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# *Campbell* at 21/*Sony* at 31

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*Abstract:* When copyright lawyers gather to discuss fair use, the most common refrain is its alarming expansion. Their distress about fair use's enlarged footprint seems completely untethered from any appreciation of the remarkable increase in exclusive copyright rights. In the nearly forty years since Congress enacted the 1976 copyright act, the rights of copyright owners have expanded markedly. Copyright owners' demands for further expansion continue unabated. Meanwhile, they raise strident objections to proposals to add new privileges and exceptions to the statute to shelter non-infringing uses that might be implicated by their expanded rights. Copyright owners have used the resulting uncertainty over the scope of liability for new uses to litigate some new businesses into bankruptcy before their legality could be determined. These developments push fair use to shelter new uses and users. When lawyers for copyright owners complain that fair use has stretched beyond their expectations, they fail to acknowledge their own responsibility for its growth. This Article takes up these questions with particular attention to the thirty-one-year-old decision in *Sony v. Universal Studios*, and Congress's assumptions about individual and contributory liability for personal copying before and after the *Sony* case.



## INTRODUCTION

The occasion for this symposium is that *Campbell v. Acuff-Rose Music, Inc.*[1] had its twenty-first birthday earlier this year, and has therefore achieved its majority. We've been invited to examine *Campbell*'s "profound influence on fair use."[2] When the Court handed down the *Campbell* decision twenty-one years ago, the opinion garnered

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1. 510 U.S. 569 (1994).

2. *Symposia*, WASHINGTON LAW REVIEW, http://www.law.uw.edu/wlr/symposia (last visited May 10, 2015).

generally positive reviews.[3] More recently, the decision, or its application by lower courts, has inspired significant criticism. The most common complaint is that *Campbell*'s instruction to focus on the transformativeness of defendant's use has given lower courts license to find a use fair whenever they are so inclined.[4]

When copyright lawyers gather to discuss fair use these days, the most common refrain is its alarming expansion.[5] This distress about fair use's enlarged footprint seems completely untethered from any appreciation of the remarkable increase in exclusive copyright rights. It's uncontroversial that the scope of U.S. copyright has expanded in the past fifty years.[6] It covers a broader array of copyrightable subject matter.[7] It lasts longer.[8] It grants owners additional rights.[9] Court decisions have

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3. *See, e.g.*, Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994); *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 331–41 (1994).

4. *See, e.g.*, Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After* Campbell v. Acuff-Rose Music, 12 DUKE L. & TECH. REV. 92 (2014); William Henslee, *You Can't Always Get What You Want, But If You Try Sometimes You Can Steal It and Call It Fair Use: A Proposal to Abolish the Fair Use Defense for Music*, 58 CATH. U. L. REV. 663 (2009); Edward E. Weiman, *Transforming Use: The Google Books Cases Have Created a New Area of Controversy Regarding the Transformative Use Defense to Copyright Infringement*, L.A. LAW., June 2014, at 16–20.

5. *See, e.g.*, LIBRARY OF CONG., ORPHAN WORKS AND MASS DIGITIZATION ROUNDTABLES 39–40 (2014) (remarks of June Besek), *available at* http://copyright.gov/orphan/transcript/0310LOC.pdf; *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 13–22 (2014) [hereinafter *Scope of Fair Use Hearing*] (testimony of June Besek, Columbia Law School); *id.* at 118–22 (prepared statement of Victor Perlman, American Society of Media Photographers); *id.* at 127, 130–33 (statement submitted by the Copyright Alliance); Terry Hart, Fox News v. TVEyes*: Fair Use Transformed*, COPYHYPE (Sept. 16, 2014), http://www.copyhype.com/2014/09/fox-news-v-tveyes-fair-use-transformed/; The Copyright Soc'y of the U.S.A., N.Y. Chapter, *Content Aggregation: Fair Use or a Use Too Far?*, PUNKCAST.COM (Oct. 24, 2013), http://punkcast.com/2534/2534/2534_csusa_content_aggregation.mp4; The Copyright Soc'y of the U.S.A., N.Y. Chapter, *If I Ran the Zoo: Probing the Contours of "The Next Great Copyright Act*" (Mar. 26, 2014), http://media.csusa.org/chapters_new_york_video_15.html; *see also* Jane C. Ginsburg, *Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms – Part II (fair use)*, REVUE INTERNATIONALE DU DROIT D'AUTEUR (RIDA) (forthcoming Jan. 2015) (claiming that recent fair use decisions violate international norms); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 438 (2008) (claiming that the fair use analyses in the *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) cases violate the Berne Convention's minimum standards).

6. *See, e.g.*, Neil Weinstock Netanel, COPYRIGHT'S PARADOX 54–80 (2008).

7. *Compare* 17 U.S.C. § 102(a) (2012), *with* Act of March 4, 1909, Pub. L. No. 60-349, § 5, 35 Stat. 1075, 1076, *and* Copyright Act of 1976, Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544–45.

8. *Compare* 17 U.S.C. §§ 302, 303, 304, *with* Act of March 4, 1909, §§ 23, 24, 35 Stat. at 1080–81, *and* Copyright Act of 1976, §§ 302, 303, 304, 90 Stat. at 2572–76.

expanded the scope of traditional copyright rights.[10] Congress has greatly enhanced the remedies for infringement.[11] Individuals and organizations supporting strong copyright laws applaud these expansions.[12] These same interests express surprise and dismay that, over the past fifty years, the fair use privilege has come to shelter a broader range of uses.[13]

I have no reason to doubt the sincerity of those expressions of dismay. The idea, though, that copyright owners' rights could be greatly inflated without inspiring a comparable expansion in fair use seems delusive. If many, many more uses are arguably prima facie infringing now than before, it follows that fair use will need to stretch to permit more of them. None of the voices expressing the hope that fair use could be confined or returned to its mid-twentieth century boundaries seem to endorse a proposal to cut back copyright rights to their mid-twentieth

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9. *Compare* 17 U.S.C. §§ 106, 106A, 1006, 1201, 1202, *with* Act of March 4, 1909, § 1, 35 Stat. at 1075 *and* Copyright Act of 1976, § 106, 90 Stat. at 2546.

10. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–05 (6th Cir. 2005); Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 201 (4th Cir. 1997); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518–20 (9th Cir. 1993); *see generally* Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587 (2008).

11. *Compare* 17 USC §§ 502–505, *with* Act of March 4, 1909, § 25, 35 Stat. at 1081–82, *and* Copyright Act of 1976, §§ 502–505, 90 Stat. at 2541–86.

12. *See, e.g.*, ALLAN ADLER, ASS'N OF AM. PUBLISHERS, INC. RE: REQUEST FOR COMMENT ON GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (Nov. 13, 2013), *available at* http://www.publishers.org/_attachments/docs/copyright_policy/aapgreenpaperc111313.pdf; AM. SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS, REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (Nov. 15, 2013), *available at* http://www.ntia.doc.gov/files/ntia/ascap_comments.pdf; MICHAEL O'LEARY, MOTION PICTURE ASS'N OF AM., IN THE MATTER OF REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (Nov. 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/motion_picture_association_of_america_comments.pdf; Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the United States Copyright Act*, 16 INFO. & COMM. TECH. L. 191 (2007).

13. *See, e.g.*, *Scope of Fair Use Hearing*, *supra* note 5, at 13–14 (testimony of June Besek, Columbia Law School); *id.* at 104, 109–11 (Association of American Publishers statement submitted for the hearing record); *Copyright Issues in Education and for the Visually Impaired: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 13–14 (2014) [hereinafter *Copyright Issues in Education and for the Visually Impaired*] (statement of Allan Robert Adler, General Counsel, Association of American Publishers); Hart, *supra* note 5; Raymond Nimmer, *"Transformative Fair Use" Compared to "Transformative Purpose Infringement", Some Cases Get this Totally Wrong Including in Google Books*, CONTEMP. INTELL. PROP., LICENSING & INFO. L. BLOG (Mar. 22, 2014), http://www.ipinfoblog.com/archives/389731-print.html; *see also* Ginsburg, *supra* note 5, at 22 ("The U.S. fair use doctrine is seeming rather cavernous of late.").

century limits.[14] They have been steadfast in insisting that it would be dangerous to allow Congress to consider balancing expanded copyright with appropriately expanded express limitations and exceptions.[15] They urge, nonetheless, that fair use must be narrowly contained.[16]

If *Campbell* is twenty-one years old, that means that another Supreme Court fair use case, *Sony Corp. of Am. v. Universal City Studios*,[17] had its thirty-first birthday in January. Some copyright lawyers with long memories identify *Sony* as the Supreme Court case in which fair use started to go wrong.[18]

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14. *See, e.g.*, *Scope of Fair Use Hearing*, *supra* note 5, at 127, 129 (statement submitted by the Copyright Alliance).

15. *See, e.g.*, *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 108 (2014) [hereinafter *2014 First Sale Under Title 17 Hearing*] (testimony of Emery Simon, Counselor, BSA, The Software Alliance) (arguing that expanding first sale doctrine "would upturn a cornerstone of our economy, our ability to contract and our ability to rely on contracts"); *Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 18 (2001) [hereinafter *2001 Section 104 Report Hearing*] (statement of Carey Ramos, National Music Publishers Association) (claiming the Register's recommendation to enact an exemption for buffer copies would adversely affect music sales); *id.* at 25 (statement of Cary Sherman, Senior Executive Vice President and General Counsel, Recording Industry Association of America, Inc.) (claiming that expanding first sale doctrine "would undermine the fundamental objectives of the Copyright Act"); *id.* at 46 (statement of Emery Simon, Counsel, Business Software Alliance) (arguing that "temporary copy exceptions . . . would create uncertainty" and suppress the growth of e-commerce); *id.* at 76 (statement of Marvin Berenson, Senior Vice President and General Counsel, Broadcast Music Inc.) (arguing that the Register's recommended exemptions "would adversely affect the rights of songwriters" and characterizing her analysis as "flawed, outside the scope of the inquiry, and not supported by the record"); *see also* sources cited *supra* note 11.

