from more trade with such countries. Through such application of fair use, citizens in developing countries could for the first time have meaningful access to knowledge and a chance to escape from poverty, without any realistic harm to the incentives for copyright holders.³³¹

IV. CONCLUSION—MOVING FORWARD

“You can kiss reconciliation and forgiveness goodbye, unless the gap between the rich and poor—the haves and have-nots—is narrowed, and narrowed quickly and dramatically.”—Bishop Desmond Tutu³³²

331. *Id.* at 2912 (“If the instrumental mandate of intellectual property law is truly to increase knowledge for positive purposes, then there must be fuller consideration of the provision of basic needs and other global public goods such as food, security, education and health care. Undernourished, diseased, dying, undereducated, or extremely impoverished populations are viewed by many as negative externalities both qualitatively and quantitatively more serious than the danger of under-incentivizing authors. . . .”).

332. Interview with Archbishop Desmond Tutu, Academy of Achievement (June 12, 2004), available at <http://www.achievement.org/autodoc/page/tut0int-3>. Archbishop Tutu’s statement was made in connection with a discussion of the Truth and Reconciliation Commission in South Africa.

If the Google Library Project were not a fair use, a fortiori, a native language translation would not be a fair use. However, as set forth above, the Library Project is, and native language translations would be, fair uses under U.S. law. They promote access to knowledge without materially or adversely affecting the reasonable market expectations of the authors at the time of creation of the original works in English.

Consistent with the fundamental purpose of U.S. copyright law to promote the arts and sciences, the United States should lead by example in the application of fair use.³³³ Thomas Jefferson wrote, “[T]hat ideas should freely spread from one to another over the globe, for the moral instruction of man, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space . . . incapable of confinement or exclusive appropriation.”³³⁴ In his inaugural address, President John F. Kennedy said, “[To those peoples . . . across the globe struggling to break the bonds of mass misery, we pledge our best efforts to help them help themselves, for whatever period is required If a free society cannot help the many who are poor, it cannot save the few who are rich.”³³⁵ It is time for the United States to apply fair use as discussed in Part III of this Article to start closing the knowledge gap between developing countries and developed countries.

333. On the issue of leading by example, see Dreyfuss & Lowenfeld, *supra* note 267, at 295 (“The member states would, under this approach, function as laboratories—much as states or provinces do in a federal system.”); THE FEDERALIST NO. 46 (James Madison) (“[T]he members of the federal will be more dependent on the members of the State governments, than the latter will be on the former.”). On the influence of one state court and even one state court justice can have in a federal system, see Adrian A. Kragen, *A Legacy of Accomplishment*, 71 CAL. L. REV. 1055, 1057-58 (1983) (discussing the influence California Justice Roger Traynor had throughout the United States by the example of his opinions in products liability, sovereign immunity, and illegally secured evidence); Henry J. Friendly, *Ablest Judge of His Generation*, 71 CAL. L. REV. 1039, 1043 (1983) (discussing the influence Justice Traynor had nationally by the example of his opinions on collateral estoppel). Of course, for the United States to lead, the applicable representatives of the United States (presumably the President and the U.S. Trade Representative) would have to be willing to resist the pressures in the United States from interest groups that opposed a broadened application of fair use, for fear that it would be one step down a slippery slope to online music piracy. It is not inconsistent, however, and it is good policy for the United States to work to prevent copyright piracy of online music and also promote fair uses of educational material in developing countries through the creation of native language translations. *Cf.* Reichman, *supra* note 266, at 42-43 (drawing a distinction between countries expecting “sympathy from the international community when they tolerate free-riding duplication of cultural goods devised primarily for entertainment and private consumption” and “efforts to limit the costs of information goods that are indispensable for national economic development”).

334. The Founders’ Constitution, 1813 Letter of Thomas Jefferson to Isaac McPherson, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html (last visited Oct. 22, 2007); see also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 53 (2003).

335. John F. Kennedy, President, Inaugural Address (Jan. 20, 1961), available at <http://www.bartleby.com/124/pres56.html>.

The practical barriers to progress in closing the gap are great.³³⁶ However, Robert Kennedy said, “[s]ome men see things as they are and say, ‘Why?’ I dream of things that never were and say, ‘Why not.’”³³⁷ The United States and its citizens should say “why not” and take the necessary steps for fair use to act as a bridge over the troubled waters of despair and poverty to knowledge and prosperity in developing countries.³³⁸

336. In the negotiations leading to TRIPS, the United States did team up with developing countries on the issue of agriculture but not on intellectual property protection. Dreyfuss & Lowenfeld, *supra* note 267, at 276 (“The United States . . . was allied with the larger developing countries on agriculture, with the European Community on the other side; but on intellectual property, the United States was, roughly speaking, allied with the European Community, and it was the developing countries that were on the other—or perhaps better, on another—side.”). The United States could team up with developing countries again. However, expanded fair use or equivalent exceptions could result in increased free speech and opposition to the governments of some developing countries (of course, this is also true for some developed countries). Therefore, some developing countries may not support expanded fair use or equivalent provisions in their domestic laws. Without fair use or equivalent provisions in the laws of the developing countries, downloading native language translations in the developing country, although created in the United States, could violate the copyright laws of those developing countries. However, paper copies of those translations, assuming they were legally made in the United States, could under U.S. law legally be distributed abroad under the first sale doctrine, codified at 17 U.S.C. § 109(a) (“Notwithstanding the provisions of section 106(3), the owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. . .”). *Cf.* *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 480-83 (9th Cir. 1994) (discussing application of first sale doctrine to products manufactured in the United States and concluding that the U.S. first sale doctrine does not apply to imports into the United States of products sold outside the United States).

337. Robert F. Kennedy, Speech at the University of Kansas (Mar. 18, 1968), http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/RFK/RFKS_peech68Mar18UKansas.htm.

338. Simon & Garfunkel sang, “When you’re down and out, When you’re on the street, . . . And pain is all around, Like a bridge over troubled water, I will lay me down.” Simon & Garfunkel, *Bridge over Troubled Water* (1970), lyrics available at http://www.lyricsfreak.com/s/simon+and+garfunkel/bridge+over+troubled+water_20124580.html.