16. *See, e.g.*, *Copyright Issues in Education and for the Visually Impaired*, *supra* note 13, at 13–14 (statement of Allen Robert Adler for the Association of American Publishers); Zehra Abdi, Morris v. Guetta*: Are Appropriation Artists Getting a Free Pass by the Second Circuit?*, COWAN, DEBAETS, ABRAHAMS & SHEPPARD LLP LEGAL BLOG (May 28, 2013), http://cdas.com/morris-v-guetta-are-appropriation-artists-getting-a-free-pass-by-the-second-circuit-2/ ("The Second Circuit's new, looser standard for determining whether a work is transformative is a shift from its usual conservatism and serves as an invitation for infringement."); Hart, *supra* note 5 ("What was once a bounded exception allowing reasonable use of copyrighted works when necessary for specific purposes has become a broad and sweeping mechanism that allows courts to seemingly ignore copyright at their own discretion."); Nimmer, *supra* note 13 ("Cases where courts protect copying verbatim of all of copyrighted works as fair use because the copies are then used for different purposes than the copyright owner has previously used its work . . . . stretch the boundaries of fair use and 'transformative' 'use' beyond any reasonable breaking point."); Barry Sookman, *The Google Book Project: Is It Fair Use?*, BARRYSOOKMAN.COM (Jan. 5, 2014), http://www.barrysookman.com/2014/01/05/the-google-book-project-is-it-fair-use/.

17. 464 U.S. 417 (1984).

18. *See, e.g.*, Henslee, *supra* note 4, at 680–81; Christopher Alan Hower, *Reviving Fair Use: Why* Sony*'s Expansion of Fair Use Sparked the File-Sharing Craze*, 7 CHI.-KENT. J. INTELL. PROP. L. 75, 81–86 (2007); David R. Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC'Y U.S.A. 345, 382–83 (2005).

In the 1976 Copyright Act, Congress replaced a scheme of bounded, defined copyright rights specified for each copyright subject-matter category with a broad statement of generally applicable copyright exclusive rights offset by a list of detailed exceptions.[19] It also codified the doctrine of fair use. The *Sony* case, filed within weeks of the 1976 Act's enactment, was the first case to pose the question whether fair use was an appropriate shelter for conduct that Congress had failed to consider.[20] Answering that question in favor of *either party* would require some revision in traditional understandings of fair use.

In *Sony*, the Court reshaped fair use in order to limit contributory liability and shelter personal uses.[21] That fair use formulation didn't work out so well for traditional beneficiaries of the fair use privilege, most of whom made uses that were both public and commercial.[22] In *Campbell,* the Court revised fair use again for the benefit of traditional fair users.[23] That might have left personal users out in the rain. But in the ten years that the *Sony* test had held sway, readers, consumers, and businesses that made products to augment consumers' enjoyment of copyright works had adjusted their expectations and habits to a world in which fair use shielded personal uses from copyright liability. If copyright owners hoped that *Campbell*'s recalibration of the fair use analysis would simply remove noncommercial and personal copies from fair use's shelter, they were disappointed. But that hope was never politically reasonable.

The *Campbell* decision, and its application by lower courts, makes more sense when one appreciates its predecessor, *Sony v. Universal*. The *Sony* decision, in turn, makes more sense when one recognizes the challenges posed by problems that Congress failed to address when it enacted the 1976 Act.

## I. A SURPRISING LAWSUIT

The 1909 Copyright Act adopted the strategy of furnishing detailed

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19. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1205 (2012)).

20. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 432 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

21. *Sony*, 464 U.S. at 449–55; *see, e.g.*, Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1845–50, 1862–65 (2006).

22. *See* Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1455–56, 1463–64 (1997).

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

specifications of the copyright rights available to owners of each type of work.[24] At the turn of the twentieth century, the specification of rights may well have seemed comprehensive, but as the century wore on, it turned out to be seriously incomplete.[25] The 1976 Act, therefore, took the opposite strategy of articulating the rights in very broad terms, and then loading up the statute with exceptions, limitations, and privileges for the uses that Congress deemed to be non-infringing.[26] Congress paid heed, though, only to uses and users brought to its attention by entities involved in hammering out copyright revision, and did not address a host of uses and users not presented to it.[27]

Once the 1976 Act took effect, users and uses that Congress had not considered inevitably arose in lawsuits. Courts were left with the unappealing choice of assimilating those uses to activities that Congress had considered;[28] finding implicit privileges, exceptions, and limitations in the statute;[29] or redesigning a statutory exception, limitation, or privilege to fit the new situation.[30] The *Sony* litigation posed two large problems to which Congress had given little thought: the liability of consumers for making copies for personal use, and the liability of device manufacturers for facilitating infringing consumer uses.

*Sony* was not the first case seeking to hold the manufacturer of a device liable because the device facilitated infringements,[31] but it was

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24. *See* Act of March 4, 1909, Pub. L. No. 60-349, § 1, 35 Stat. 1075, 1075. This specification looks a little crazy to modern eyes. Literary works, for example, received an exclusive translation right but dramatic works did not; dramatic works, but not literary works, got an exclusive right to record the works and exhibit or perform the recordings. Musical works' public performance right was limited to public performance for profit; dramatic works' public performance right had no for-profit limitation. As originally enacted, the 1909 Act gave novels and other literary works no public performance right whatsoever. *Id.*

25. *See, e.g.*, Jessica Litman, *Silent Similarity*, 14 CHI.-KENT J. INTELL. PROP. L. 11 (2015).

26. *See* 17 U.S.C. §§ 106–122 (2012); *see generally* JESSICA LITMAN, DIGITAL COPYRIGHT 54–59 (2006).

27. I told this story at some length in Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

28. *See, e.g.*, Am. Broad. Co. v. Aereo, Inc., __ U.S. __, 134 S. Ct. 2498, 2505–08 (2014).

29. *See, e.g.*, Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. 1999); Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

30. *See, e.g.*, *In re* Cellco P'ship, 663 F. Supp. 2d 363, 375–77 (2009) (holding the public performance of ringtones to be privileged by 17 U.S.C. § 110(4) (2005)).

31. In *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911), the publisher of a novel sued a film studio for producing an unauthorized film adaptation of the novel. *Id.* at 60. Under the copyright law in effect at the time, a film version was not a "copy" of the novel on which it was based. The Supreme Court held that when the movie theatres that bought the film projected its images on a screen, those projections dramatized the novel. *Id.* at 61–62. By making and advertising the film, the studio was

the first suit seeking to hold a manufacturer of a device liable for facilitating allegedly infringing behavior by millions of consumers in their homes.[32] The case raised problems that Congress had not considered during the twenty-year process that led to the revision. Members of Congress appear to have assumed that individuals were not liable for making personal copies of copyrighted works, and they simply hadn't imagined a suit against a device maker seeking to recover for the actions of millions of individuals in their homes.[33] Indeed, although Congress paid significant attention to newfangled copying technologies, and had asked a blue ribbon commission to consider the issues posed by new methods of reproduction, nobody appears to have suggested to congressional committees or to the members of the Commission on New Technological Uses (CONTU) that the manufacturers of copying devices might be liable for infringing uses of their machines.

## II. WHAT WE LEARN FROM THE LEGISLATIVE HISTORY

The disruptive technologies of the 1960s were photocopying and audiotape recording. Computers were on the horizon, but the threats they posed were still hypothetical. When educators asked for exemptions for educational photocopying and computer use, copyright owners urged Congress to leave those exemptions out of the statute and instead refer the question whether they were necessary to a blue ribbon commission.[34] During the hearings on successive drafts of the legislation that became the 1976 Act, witnesses and members of Congress discussed photocopying and tape recording extensively.[35] Everyone acknowledged

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liable not as a direct infringer, but as a contributory infringer. *Id.* at 62–63. Early suits against radio broadcasters over the broadcast of unlicensed public performances for the purpose of promoting the sales of radios cast the manufacturer-broadcaster as a contributory rather than a direct infringer. *See, e.g.*, Jerome H. Remick & Co. v. Gen. Elec. Co., 16 F.2d 829, 829 (S.D.N.Y. 1926).

32. *See* Leval, *supra* note 22, at 1457.

33. *See infra* notes 34–60 and accompanying text.

34. *E.g.*, *Copyright Law Revision: Hearing on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 1452-60 (1965) [hereinafter *1965 House Hearings*] (testimony of Bella Linden, American Textbook Publishers Institute). Congress did refer the photocopying problem to a commission, which it named the Commission on New Technological Uses of Copyrighted Works (CONTU). NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 1 (1978). CONTU labored mightily and came back with a report strongly implying that individual photocopying was fair use but photocopying by commercial photocopy services might not be. *Id.* at 48–50.

35. *See generally Prohibiting Piracy of Sound Recordings: Hearing on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. (1971) [hereinafter *Prohibiting Piracy of Sound Recordings Hearing*]; *Copyright Law Revision: Hearing on S. 597 Before the Subcomm. on Patents, Trademarks & Copyrights of the S. Comm. on the Judiciary*, 90th

that consumers were already using photocopiers and tape recorders to make copies of copyrighted works for their own use, and that there was not and should not be a fear of consumer liability for making those copies.[36] Most but not all of the witnesses said that an individual's use of a photocopy machine in a library or workplace qualified as fair use.[37] There were outliers. One witness—Ralph Dwan, of the 3M Corporation (a major manufacturer of both audiotape and photocopy machines)—asked Congress to enact a provision explicitly privileging the making of any personal or private copies so long as they were not offered for sale.[38] In response to Dwan's proposal, a single witness—Irwin Karp for the Author's League—insisted that even individual photocopying should be considered to be infringement:

> If an individual or an institution borrowed a copy of a book from a library and ran off 100 copies on a Xerox machine, or any other method, 100 copies at one time, and sold them or gave them to me and to 99 other people, he would be guilty of infringement. If he ran off the hundred copies one at a time, as each of us ordered them, and gave them or sold them to us, it would still be an infringement. In either event a hundred copies would have been made and placed in the hands of a hundred people without the author's consent, and without any payment to the author or publisher.
>
> Now suppose that I and the 99 other persons each borrowed the same copy of the book from the same library and each of us made a copy for himself on a Xerox machine. The result is the same. One hundred copes [sic] have been made and placed in the hands of a hundred people without the author's consent, and without any payment to the author or publisher.
>
> Now I had not intended to belabor the Xerox machine; we don't object to copying technology, we welcome it. It so

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Cong. (1967) [hereinafter *1967 Senate Hearings*]; *1965 House Hearings*, *supra* note 34; Diane Leenheer Zimmerman, *Modern Technology, Leaky Copyrights, and Claims of Harm: Insights from the Curious History of Photocopying*, 61 J. COPYRIGHT SOC'Y OF THE U.S.A. 1, 19–27 (2013).

36. *See, e.g.*, *Prohibiting Piracy of Sound Recordings Hearing*, *supra* note 35, at 22–23 (colloquy).

37. *See, e.g.*, *Copyright Law Revision: Hearing on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary*, 89th Cong. 180 (1965) (testimony of Mark Carroll, Chairman, Copyright Committee, Association of American University Presses); *id.* at 187–88 (colloquy); *1965 House Hearings*, *supra* note 34, at 119–21 (statement of Dan Lacy, Managing Director, American Book Publishers Council); *id.* at 367–71 (colloquy); *id.* at 1517–18 (colloquy).

38. *1965 House Hearings*, *supra* note 34, at 1498–99 (statement of Ralph H. Dwan, Minnesota Mining & Manufacturing Co. (3M)).

> happens that when someone makes a superior product they must suffer the penalty of being cited an example, and I am only using them as an example.[39]

For the most part, though, lawyers representing copyright owners testified that their concern over photocopying technology was that it would be used for mass duplication, displacing the traditional publishing industry.[40] Though consumers also made copies, copyright owners didn't view that as a major concern.[41] None of the lobbyists participating in copyright revision suggested that the makers of photocopying machines might be liable for unauthorized copying by their customers.[42] Members of Congress didn't seriously consider whether the new law should impose liability on consumers or manufacturers for photocopying because nobody asked them to do so.

Similar evidence supports the inference that members of Congress believed that neither the 1909 Copyright Act nor the 1976 Act made it illegal for consumers to use a tape recorder to record music from records or radio broadcasts. The 1909 Act had protected "musical works" (i.e., the musical composition authored by a composer) but had not extended copyright protection to "sound recordings" (i.e., the recording of a performance of a composition, authored by performers and a record producer or sound engineer).[43] Record labels first sought federal copyright protection for their recordings in response to radio broadcasters' and jukebox operators' commercial use of their records.[44]

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39. *Id.* at 1756 (statement of Irwin Karp, Authors' League of America, Inc.).

40. *See, e.g.*, *id.* at 1431 (testimony of Bella Linden, American Textbook Publishers Institute); *id.* at 1514 (prepared statement of Williams & Wilkins Co.).

41. *See, e.g.*, *1967 Senate Hearings*, *supra* note 35, at 64–96 (testimony of Prof. Jesse W. Markham, Horace S. Manges, Lee C. Deighton, and Bella L. Linden for the American Textbook Publishers Institute and the American Book Publishers Council, Inc.); *1965 House Hearings*, *supra* note 34, at 121 (testimony of Dan Lacy, Managing Director, American Book Publishers Council); *id.* at 1451–60 (testimony of Bella Linden, American Textbook Publishers Institute); *id.* at 1505–07 (colloquy); *id.* at 1517–18 (colloquy); *see also id.* at 1650 (statement of Gerhard Van Arkel, General Counsel, International Typographical Union) ("There is all the difference in the world between a library photocopying an occasional page of a work for the use of a scholar, and the making of multiple copies of entire works by any of the photographic processes which may now substitute for printing, presswork and binding.").

42. One witness did suggest that the owner of a copying machine should be liable for its infringing use, but thought that manufacturers' responsibility should be limited to an obligation to affix labels on their machines warning that the use of the machines was subject to federal currency and copyright laws. *1965 House Hearings*, *supra* note 34, at 1516 (testimony of Lyle Lodwick, Williams & Wilkins Co.).

43. *See generally* BARBARA A. RINGER, STUDY NO. 26: THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS (1957).

44. *See, e.g.*, Milton Diamond & Jerome H. Adler, *Proposed Copyright Revision and*

Efforts to expand copyright to cover sound recordings in the 1920s, 1930s, and 1940s foundered.[45] In the 1950s, increasing concern over commercial record piracy made the problem more urgent.[46]

As early as 1961, the Copyright Office recommended that the revision bill that became the 1976 Copyright Act confer copyright protection on sound recordings,[47] and it included copyright for sound recordings in the earliest draft revision bill.[48] In 1963, the Phillips Corporation introduced the 3.8 mm audio cassette tape and portable cassette tape player to the U.S. market. As a result, commercial record piracy became cheaper and easier.[49] Meanwhile, the sale of inexpensive consumer cassette tape recorders allowed home taping of records and radio to explode.[50] By 1965, the House and Senate committees had settled on language giving sound recordings limited copyright protection,[51] but the copyright

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*Phonograph Records*, 11 AIR L. REV. 29, 45, 55–56 (1940).

45. A 1957 Copyright Office Study described previously unsuccessful efforts to extend copyright to sound recordings going back as early as 1925. RINGER, *supra* note 43, at 21–37. The principal obstacles, as then-Assistant Register Barbara Ringer tells the story, were disputes between performers and record labels about which of them the law should deem the author and copyright owner, resistance by composers and music publishers, and objections from broadcasters, who feared that copyright in recordings would oblige them to pay record royalties as well as music royalties. *Id.*

46. *See, e.g.*, Sidney A. Diamond, *Copyright Problems of the Phonograph Record Industry*, 8 BULL. COPYRIGHT SOC'Y OF THE U.S.A. 337, 353 (1961); RINGER, *supra* note 43, at 47.

47. REGISTER OF COPYRIGHTS, H. COMM. ON THE JUDICIARY, 87TH CONG., REP. ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 17–18 (Comm. Print 1961).

48. COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND COMMENTS AND DISCUSSION ON THE DRAFT 1 (Comm. Print 1964) [hereinafter CLR Part 3]. The copyright for sound recordings was expressly limited by section 10 of the draft bill to a right to reproduce directly and distribute dubbed copies of the sound recording, excluding an imitation right and a public performance right. *See id.* at 7–8. This limitation survived in the version enacted in 1976. One of the political problems that doomed earlier efforts was a dispute over whether the author of a sound recording was the musician responsible for the performance or the record label that released it. The 1964 draft sought to evade that problem by failing to specify the answer. That disagreement remained a dozen years later, and the act accordingly incorporated the ambiguity. The dispute over authorship of sound recordings continues to plague the law today. *See, e.g.*, Bucciarelli-Tieger v. Victory Records, Inc., 488 F. Supp. 2d 702 (N.D. Ill. 2007).

49. *See Prohibiting Piracy of Sound Recordings Hearing*, *supra* note 35, at 4 (statement of Rep. Celler); *id.* at 10–12 (testimony of Barbara A. Ringer, Assistant Register of Copyrights).

50. *See id.* at 120 (letter from David Abshire, Assistant Secretary for Congressional Relations, U.S. Department of State); ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 444–48 (2009).

51. Sections 106 and 112 of H.R. 4347, 89 Cong. (as introduced by Rep. Emanuel Celler on Feb. 4, 1965), like the 1964 draft bill, described *supra* note 48, would have given the owners of the copyright in sound recordings the exclusive right to duplicate or dub the actual sounds on the recording, and to distribute dubbed copies but no public performance right. Performers and musicians objected vehemently to the bill because it failed to give their interests sufficient protection. *See 1965 House Hearings*, *supra* note 34, at 1387–405 (1966) (the Performing Musicians' Opposition to the 1965 Bill for General Copyright Revision).

revision bill had stalled in the Senate because the operators of Community Antenna Television (an early form of cable television) couldn't reach agreement with motion picture producers and broadcasters.[52] Record labels insisted that the piracy problem demanded immediate action.[53] The Senate subcommittee made the decision to split off the sound recording copyright provisions into a discrete bill and enact it separately.[54] Drafters took the substantive provisions of the copyright revision bill and retrofitted the language to match the language of the 1909 Act.[55]

At the House hearings on the new, stand-alone sound recording copyright bill, House Judiciary Committee Chairman Emanuel Celler explained that the bill was designed to target record "piracy," which he described as "the unauthorized commercial duplication and sale of a reproduction of a sound recording, often at a sharply cut price."[56] Representative Edward Biester, Republican of Pennsylvania, asked whether his son's use of a cassette recorder to record music off the radio would be prohibited by the bill. Assistant Register of Copyrights Barbara Ringer assured him that it would not.[57]

The House Report on the bill repeated that understanding:

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in

52. *See Copyright Law Revision—CATV: Hearing on S. 1006 Before the Subcomm. on Patents, Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 89th Cong. (1966); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 874–75 (1987).

53. *See Prohibiting Piracy of Sound Recordings Hearings*, *supra* note 35, at 38–41 (statement of Stanley M. Gortikov, Director, Recording Industry Association of America); *id.* at 41–42 (statement of Jack Grossman, President, National Association of Record Merchandisers, Inc.).

54. *See* S. REP. NO. 92-72, at 3–6 (1971).

55. *Prohibiting Piracy of Sound Recordings Hearing*, *supra* note 35, at 13 (testimony of Barbara A. Ringer, Assistant Register of Copyrights).

56. *Id.* at 4 (statement of Rep. Celler).

57. *Id.* at 22–23 (colloquy).

recorded musical compositions over the past 20 years.[58]

That formulation indicates that members of the House committee recognized that neither the owners of musical composition copyrights nor the owners of the new sound recording copyrights had rights under the statute that extended to noncommercial home copying. Chairman Kastenmeier made the point again on the floor of the House of Representatives just before the House voted in favor of the Bill.

> Mr. KAZEN. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> Mr. KASTENMEIER. Yes.
>
> Mr. KAZEN. In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of this bill?
>
> Mr. KASTENMEIER. This is not included in the bill. I am glad the gentleman raises the point.
>
> On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report.[59]

Thus, as of 1971, when the language, structure, and scope of the bill that became the 1976 Copyright Act had been settled except for details, members of Congress appear to have believed that that language didn't and wouldn't reach noncommercial consumer copying. As with photocopiers, there was no suggestion that the manufacturers of audio recorders or blank audio media might bear legal responsibility for unlicensed copies.

Let me stop to emphasize the limits of my point. I am not arguing here that the language of the 1976 Copyright Act should be read to incorporate an unstated exclusion for consumer liability. I am making only the modest observation that the evidence we have indicates that, when Congress enacted the 1976 Act, senators and representatives believed that neither consumer photocopying nor consumer taping of music would count as copyright infringement under the language of the Act. Reasonable people may have heated arguments over the extent to

58. H.R. REP. NO. 92-487, at 7 (1971).

59. 117 CONG. REC. 34, 748–49 (1971).

which Congress's understanding of what it was doing ought to constrain courts' interpretation of the language Congress enacted. For my purposes, it's sufficient to show that Congress didn't anticipate that the 1976 Act would subject consumers to liability for copyright infringement, so it didn't give any attention to the circumstances under which consumers should receive express exemptions or privileges.

Because Congress appears to have assumed that individuals would not be liable for copyright infringement for unauthorized consumer copying, it didn't take the opportunity at any time during the twenty-year revision process to consider what exceptions, limitations, and privileges would be appropriate for unlicensed personal uses.[60] Because of that assumption, moreover, it never considered the possibility that widespread unlicensed personal uses would be deemed infringing in the aggregate, or that the makers of devices or services would be accused of infringement for making those uses possible. It had no opportunity to design exemptions or limitations for those cases, if it thought it appropriate to do so, nor to fashion an appropriate range of remedies for contributory infringement liability predicated on the sale of infringement-enabling devices and services to the general public.

## III. *SONY* AND ITS AFTERMATH

On November 11, 1976, three weeks after Congress enacted the 1976 Copyright Act, Universal Studios filed a copyright infringement suit against William Griffiths. Universal didn't expect to recover any money from Griffiths. In fact, he was a client of Universal's law firm who happened to own a Sony Betamax videotape recorder. The firm secured his permission to be sued before naming him in its lawsuit against Sony.[61] Universal felt that Sony's manufacture and sale of a videotape recorder infringed its copyrights in the programs that consumers taped.[62] Because Sony itself did not reproduce, adapt, distribute, perform, or

60. A handful of privileges that courts have applied to personal uses were in fact drafted for the benefit of institutions. The § 110(4) privilege that the court in *In re Cellco P'ship*, 663 F. Supp. 2d 363, 375–77 (S.D.N.Y. 2009), construed to permit owners of cellphones to publicly perform music when their cellphones rang in public places, for example, was designed to permit school assemblies. *See* COPYRIGHT LAW REVISION PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 39 (Comm. Print 1965).

61. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 437 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); *see* JAMES LARDNER, FAST FORWARD: A MACHINE AND THE COMMOTION IT CAUSED 17 (2002). Lardner's book, adapted and expanded from a series of articles in *The New Yorker* magazine, is an authoritative and highly readable account of the facts underlying the Sony Betamax lawsuit.

62. *See* LARDNER, *supra* note 61, at 5–9, 13.

display any of Universal's movies, Sony was not itself doing anything the copyright statute prohibited. Universal's legal theory, though, was that Sony was deliberately enabling consumers to make unlawful copies of television programs, and should therefore be held liable as a contributory infringer.[63] In order to hold Sony liable for consumers' copyright infringement, Universal's lawyers believed they should make one of those consumers a defendant in the suit.[64]

Many copyright owners understandably believe that they should be able to control who profits from works in which they own the copyrights.[65] Sony was making a significant amount of money selling devices designed to copy copyrighted television programs, and the fact that Sony wasn't itself doing any of the copying didn't seem to Universal as if it should be determinative. And while suits against consumers before this lawsuit were almost unheard of, copyright owner efforts to stop other businesses from profiting from copyrighted works were not.

I like to call this problem the trumpet problem.[66] Trumpets, here, are a synecdoche for the businesses that make instruments, devices, and services designed for the enjoyment of copyrighted works. This category comprises trumpets, pianos, violins, radios, cameras, televisions, tape recorders, film projectors, computers, DVD players, ebook readers, smart phones, tablets, iPods, music cyberlockers, cloud storage, and user-generated video platforms. The people who make trumpets are in the business of making money because of works written by others. Indeed, their business models often depend on the indirect commercial exploitation of other people's creativity. In general, trumpet makers profit commercially by taking advantage of readers', listeners', and players' willingness to spend money to enhance their enjoyment of works (or advertisers' willingness to spend money to reach individuals who enjoy copyrighted works). Because the copyright statute defines the scope of copyright owners' rights with reference to reproducing, adapting, and publicly distributing, performing, and displaying, unlicensed profiting from copyrighted works, without more, is not infringement.

In suing Sony for making and selling Betamax recorders, then, Universal was claiming that consumers who used the Betamax to record

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63. *See Sony*, 480 F. Supp. at 441–42.

64. *See* LARDNER, *supra* note 61, at 17–18.

65. *See*, *e.g.*, David Carr, *Spreading Disruption, Shaking up Cable TV*, N.Y. TIMES, Mar. 18, 2013, at B1, B5.

66. *See, e.g.*, Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 21 (2010).

and then watch television programs were making infringing copies of the programs, and that Sony should be liable as a contributory infringer for giving consumers the tool necessary to commit the infringement.[67] The aspect of the suit that attracted the most public attention was the claim that William Griffiths might be liable for using a recording device in his home to allow him to watch television programs.[68] The claim that proved more troubling to the judges who had to decide the case was the idea that an appropriate response to unlicensed copying was to impose infringement liability on the makers and sellers of copying machines.[69] Neither Congress nor the CONTU Commission had even broached that as a possibility. What made the claim at least colorable was Congress's casting exclusive copyright rights in very broad terms and then subjecting the rights to specific exceptions. Sony's sale of video recorders was simply a particularly surprising example of a situation in which Congress had failed to imagine copyright infringement liability and therefore failed to include express limitations or define boundaries to divide infringing from non-infringing actions. The general problem would keep coming up.

The trial judge reviewed the copyright statute's legislative history and concluded that neither the 1909 Copyright Act nor the 1976 Act gave copyright owners control over an individual's home copying of television broadcasts for personal use.[70] On appeal, the Ninth Circuit reversed. The panel read the language of the statute to prohibit any and all reproductions that were not explicitly exempted.[71] Home videotaping went unmentioned by both the 1909 and 1976 Copyright Acts, so making personal videotapes necessarily infringed the studios' copyright. Since the primary purpose of a Betamax machine was to allow consumers to make these infringing copies, Sony, its advertising agency, and the stores that sold Betamax recorders should all be liable for contributory infringement.[72]

Sony appealed, and the Supreme Court agreed to hear the case. After

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67. *See Sony*, 480 F. Supp. at 441–42.

68. *See, e.g.*, Robert Lindsey, *Monumental Legal Battle Shaping Up in Bid to Bar Color TV Recorders*, N.Y. TIMES, Mar. 25, 1977, at D1, D8; Philip Shenon, *Copyright v. 'Reprography' Revolution*, N.Y. TIMES, Oct. 25, 1981, at E7.

69. *See* Leval, *supra* note 22, at 1457; Jessica Litman, *The* Sony *Paradox*, 55 CASE W. RES. L. REV. 917, 945–46 (2005).

70. *Sony*, 480 F. Supp. at 442–47.

71. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 966 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

72. *Id.* at 971–76.

oral argument, the majority of Justices were disposed to affirm the Ninth Circuit decision, at least in part.[73] Justice Blackmun took on the assignment of drafting the opinion for the Court. His analysis began with the premise that the 1976 Act granted copyright owners a broad reproduction right. According to Congress' plan, any unlicensed reproduction was infringing unless it came within a statutory exception. The statute did not include an express exemption for home video recording.[74] Justice Blackmun concluded that Congress had proved it was able to draft explicit exemptions for the private uses when it included a privilege for libraries to make a single copy for a patron's private study scholarship or research, and when it limited the performance right to public performances.[75] Fair use should not apply; it was a narrow privilege intended to permit "productive uses[s], resulting in some added benefit to the public beyond that produced by the first author's work."[76]

Justice Stevens disagreed. He insisted that the legislative history of the 1976 Copyright Act evidenced a widely shared understanding that it was not copyright infringement for individuals to make personal copies for their own use.[77] A further difficulty with reading the statute to permit the imposition of contributory liability for the aggregate copying of millions of consumers was the fact that the remedy sections of the statute didn't seem to contemplate it; indeed, they permitted copyright owners to seek statutory damages, even for innocent infringement, of a minimum of $200 for each and every work infringed. Those provisions

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73. This account of the Supreme Court's deliberations in the *Sony* case is drawn from the papers of Justices Blackmun, Marshall, and Brennan, and has been told in more detail in Jonathan Band & Andrew J. McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of* Sony v. Universal, 17 COLUM.-VLA J.L. & ARTS 427 (1994), and Litman, *supra* note 69. Justice Blackmun had reluctantly recused himself from an earlier copyright fair use case, *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975), because of his nine years as resident counsel to the Mayo clinic. The Mayo Foundation was a defendant in the case. Blackmun's personal notes indicate that, had he participated, Blackmun would have provided the fifth vote to reverse the Court of Claims, and hold the National Library of Medicine liable for photocopying articles from medical journals.

74. First Draft Opinion of Justice Harry A. Blackmun at 8–9, Sony Corp. of Am. v. Universal City Studios, Inc., No. 81-1687 (circulated June 13, 1983).

75. *Id.* at 12–13. Furthermore, Blackmun wrote, Congress had proved it was able to draft exemptions for the reproduction of single copies when it included privileges for libraries and broadcasters to make no more than one copy in the statute. *Id.* at 9. Justice Blackmun also noted that the House and Senate Reports mentioned a handful of instances in which the making of a single copy would be fair use. *Id.*

76. *Id.* at 22.

77. Memorandum from Justice John Paul Stevens to the Conference (June 13, 1983); Letter from Justice John Paul Stevens to Justice Harry A. Blackmun (Jan. 24, 1983); *see also* Band & McLaughlin, *supra* note 73, at 433–34.

would subject both consumers and the manufacturers of copying equipment to "truly staggering liability."[78]

Justice Stevens circulated letters to the other Justices arguing the merits of his position. He sent around successive drafts of an alternative opinion.[79] Justice Stevens would have recognized a categorical exemption for consumer home copying, but could not persuade a majority of his colleagues to agree. Instead, he articulated a standard for ascertaining whether William Griffiths' copying (and the copying of four million Betamax owners like him) was a sufficient predicate for Sony's liability. Stevens' efforts peeled off Justices from Justice Blackmun's majority until he had collected the five votes he needed.[80] Stevens' opinion for the majority concluded that consumers' copying of broadcast television was in many cases not copyright infringement because it was fair use.

> [Section 107] identifies various factors that enable a court to apply an "equitable rule of reason" analysis to particular claims of infringement. Although not conclusive, the first factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. If the Betamax were used to make copies for a commercial or profitmaking purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. § 107(2) (1982 ed.), and that 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, see § 107(3), does not have its ordinary effect of militating against a finding of fair use.
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> This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). The purpose of copyright is to create incentives for creative

78. Letter from Justice John Paul Stevens to Justice Harry A. Blackmun (Jan. 24, 1983).

79. First Draft Memorandum of Justice John Paul Stevens, Sony Corp. of Am. v. Universal City Studios, Inc. (No. 81-1687) (circulated June 13, 1983); Second Draft Memorandum of Justice Stevens, Sony Corp. Of Am. v. Universal City Studios, Inc. (No. 81-1687) (circulated June 27, 1983); Third Draft Memorandum of Justice Stevens, Sony Corp. of Am. v. Universal City Studios, Inc. (No. 81-1687) (circulated June 28, 1983).

80. *See* Litman, *supra* note 69, at 932–41.

> effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.
>
> Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.
>
> In this case, respondents failed to carry their burden with regard to home time-shifting.[81]

While Justice Stevens failed to persuade the majority of his colleagues that personal uses should be categorically exempt from copyright infringement liability, he did persuade them to adopt a standard under which personal uses were deemed noncommercial and presumptively fair. The standard would prove unworkable not because of that presumption, but because of the corollary that all commercial uses were presumptively unfair.[82]

A year after releasing the *Sony* decision, in a case involving excerpts from former President Gerald Ford's autobiography, the Court returned to the twin presumptions. *The Nation* had summarized and quoted 300

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81. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–51 (1984). Justice Blackmun revised his draft majority opinion and released it as a dissent. He argued that fair use should be limited to productive reuses that merited a subsidy, and consumer copying for personal use was an ordinary rather than a productive use. But he had, at least temporarily, lost that argument with his colleagues.

82. Leval, *supra* note 22, at 1455–56.

words from Ford's forthcoming memoir, and the publisher had sued it for copyright infringement. The Court of Appeals for the Second Circuit thought the use should be deemed fair under § 107,[83] but the Supreme Court relied on the *Sony* presumptions to reverse.[84] Although *The Nation* magazine was marginal,[85] it was formally a business, seeking to earn a profit. Its use of 300 words from the Ford memoir was therefore commercial, and thus presumptively unfair. "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use," Justice O'Connor wrote, quoting *Sony*. "[Every] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[86]

The *Harper & Row* case highlighted a defect in *Sony*'s formulation of fair use. In *Sony*, the Court confronted a case predicated on consumers' personal copying. The Supreme Court found that copying to be fair use by recognizing a presumption that noncommercial uses came within the shelter of § 107. But, that, in turn, suggested a related presumption that commercial uses were to be presumed unfair. As one would expect, the latter presumption worked very badly for traditional beneficiaries of fair use, many of whom used copyrighted works in connection with commercial activity. Biographers,[87] parodists,[88] and news organizations[89] suddenly found fair use unavailable. Meanwhile, though, the public had come to understand that noncommercial and personal uses were not infringing. Members of Congress appear to have shared that interpretation.

While the *Sony* litigation was working its way through the courts, motion picture studios, device makers, and consumer and library groups

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83. Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 208 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

84. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560–63 (1985).

85. According to the Court of Appeals for the Second Circuit, *The Nation*'s receipts from newsstand sales of the issue were $418. *Harper & Row*, 725 F.2d at 198.

86. *Harper & Row*, 471 U.S. at 562; *see also* Stewart v. Abend, 495 U.S. 207, 237 (1990) (Since "[p]etitioners received $12 million from the re-release of the motion picture during the renewal term," their use was commercial.).

87. *See, e.g.*, New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 583–84 (2d Cir. 1989).

88. *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990); Original Appalachian Artworks v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Ga. 1986).

89. *See* Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc., 804 F. Supp. 950 (W.D. Mich. 1992).

sought clarifying copyright amendments from Congress.[90] Between the 1981 Ninth Circuit decision finding Sony liable, and the 1984 Supreme Court decision holding that home recording of broadcast television programming was fair use, Congress held seven hearings on the issue and considered nine different bills.[91] Both motion picture industry-backed bills[92] and consumer- and device-maker-backed bills[93] expressly absolved consumers of any liability for home recording of video programs. Movie industry bills, however, coupled the exemption with a mechanism for collecting royalties from device and media manufacturers.[94] The industry assured Congress that it had no interest in pursuing individual homeowners who taped television shows.[95] Even the Motion Picture Association of America lobbyist Jack Valenti, who famously testified that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone," conceded a few minutes later that he owned and used a video tape recorder and wasn't at all worried about being sued.[96]

The assumption that consumers would not be not liable for making unlicensed copies for personal use persisted in Congress during the decade following the *Sony* decision and was an important predicate for

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90. *See Video and Audio Home Taping: Hearing on S. 31 and S. 175 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 98th Cong. 1 (1983) [hereinafter *1983 Home Taping Hearing*]; *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts of the H. Comm. on the Judiciary*, 97th Cong. (1982) [hereinafter *1982 Home Recording Hearing*].

91. *See 1983 Home Taping Hearing*, *supra* note 90; *Copyright Office/Copyright Royalty Tribunal: Hearing Before the Subcomm. on Courts, Civil Liberties, & the Administration of Justice of the H. Comm. on the Judiciary*, 98th Cong. (1983) [hereinafter *1983 Royalty Tribunal Hearing*]; *Oversight of the Copyright Office and the Copyright Royalty Tribunal: Hearing Before the Subcomm. on Patents, Copyrights, & Trademarks of the S. Comm. on the Judiciary*, 98th Cong. (1983) [hereinafter *1983 Oversight Hearing*]; *Copyright and Technological Change: Hearing Before the Subcomm. on Courts, Civil Liberties, & the Administration of Justice of the H. Comm. on the Judiciary*, 98th Cong. (1983) [hereinafter *1983 Technological Change Hearing*]; *1982 Home Recording Hearing*, *supra* note 90; *Copyright Infringements (Audio and Video Recorders): Hearing on S. 1758 Before the S. Comm. on the Judiciary*, 97th Cong. 549 (1982) [hereinafter *1982 Copyright Infringements Hearing*].

92. *See, e.g.*, S. 31, 98th Cong. (1983); H.R. 5705, 97th Cong. (1982).

93. *See, e.g.*, S. 175, 98th Cong. (1983); S. 1758, 97th Cong. (1981); H.R. 4783, 97th Cong. (1981).

94. *See, e.g.*, S. 31, 98th Cong. (1983).

95. *See, e.g.*, *1983 Home Taping Hearing*, *supra* note 90, at 276–77 (testimony of Jack Valenti, Motion Picture Association of America); *1982 Copyright Infringements Hearing*, *supra* note 91, at 459 (testimony of Jack Valenti, Motion Picture Association of America).

96. *See 1982 Home Recording Hearing*, *supra* note 90, at 8, 10 (testimony of Jack Valenti, Motion Picture Association of America).

the 1992 Audio Home Recording Act.[97] In the years following *Sony*, the recording industry lobbied Congress in pursuit of a rule limiting the importation and sale of digital audio recorders.[98] Record labels argued that the *Sony* standard didn't, or at least shouldn't, make home audio recording lawful; the manufacturers of tape recorders insisted that their devices were staple articles of commerce under *Sony*, immune from liability so long as they were capable of substantial non-infringing uses.[99] Eventually, record labels, composers, music publishers, musicians, and the makers of recording devices reached a compromise calling for the implementation of copy-control technology in digital recorders and the payment of a royalty on sales of recording machines and blank recording media, to be divided among record labels, performers, composers, and music publishers.[100]

Crucially, though, in return for those provisions, members of Congress insisted on an explicit statement in the law that clarified consumers' rights to make noncommercial copies of recorded music without fear of copyright liability.[101] That concession was essential to gaining congressional support for the amendment. Owners of music and sound recording copyrights acceded to it because—at the time—it seemed cheap.[102] Under the *Sony* formulation of fair use, noncommercial consumer copying was already presumptively fair.[103]

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97. *See* H.R. REP. NO. 102-873 (1992); S. REP. NO. 102-294, at 30 (1991) ("The purpose of S. 1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.").

98. *See generally Copyright Issues Posed by Digital Audio Tape: Joint Hearing Before the Subcomm. on Patents, Copyrights, & Trademarks of the S. Comm. on the Judiciary and the Subcomm. on Courts, Civil Liberties, & the Administration of Justice of the H. Comm. on the Judiciary*, 100th Cong. (1987) [hereinafter *1987 Digital Audio Hearing*]; *Home Audio Recording Act: Hearing on S. 1739 Before the S. Comm. on the Judiciary*, 99th Cong. (1986) [hereinafter *1986 Home Audio Hearing*].

99. *See 1986 Home Audio Hearing*, *supra* note 98, at 90–91 (testimony of Stanley Gortikoff, Recording Industry Association of America); *id.* at 289–90, 298 (testimony of Charles Ferris, Audio Recording Rights Coalition).

100. *See Audio Home Recording Act of 1991: Hearing on H.R. 3204 Before the Subcomm. on Intellectual Property & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 1–2 (1993) [hereinafter *1991 Audio Recording Hearing*] (remarks of Rep. Hughes); *The Audio Home Recording Act of 1991: Hearing on S. 1623 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 102d Cong. 109–11 (1992) (testimony of Jason Berman, Recording Industry Association of America).

101. H.R. REP. NO. 102-873, pt. 1, at 24 (1992); *see* William F. Patry, *Section 1008*, PATRY COPYRIGHT BLOG (Aug. 17, 2005), http://williampatry.blogspot.com/2005/08/section-1008.html.

102. *See generally 1991 Audio Recording Hearing*, *supra* note 100.

103. *See* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002). The continuing vitality of the consumer noncommercial copying exemption, and its application to files copied using computers rather than dedicated audio recording devices, is disputed. *See id.* at 357–60. *Compare*

## IV. FAIR USE AND *CAMPBELL V. ACUFF-ROSE*

While consumers and businesses after *Sony* organized their activities and products around the assumption that noncommercial and personal consumer uses were generally non-infringing, writers, publishers, and performers faced an unanticipated risk of liability for customary uses. The presumptive unavailability of fair use for commercial purposes meant that uses long deemed to be fair use suddenly were fair no more. Some courts devised evasions to allow them to give the commercial nature of the use reduced weight,[104] but other courts found the commercial purpose of purported fair users determinative.[105]

In 1994, the Supreme Court repudiated the twin presumptions when it decided *Campbell*.[106] It did not, however, repudiate either the result or the reasoning in *Sony*. Justice Souter's opinion for the Court instead maintained that *Sony* had been misconstrued by lower courts.

> If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." *Harper & Row* . . . (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "[n]o man but a blockhead ever wrote, except for money." 3 Boswell's Life of Johnson 19 (G. Hill ed. 1934).[107]

The *Sony* opinion, he insisted, "called for no hard evidentiary

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A&M Records, Inc. v. Napster, Inc., 239 F.2d 1004, 1024 (9th Cir. 2001) ("Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives."), *with* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999) ("Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.").

104. *See, e.g.*, Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (D. Mass. 1986).

105. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1436 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994); Hi-Tech Video Prods. v. Capital Cities/ABC, Inc., 804 F. Supp. 950, 955 (W.D. Mich. 1992); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1532 (S.D.N.Y. 1991); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Ga. 1986).

106. *Campbell*, 510 U.S. at 583–85, 594.

107. *Id.* at 584.

presumption."[108] A more important aspect of the first fair use factor, Justice Souter wrote, was the extent to which the use was "transformative." That formulation was drawn from Judge Pierre Leval's 1990 Harvard Law Review commentary *Toward a Fair Use Standard*.[109] (Judge Leval later returned the favor, calling Justice Souter's opinion in *Campbell* "the finest opinion ever written on the subject of fair use."[110]) The *Campbell* analysis returned fair use part of the way back to the traditional, mid-twentieth century understanding of how fair use should work. But, of course, it couldn't return it all the way. The problem posed by the *Sony* case remained unsolved. What should courts do about uses or infringement claims that Congress had paid no attention to, in particular personal uses? *Campbell* didn't speak to it; it carefully preserved the result in *Sony* without giving lower courts much guidance on whether or when the *Sony* analysis remained viable. As the 1976 Act aged, that problem arose more and more often. Courts have struggled to figure out how fair use applies to new uses and new technologies.[111] Efforts to gain more clarity from Congress, meanwhile, have largely been stymied by legacy copyright owners' insistence that Congress enact no new express exemptions and privileges.

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108. *Id.*

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

110. *See* Leval, *supra* note 22, at 1464. Judge Leval also observed that he agreed that the Court had reached the right result in *Sony*: "Before leaving *Sony*, I wish to make clear that I do not suggest it was incorrectly decided. I am wholly in agreement that production of the VTR [(video tape recorder)] should not have been enjoined." *Id.* at 1457. The Judge continued:

> If it were enjoined because of its capacity to make infringing copies, why not also enjoin the use of the camera, the audio-tape recorder, the photocopier, and the computer—perhaps even pen and paper, or the printing press. All can be used to make infringing copies. The copyright law could put us back in the middle ages. But the decision to deny relief was fully justified on other grounds without need to launch a fundamental reinterpretation of fair use. As for the question whether an infringement has occurred when a private person uses the VTR to time-shift a program for a one-time noncommercial viewing, that question falls in the same category as the question whether infringement occurs when the waiters sing "Happy Birthday" at a patron's table, or when someone makes a photocopy of a *New Yorker* cartoon to put up on the refrigerator. What category is that? Questions that never need to be answered. If it did need to be answered, I believe the answer would be provided by the doctrine of de minimis non curat lex—the law does not concern itself with trifles—a doctrine that is of great importance to a proper understanding of the law of copyright.

*Id.* at 1457–58.

111. *See, e.g.*, *In re* Aimster, 334 F.3d 643 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 2004 (9th Cir 2001); Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 321–25 (S.D.N.Y. 2000), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999), *aff'd in part, rev'd in part*, 336 F.3d 811 (9th Cir. 2003); Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., 907 F. Supp. 1361, 1378–82 (N.D. Cal. 1995).

## V. PERSONAL USES, CONTRIBUTORY LIABILITY, AND CONGRESS

In the years since the enactment of the 1976 copyright revision, Congress has had many chances to revisit the question of consumer liability for personal uses. It has amended the copyright law more than fifty times, and held innumerable hearings on digital piracy, online infringement, and peer-to-peer file sharing.[112] Yet, until the 2003 John Doe suits filed by record labels and motion picture producers, members of Congress appear not to have anticipated that consumers might be liable for making copies for personal uses.

When courts in the 1990s read § 106 rights expansively to reach commercial activity that corresponded to common personal uses, members of Congress read those decisions to apply to exploitative and commercial acts without threatening consumers' behavior.[113] When the Ninth Circuit held that a computer repair firm's turning on a computer infringed the § 106(1) reproduction right in the computer's operating system software,[114] Congress amended the law to permit computer maintenance and repair services to turn on their customers' computers.[115] It didn't include a provision allowing consumers to turn on their own computers, because of members' assumption that consumers' computer use did not violate copyright owners' rights under § 106(1).[116] When civil liberties groups lobbied for explicit consumer exemptions, senators and representatives voiced skepticism that courts would hold consumers liable for ordinary uses of copyrighted works.[117] When

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112. *See* U.S. COPYRIGHT OFFICE, CIRCULAR 92: COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, at vi–xii (2011); *see, e.g.*, *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *2002 Piracy Hearing*]; *Music on the Internet: Is There an Upside to Downloading?: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *2000 Music on the Internet Hearing*].

113. *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1904–07 (2007).

114. MAI Sys. Corp. v. Peake Computer, Inc., 991 F.2d 511, 517–18 (9th Cir. 1993); *see also* Joseph Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1255–78 (2001); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134.

115. Computer Maintenance Competition Assurance Act, Pub. L. No. 105-304, 112 Stat. 2860, 2886 (1998).

116. *See* 144 CONG. REC. S4888–89 (1998) (statement of Sen. Ashcroft); *id.* at 4892–92 (remarks of Sen. Grassley); 144 CONG. REC. H7092 (1998) (statement of Rep. Frank); 143 CONG. REC. E21 (Jan. 1, 1997) (statement of Rep. Knollenberg); Litman, *supra* note 113, at 1905 n.190.

117. *See, e.g.*, *Digital Media Consumers' Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*,

Congress took up the question of contributory liability for infringing material posted publicly by subscribers, it enacted safe harbors for Internet service providers rather than oblige them to screen all files posted to the Internet for infringing content.[118] Having enacted a provision to protect a particular class of services from liability for their subscribers' acts, Congress raised the minimum and maximum statutory damages available for infringement.[119] It did not otherwise revisit the question of remedies to devise a measure for damages appropriate for contributory infringers.

Three years later, in a report mandated by the Digital Millennium Copyright Act (DMCA), the Register of Copyrights proposed that Congress enact a narrow statutory privilege to make temporary digital copies incidental to an otherwise lawful use.[120] Representatives of the

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108th Cong. 46–47 (2004) (statement of Rep. Stearns); *id.* at 68–71 (colloquy); *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. (1997).

118. Digital Millennium Copyright Act, title II, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified at 17 U.S.C. § 512); *see also* 144 CONG. REC. S4888 (May 14, 1998) (remarks of Sen. Ashcroft). Judge Edward Damich was a member of Senator Orrin Hatch's staff while Congress was considering the DMCA. Judge Damich told me that he had suggested to copyright owners and Internet service providers that the statute should include language clarifying that individual consumers were not liable for viewing infringing files over the Internet from their homes. Lobbyists for copyright owners were unenthusiastic, and Internet service providers insisted that such language would not be necessary, so long as the providers would not be held liable for consumers' infringement. *See* Litman, *supra* note 26, at 30–31, 34 n.12.

119. The 1988 Berne Convention Implementation Act had amended § 504(c) by raising the minimum statutory damages award from $250 per work infringed to $500 per work infringed, and doubling the maximum awards from $10,000 per work for non-willful infringement and $50,000 per work infringed for willful infringement to $20,000 and $100,000 per work infringed. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 2860. In 1999, Congress increased the minimum and maximum statutory damage awards again, to $750, $30,000, and $150,000 per work infringed. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774, 1774.

120. Section 104 of the Digital Millennium Copyright Act had directed the Copyright Office to study the question (among others) and to submit a report to Congress within two years. In the 2001 report, the Copyright Office noted sharp division between proponents of a broad privilege to make ephemeral RAM (random access memory) copies incidental to lawful use and opponents of any diminution in the scope of the reproduction right. Representatives of copyright owners had argued, the Copyright Office reported, that it was inappropriate to enact any exception for the benefit of any user interest that had not demonstrated concrete harm from the potentially overbroad application of section 106. Computer repair services had demonstrated harm and Congress had accordingly enacted a narrow exception. Since others had not yet been held liable for making RAM copies, any statutory privilege was premature. *See* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 50–58 (2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf [hereinafter DMCA SECTION 104 REPORT]. After examining testimony and written comments on both sides, the Copyright Office had concluded that the scope of the exclusive reproduction right was disputed:

entertainment and software industries protested. Rather than arguing that consumers who made such copies were or should be liable under current law, opponents of the legislation warned that even a narrow privilege might provide a loophole for future commercial piracy.[121] As part of the same Report, the Register noted that the literal language of the copyright law appeared to prohibit the common and prudent practice of making archival or backup copies of computer files and other digital content.[122] Copyright owners, while acknowledging the mismatch between the statutory language and widespread behavior, opposed any amendment of the law to permit digital backups. They argued that since nobody had sued consumers over backing up their hard drives, proponents of an archival exception had failed to prove any harm from its absence.[123] Adding an express exception for computer or other digital backups, they insisted, would only encourage commercial software pirates to use the exception as a bad faith justification for infringement.[124] The Register nonetheless recommended that Congress enact a modest change, either enacting a limited privilege for digital backups, or limiting the uses that could be made of backup files that were otherwise privileged under the fair use doctrine.[125] The entertainment software trade association

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> Nonetheless, a general rule can be drawn from the language of the statute. In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner's exclusive right to extend to all reproductions from which economic value can be derived.

*Id.* at 111. RAM copies, the Office concluded, should generally be deemed to be fixed within the meaning of the statute and therefore potentially infringing. *Id.* at 112–23. There was, however, no evidence that anyone was bringing copyright infringement suits against consumers for such copying, and the Office had concluded that consumer RAM copies would generally be deemed non-infringing because of fair use or implied license. *Id.* at 124–45. The Register nonetheless supported an amendment to clarify that no liability should attach to ephemeral copies that were incidental to lawful music transmissions. *Id.*

121. Music industry representatives insisted that such an amendment would be inappropriate since no showing of harm had been made. Software publishers protested that recognizing any loopholes for any users would post grave piracy risks. *See 2001 Section 104 Report Hearing*, *supra* note 15, at 76–83 (statement of Marvin Berenson, Broadcast Music, Inc.); *id.* at 17–23 (statement of Carey Ramos, National Music Publishers Association); *id.* at 45–52 (statement of Emery Simon, Business Software Alliance).

122. *See* DMCA SECTION 104 REPORT, *supra* note 120, at 150 ("Based on the evidence presented during the course of preparing this Report, there is a fundamental mismatch between accepted, prudent practice among most system administrators and other users, on one hand, and section 117 on the other. As a consequence, few adhere to the letter of the law.")

123. *Id.* at 65, 151–52.

124. *Id.* at 61–63, 152.

125. The Copyright Office had concluded that, in the absence of an express archival exception, hard disk backups were probably fair use. *Id.* at 158–59. If they were fair use, though, backup copies would be deemed to have been "lawfully made," and therefore potentially subject to the first sale doctrine, which permits the owners of lawfully made copies to resell them or give them away.

objected that the current statutory exception for back-up copies of computer programs was itself no longer necessary, since software was distributed on more durable media than it had been when Congress enacted the original archival exception, and that the provision was already being used as an excuse for ruinous piracy.[126] Music copyright owners expressed alarm that the statutory privilege might be expanded to permit archival copies of music.[127] No member of Congress introduced an amendment to implement the Register's proposal.

As recently as a decade ago, then, most members of Congress had no reason to believe that their constituents' ordinary noncommercial copying, adaptation, distribution, performance, or display of material protected by copyright would subject them to copyright infringement suits. Although Congress had significantly expanded the scope of copyright rights, it had done so against a background understanding that the law did and should protect copyright owners' ability to exploit their works, while preserving the public's liberties to read, listen, view, or use those works, even when individual consumers made unlicensed copies for personal use.[128]

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*Id.* at 153–57; *see also* 17 U.S.C. § 109(a) (2012). The Register's Report therefore recommended that Congress either enact a narrow archival privilege for backups that expressly prohibited the distribution of backup copies, or amend the first sale doctrine to exclude any fair use copies from its coverage. *See id.* at 157–61. Copyright owner lobbyists have steadfastly resisted proposals to implement some analogue of the first sale doctrine for works in digital form. *See 2014 First Sale Under Title 1 Hearing*, *supra* note 15, at 108–09 (2014) (testimony of Emery Simon, BSA, The Software Alliance); *id.* at 138–50 (statement submitted by the Association of American Publishers). Since the Supreme Court ruled in *Kirtsaeng v. Wiley*, __ U.S. __, 133 S. Ct. 1351 (2013), that § 109(a) applies to copies manufactured outside of the United States as well as to copies manufactured within it, publishers have sought to persuade Congress to narrow the doctrine, *see 2014 First Sale Under Title 17 Hearing*, *supra* note 15, at 6 (testimony of Stephen Smith, John Wiley & Sons, Inc.), and have urged the U.S. Trade Representative to negotiate trade agreements repudiating the Supreme Court decision. *See* Margot Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014).

126. *See 2001 Section 104 Report Hearing*, *supra* note 15, at 183–86 (statement of Douglas Lowenstein, Interactive Digital Software Association).

127. *See id.* at 80–83 (statement of Marvin Berenson, Broadcast Music, Inc.).

128. In 2002, the producers of censored versions of popular DVDs filed suit against film studios seeking a declaratory judgment that their businesses were not infringing. The studios counterclaimed for copyright infringement. Businesses that produced software designed to censor objectionable content on DVDs intervened as counterclaimants and counter defendants, seeking a declaration that their software, which did not require the distribution of copies of the censored films, did not infringe the copyrights in the films. *See* CleanFlicks of Colorado, LLC, v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006). Representative Lamar Smith introduced a bill to allow families to make objectionable content on DVDs imperceptible, so long as no fixed copy was made of the altered film. H.R. 4586, 108th Cong. (2004). The Register of Copyrights testified that she believed the manufacture and use of such software was completely legal. *See The Family Movie Act: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H.*

Those background assumptions changed when the widespread adoption of peer-to-peer file sharing threatened to displace traditional distribution systems. Copyright owners asserted that individual consumers using networked digital technology posed a greater threat to copyright than commercial pirates.[129] Representatives of newfangled services insisted that individuals using their services were making lawful personal uses of protected content.[130] Yet, neither members of Congress nor copyright owners sought legislation that would address consumers' unlicensed copying directly, or clarify the circumstances under which personal copying would support infringement liability. Peer-to-peer systems inspired the recording industry association to bring "John Doe" suits against thousands of individual consumers.[131] Most of the 30,000 John Doe suits settled without a trial, but the handful that were tried resulted in jaw-dropping verdicts against individual users of peer-to-peer file sharing software.[132] At recent House Judiciary Committee hearings,

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*Comm. on the Judiciary*, 108th Cong. 7–8 (2004) [hereinafter *2004 Movie Act Hearing*] (testimony of MaryBeth Peters, Register of Copyrights). Jack Valenti testified for the Motion Picture Association of America that while the studios had no objection to families' fast forwarding through objectionable content in the privacy of their homes, enacting the bill would both undermine the copyright owners' fundamental right to make derivative works and would give cover to companies making profits from disfiguring the original vision of the movies' creators. *Id.* at 67–68. Valenti suggested that Congress should wait and see whether ongoing negotiations between film studios and software companies might yield a licensing solution. *Id.* at 68. At no time was there any suggestion that consumers might face lawsuits challenging their use of such software. Representative Smith insisted that the legislation was necessary to protect software companies from the financial burden of litigation. *Id.* at 2. Congress enacted the bill the following year as Title II of the Family Entertainment and Copyright Act, Pub. L. No. 109-9, 119 Stat. 223 (2005) (codified in relevant part at 17 U.S.C. § 110(11) (2012)). The House Committee Report characterized the law as a clarification of potential liability for companies that assisted parents in seeking to "control what their children watch in the privacy of their own home." H.R. REP. NO. 33, at 5 (2005). Thus, while the statutory privilege is cast in terms of consumers' private use, its impetus and justification was to protect commercial businesses from liability for enabling those uses. The privilege does not extend to making a fixed copy of the censored film for personal use. Title I of the Family Entertainment and Copyright Act criminalized the unlicensed recording of a motion picture in a movie theater, and set a penalty of three years imprisonment for a first offense and six years imprisonment for subsequent offenses.

129. *See 2002 Piracy Hearing*, *supra* note 112, at 19–23 (statement of Hilary Rosen, Recording Industry Association of America); *id.* at 102 (statement of National Music Publishers' Association).

130. *See 2000 Music on the Internet Hearing*, *supra* note 112, at 16 (2000) (statement of Hank Barry, Napster); *id.* at 22 (statement of Michael Robertson, MP3.com, Inc.); *id.* at 39 (statement of Gene Kan, Infrasearch, Inc.).

131. *See* Arista Records, LLC v. Doe, 604 F.3d 110 (2d Cir. 2010); Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1–2; Greg Sandoval, *RIAA's Cary Sherman Says Lawsuits Were the Only Option*, CNETNEWS.COM (Dec. 19, 2008, 4:38 PM), http://www.cnet.com/news/riaas-cary-sherman-says-lawsuits-were-the-only-option/.

132. *See* Sony BMG Music Entm't v. Tenenbaum, 719 F.3d 67, 72 (1st Cir. 2013) ($675,000); Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 901 (8th Cir. 2012) ($1,920,000 reduced on

critics of the verdicts urged Congress to revisit the statutory damages provisions to adjust the range of damages to make them more nearly proportional to the harm caused by infringement.[133] Copyright owners resisted any reduction; they insisted that statutory damages perform a crucial deterrent function that is only possible when very large awards are available.[134]

The John Doe suits, though, were a highly publicized sideshow; mainstream copyright owners have largely abandoned them today.[135] Copyright owners' more important goal was to hold providers of Internet services liable for consumers' allegedly infringing activities. In 2005, motion picture and music copyright owners succeeded in recovering against Grokster, the proprietor of popular peer-to-peer file sharing software, for inducing individual consumers to commit copyright infringement.[136] Copyright owners followed up that victory by filing inducement suits against other distributors of peer-to-peer file sharing

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appeal to $220,000); BMG Music v. Gonzalez, 430 F.3d 888, 889 (7th Cir. 2005) ($22,500 awarded on summary judgment).

133. *See Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 65–67 (2014) [hereinafter *Copyright Remedies Hearing*] (testimony of Sherwin Siy, Public Knowledge); *id.* at 51–53 (testimony of Matt Schruers, Computer and Communications Industry Ass'n); *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7, 20–21 (2014) (statement of David Nimmer, UCLA School of Law); *id.* at 116 (statement of Glynn S. Lunney, Jr., Tulane University Law School).

134. *See* U.S. PATENT & TRADEMARK OFFICE, DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, PUBLIC ROUNDTABLE PANEL DISCUSSION ON GREEN PAPER ON COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 97–98 (June 25, 2014) (statement of Jay Rosenthal, National Music Publishers Association), *available at* http://www.uspto.gov/ip/global/copyrights/GREEN_PAPER_ON_COPYRIGHT_POLICY_etc.PDF; *id.* at 90–91 (statement of David Herlihy, Herlihylaw.com and Northeastern University); U.S. DEP'T OF COMMERCE, ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE 17 (May 21, 2014) (remarks of Steven Marks, Recording Industry Association of America), *available at* http://www.uspto.gov/ip/global/copyrights/roundtable_transcript-nashville-14-06-10.pdf.

135. After five years, the Recording Industry Association of America announced it would end its program of suing thousands of individual consumers for copyright infringement. *See* McBride & Smith, *supra* note 131, at B7. The tactic had by then spread to the owners of copyrights in independent films, pornographic films, and the Las Vegas Review Journal. *See Copyright Trolls*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/copyright-trolls (last visited Jan. 5, 2015); Eriq Gardner, *"Hurt Locker" Producer Nicolas Chartier on His Anti-Piracy Crusade and Why Union Workers Need Less Pay*, HOLLYWOOD REP. (Jan. 15, 2015), http://www.hollywoodreporter.com/thr-esq/hurt-locker-producer-nicolas-chartier-763982.

136. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). Rebecca Tushnet mused on the implications of the *Grokster* opinion for the VCR, iPod, and distributors of BitTorrent software. *See* Rebecca Tushnet, REBECCA TUSHNET'S 43(B)LOG (June 27, 2005), http://tushnet.blogspot.com/2005/06/this-is-copy-of-what-i-posted-at.html.

software,[137] Internet service providers,[138] websites,[139] user-generated content sites,[140] credit card companies,[141] cloud storage businesses,[142] a satellite television company,[143] and venture capital firms,[144] with mixed results. Courts have struggled to determine whether to attribute allegedly actionable copying and other uses to consumers or to defendant intermediaries.[145] (This is another question the forty-year-old statute understandably failed to address.) If the consumer is responsible for the allegedly infringing acts, then the intermediaries' liability turns on whether the consumers' acts should be deemed fair use.

By replacing a regime of detailed defined rights with one in which copyright exclusive rights are defined broadly, subject to many detailed express exceptions, Congress in 1976 increased the pressure on fair use significantly. The only exceptions enacted as part of the 1976 Act were those requested by lobbyists for particular user interests and assented to by lobbyists for copyright owners.[146] In the nearly forty years since then,

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137. *See, e.g.*, Arista Records, LLC v. Lime Group LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2011).

138. *See generally* Steve Seidenberg, *US Perspectives: ISPs in US Face New Copyright Attack*, INTELL. PROP. WATCH (Dec. 22, 2014), http://www.ip-watch.org/2014/12/22/isps-in-us-face-new-copyright-attack/.

139. *See, e.g.*, Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013).

140. *See, e.g.*, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012); Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012).

141. *See, e.g.*, Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788 (9th Cir. 2007).

142. *See, e.g.*, Disney Enters. Inc. v. Hotfile Corp., 798 F. Supp. 2d 1303 (S.D. Fla. 2011); Perfect 10, Inc. v. Rapidshare A.G., No. 09-CV-2596, 2010 U.S. Dist. LEXIS 146053 (S.D. Cal. 2010); *see also* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (discussing inducement claims against business that purported to facilitate the resale of digital music downloads).

143. The complaint in *Fox Broad. Co. v. Dish Network, L.L.C.*, 747 F.3d 1060 (9th Cir. 2014), alleged that Dish Network induced infringing copying by consumers by supplying digital video recorders with commercial skipping capabilities. *See* Complaint at 17–18, Fox Broad. Co. v. Dish Network, L.L.C., 747 F.3d. 1060 (9th Cir. 2014) (No. CV12-04529). The district court and the Court of Appeals for the Ninth Circuit concluded for the purpose of a preliminary injunction motion that consumers' use of the digital video recorders was fair, and Dish was therefore unlikely to be liable for inducement. 747 F.3d at 1068–70; *see also* Dish Network, L.L.C. v. Am. Broad. Cos., No. 12-CV-4155, 2013 US Dist LEXIS 143492 (S.D.N.Y. 2013) (discussing contributory infringement counterclaims filed by ABC and CBS on the same facts).

144. *See, e.g.*, UMG Recordings, Inc. v. Veoh Networks, Inc., No. 07-CV-5744, 2009 U.S. Dist. LEXIS 70553, *aff'd*, 718 F.3d 1006 (9th Cir. 2013).

145. *See* Am. Broad. Cos. v. Aereo, Inc., __ U.S. __, 134 S. Ct. 2498, 2512–13 (2014) (Scalia, J. , dissenting); Cartoon Network LP v. CSC Holdings, Inc. 536 F.3d 121 (2d Cir. 2008); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Costar Group, Inc. v. Loopnet, Inc., 373 F.3d 544 (4th Cir. 2004); Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., 907 F. Supp. 1361 (N.D. Cal. 1995).

146. *See* Litman, *supra* note 27.

the only express exceptions added to the statute have been those proposed by lobbyists for particular user interests and assented to by lobbyists for copyright owners.[147] Sometimes, even when everyone agrees that the law no longer makes sense, copyright owner lobbyists resist the enactment of any new exceptions or privileges, allegedly because any new exception would vastly increase the risk of commercial piracy.[148] That requires courts, counsel, administrators, and individuals to rely on ill-defined implicit privileges or exceptions, or to believe in a generous and forgiving version of the fair use privilege.[149]

Congress has had many opportunities in the thirty years since *Sony* to revisit the issues of personal use and contributory infringement. In the decade when the *Sony* test held sway, Congress codified a consumer personal copying privilege in the Audio Home Recording Act. In the ensuing years, lobbyists for copyright owners have discouraged Congress from enacting even narrow privileges for personal copying.[150] In addressing the liability of Internet service providers for infringement by subscribers, Congress enacted safe harbors insulating service providers from liability for the infringement of third parties, but did not take the opportunity to address what measure of damages might be appropriate for service providers who exceeded those safe harbors. Copyright owner lobbyists have resisted any suggestions to fill that gap.[151] Thus, the core problems that led the *Sony* Court to rule the way it did remain unaddressed by intervening legislation.

It's hard to avoid the inference that copyright owners hope to discourage Congress from paying too much attention to the question of

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147. *See* Litman, *supra* note 66.

148. *See, e.g.*, *2001 Section 104 Report Hearing*, *supra* note 15; *see also supra* notes 120–27 and accompanying text.

149. It's also worth reflecting that some of the recent copyright fair use decisions that have attracted the most heated complaints would have been slam-dunk fair use cases under the standard articulated in *Sony*. One rights holder representative compared the district court decision in *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff'd*, 755 F.3d 87 (2d Cir. 2014), for example, to *Plessy v. Ferguson*, 63 U.S. 537 (1896), which notoriously upheld the constitutionality of state segregation laws under the doctrine of "separate but equal." *See* LIBRARY OF CONG., ORPHAN WORKS AND MASS DIGITIZATION ROUNDTABLES 118 (2014) (statement of Mickey Osterreicher, National Press Photographers' Association), *available at* http://www.copyright.gov/orphan/transcript/0311LOC.pdf. Yet, as an unambiguously noncommercial use, HathiTrust's activities would have been entitled to *Sony*'s presumption of fairness.

150. *See* sources cited *supra* notes 117, 125, and 126.

151. *See Copyright Remedies Hearing*, *supra* note 133, at 75–76 (testimony of Nancy E. Wolff, Cowan DeBaets Abrahams & Sheppard); *id.* at 116–24 (statement of Sandra Aistars, Copyright Alliance).

consumer liability for personal uses. All evidence suggests that members of Congress believe that at least some and perhaps most personal uses are non-infringing, and might enact an exemption into law if they were pressed. The absence of a statutory provision leaves personal uses to the fickle embrace of § 107. But representatives of public interest groups, consumer groups, libraries, and educational institutions have gradually come to agree that they prefer the current law to an explicit statutory privilege.[152] Fair use subjects them to significant uncertainty but probably gives them broader leeway to make appropriate uses than any amendment that copyright owner lobbyists would permit Congress to enact.

The story surrounding secondary liability of Internet-related trumpet makers is somewhat different. Copyright owners have actively sought, but so far failed to secure, the enactment of statutes enabling them to shut down services that allegedly facilitate infringement.[153] One important factor in the failure of the legislation has been copyright owner lobbyists' refusal to compromise on the terms of the law with the businesses they were seeking to put out of business.[154] Another was that the overreaching provisions that copyright owners sought were sufficiently extreme to inspire a rare, widespread public protest.[155] Without a statutory fix, copyright owners have sued Internet intermediaries directly, but are finding the statutory safe harbor and consumers' plausible fair use privilege to be significant obstacles.[156]

In the nearly forty years since Congress enacted the 1976 Copyright Act, the rights of copyright owners have expanded markedly. Copyright

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152. *See The Scope of Fair Use Hearing*, *supra* note 5, at 6–7 (testimony of Peter Jaszi, American University); *id.* at 22–24 (statement of Naomi Novik, Organization for Transformative Works); *id.* at 144–54 (statement of the Library Copyright Alliance).

153. *See* Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Protect IP Act of 2011, S. 968, 112th Cong. (2011); *see generally* AnneMarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective of ACTA, SOPA and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153 (2012).

154. *See, e.g.*, Zoe Lofgren, *Championing Technology and FreeSpeech in Congress Was Lonely . . . But Not Anymore*, *in* HACKING POLITICS: HOW GEEKS, PROGRESSIVES, THE TEA PARTY, GAMERS, ANARCHISTS, AND SUITS TEAMED UP TO DEFEAT SOPA AND SAVE THE INTERNET 181, 181–88 (David Moon, Patrick Ruffini & David Segal, eds. 2013) [hereinafter HACKING POLITICS]; Patrick Ruffini, *A Punch in the Gut*, *in* HACKING POLITICS, *supra*, at 107–12.

155. *See* Tiffany Cheng, *The Blackout*, *in* HACKING POLITICS, *supra* note 154, at 158, 158–60.

156. *See, e.g.*, UMG Recordings v. Veoh, 718 F.3d 1006 (9th Cir. 2013); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012); *see also* Fox Broad. Co. v. Dish Network L.L.C., No. 12-CV-4529, 2015 WL 1137593 (C.D. Cal. Jan. 20, 2015) (granting summary judgment to Dish Network on claim that it induces infringing consumer copying of Fox programming because consumers' copying is fair use).

owners' demands for further expansion continue unabated. Meanwhile, they raise strident objections to all proposals to add new privileges and exceptions to the statute to shelter non-infringing uses that might be implicated by their expanded rights. Copyright owners have used the resulting uncertainty over the scope of liability for new uses to litigate some new businesses into bankruptcy before their legality could be determined.[157] All of these developments push fair use to shelter new uses and users. When copyright owners complain that fair use has stretched beyond their expectations, they fail to acknowledge their own responsibility for its growth.

## CONCLUSION

When Congress enacted the 1976 Act, it apparently believed that consumers' personal copying would not subject them to liability for copyright infringement under the new statute, but nothing in the language of the statute made that understanding explicit. Congress did not consider and did not provide for claims that making devices that facilitate consumer infringement might subject device makers to infringement liability. The *Sony* case, filed shortly after the Act's enactment, raised both questions. Confronted with a choice between finding liability where Congress had not intended to impose it or construing the statute to reach a narrower set of uses than the literal language might warrant, the Supreme Court settled on a new formulation of the fair use privilege that allowed it to avoid finding Sony liable for consumers' personal copying. That fair use analysis wreaked a lot of mischief in the decade it controlled, chiefly by making it much more difficult for commercial uses to claim their uses were fair. It also, for good or ill, encouraged both consumers and businesses to structure their interactions around the assumption that consumers' personal copying would normally be fair use. In 1994, the Court decided *Campbell*, and replaced the analysis it had adopted in *Sony* with a test that focused primarily on the transformativeness of the allegedly fair use. It left the implications of that change for secondary liability and consumer personal uses uncharted.

Meanwhile, Congress had enacted the Audio Home Recording Act, articulating an exemption from liability for consumers' noncommercial copying of recorded music,[158] but had not otherwise addressed the

157. *See generally* Litman, *supra* note 103; Jessica Litman, *Antibiotic Resistance*, 30 CARDOZO ARTS & ENT. L. J. 53 (2012).

158. *See supra* notes 97–103 and accompanying text.

question of consumer liability for personal use. It had doubled the statutory damages available for infringement,[159] but had not tackled the appropriate monetary relief for trumpet makers held contributorily liable for the aggregate infringement of millions of consumers. After *Campbell*, copyright owner lobbyists discouraged Congress from adding any further express exceptions, privileges, or limitations to the statute, and from reducing or moderating the statutory damages range. When consumer advocates or the Copyright Office pointed out inconsistencies between the literal words of the statute and common, non-infringing consumer behavior, copyright owners insisted that the proponents of new limitations had failed to make a compelling showing that the status quo caused actual harm. If consumers were not being sued for their activity, the fact that their behavior might be prohibited by a literal reading of the language of the law, they insisted, harmed nobody. Congress has a longstanding disinclination to enact copyright laws over the opposition of major copyright lobbies,[160] and has not been motivated to disregard that opposition in order to clarify either the scope of consumer liability for personal copying or the contours of contributory infringement.

Copyright rights have expanded and will probably continue to expand. Advocates for copyright owners resist any proposal to incorporate specific privileges and exceptions into the statute to privilege uses that Congress deems non-infringing. They warn that any new privilege or exception poses a grave risk that future pirates will make use of the privileges to shield wrongful behavior. The uncertainty surrounding consumer liability, moreover, is itself a weapon that can be deployed against newfangled trumpet makers and the venture capital firms that might fund them. With no specific exceptions, though, courts have little recourse but to construe fair use as expansively as they have recently construed copyright rights. And that is very expansively indeed.

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159. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 2860. In 1999, the Digital Theft Deterrence and Copyright Damages Improvement Act increased statutory damages yet again. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774.

160. *See generally* Litman, *supra* note 27.