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Summer 2005

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55 Case Western Reserve Law Review 777 (2005).

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BREAKING THE VICIOUS CIRCULARITY: SONY'S CONTRIBUTION TO THE FAIR USE DOCTRINE

Frank Pasquale[†]

“While securing compensation to the holders of copyrights was an essential purpose of [the Copyright] Act, freezing existing economic arrangements for doing so was not.”¹

—U.S. Supreme Court, *Teleprompter v. CBS*

The fair use doctrine permits certain uses of copyrighted material that are unauthorized by the copyright holder. In 1984, the Supreme Court decided that unauthorized home taping of television programs was a “fair use” of such programs.² Decried by the dissent and frequently contested in ensuing cases, that decision sealed the majority’s case that the videotape recorder³ was capable of substantial non-infringing uses.⁴

[†] Associate Professor of Law, Seton Hall Law School. I would like to thank Jacqui Lip-ton and the organizers of the symposium for inviting me to participate. I also thank Jake Barnes, Charles Sullivan, Shavar Jeffries, Gaià Bernstein, and other Seton Hall colleagues for their incisive and constructive comments.

¹ *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 414 n.15 (1974).

² *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). Though the landmark *Sony v. Universal Pictures* case is remembered primarily for its limitation of liability for contributory infringement, that part of the holding rested in part on a perhaps more fundamental decision: that personal copying of televised programs was a “fair use” of the material. To demonstrate that the VTR was not simply an instrument of infringement, but also had substantial non-infringing uses, the Court held “unauthorized home time-shifting” (i.e., a viewer’s taping a program in order to watch it later than its original broadcast) was a “fair use” of the program under § 107 of the Copyright Act. *Id.*

³ Throughout this piece I shall refer to the contested technology interchangeably as either

In the twenty years since *Sony*, the dissent's skepticism about the fairness of time-shifting has gotten about as warm a reception in appellate courts as the majority's position. This is unfortunate because the *Sony* majority solved a problem internal to the fair use doctrine in a way that made economic, legal, and moral sense. Courts have been sharply divided on how to assess the effect of a contested use on the "market for or value of" the plaintiff's copyrighted work—a key factor in fair use analysis. The *Sony* majority broadly considered the effect of the contested use on the value of the copyrighted work *overall*, rather than narrowly considering its effect on the licensing market most directly affected by the contested use. However, many recent appellate decisions have cut this inquiry short by ignoring *Sony*'s method and applying the following standard articulated in Justice Blackmun's dissent:

[A]n infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work.⁵

This idea comes out of thin air, grounded neither in the relevant statutory language nor in any convincing economic or moral analysis of the technology involved. This narrow approach inevitably degenerates into circularity, as it assumes the legal status of the work it is supposed to help determine.⁶ As Nimmer explains,

a videotape recorder or videocassette recorder. It is interesting to note at the outset that the technology at stake could have been disabled in order to assure that it could only play videocassettes, and not record them. However, the Supreme Court appeared never to seriously consider this technology-tailoring option—a reluctance echoed in the recent decision of the D.C. Circuit to prevent the Federal Communications Commission to impose a "broadcast flag" on new technology in order to prevent unauthorized copying of content.

⁴ It is unclear whether the Supreme Court needed to reach this issue to determine *Sony*'s liability because many important owners of audiovisual content, including the major sports leagues, had declared that they did not object to home taping, and taping of that content may well have constituted a substantial non-infringing use. However, it did need to reach the issue in order to determine the liability of the individuals sued by the copyright holders.

⁵ *Sony*, 464 U.S. at 485 (Blackmun, J., dissenting).

⁶ A circular argument is invalid because it presumes the conclusion it seeks to vindicate. Since a "fair use" finding can be construed as a "taking" of intellectual property, it is useful to look to the literature on takings in order to fully understand the force of the circularity critique here. See, e.g., Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 7 (1996) (commenting on the Supreme Court's

[A] potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff's work, which use could in turn be defined in terms of the relevant potential market. In other words, it is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar.⁷

If the dissent were correct, this fair use factor would *always* militate against a fair use finding. Nevertheless, Blackmun's narrow approach has informed "effect on the market" analysis in several leading fair uses cases, and proven decisive to their resolutions.⁸

As a result, lawyers, legal scholars, and judges have struggled to define the scope and force of *Sony's* fair use holding for the past twenty years. At its narrowest, the decision merely carves out an exception for personal copying (bordering on the *de minimis*) in cases when excessively high transaction fees would make licensing impossible.⁹ As copyrighted content migrates online, and micropayment systems proliferate,¹⁰ such a narrow interpretation would soon render *Sony's* precedent obsolete.¹¹ Worried by the trend from fair use to

"hopelessly circular inquiry into reasonable investment-backed expectations" in the context of takings cases). *But see* Michael Abramowicz, *Constitutional Circularity*, 49 U.C.L.A. L. REV. 1 (2001) (describing various controversies in constitutional law in which circular reasoning is inevitable).

⁷ MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05(A)(4) (2004).

⁸ *See, e.g.,* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1386-87 (6th Cir. 1997) (en banc) (holding that defendant's photocopying of plaintiff's copyrighted work was not a fair use because it harmed the reasonable potential market value of the copyrighted works); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930-31 (2d Cir. 1995) (same).

⁹ The scholarly community has long taken Wendy Gordon's 1983 article, *Fair Use as Market Failure*, to be the locus classicus for this point of view. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (asserting that "the courts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market"). However, she clearly does not take the position that all uses that can be paid for should be paid for. *See* Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002) (responding to criticisms may by Glynn S. Lunney, Jr., in *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 987-91 (2002).

¹⁰ Micropayments are "small digital payments of between a quarter and a fraction of a penny." Clay Shirky, *Fame v. Fortune: Micropayments and Free Content*, first published September 5, 2003 on the "Networks, Economics, and Culture" mailing list, available at http://www.shirkey.com/writings/fame_vs_fortune.html. Internet services like BitPass, FirstVirtual, Cybercoin, Millicent, DigiCash, Internet Dollar, and Pay2See have served as micropayment systems.

¹¹ *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 224 (1st ed., Hill and Wang 1994) (as-

“fared use,”¹² several commentators have attempted to interpret *Sony* more broadly. For example, Glynn Lunney has claimed that *Sony* requires courts to permit copying as fair use if the plaintiff cannot demonstrate that the harm to its interests outweighs the general societal interest in the copying.¹³

While by no means contradicting Lunney’s approach, this article sets itself a more modest task. Although scholars have interpreted *Sony* expansively to “rationally revitalize” fair use doctrine generally, *Sony*’s potential to rationalize one specific aspect of the extant fair use test—the analysis of the effect of the use on the “market for or

serting that micropayment systems “should substantially reduce the specter of transaction costs. As these costs dissolve, so, too, should the perceived need for safety valves such as fair use.”) (quoted in JULIE COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 566 (2003)). Goldstein’s arguments have been amply discredited. See, e.g., Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1168-69 (2000) (noting that the “consolidation of authority over rights may reduce competition and lead to coercion”); James Boyle, *Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2019 (2000) (explaining the aspects of fair use despite improved pricing methods available); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1819 (2000) (noting the importance of “an economic model that focuses on creating the conditions for random or fortuitous access to copyrighted content”). Several commentators have noted chilling effects due to permission requirements. See, e.g., Negativland, *Two Relationships to a Cultural Public Domain*, 66 LAW & CONTEMP. PROBS. 239, 257 (2003) (“The dangers to collage from payment and permission requirements also include the aspect of affordability Purchasing a single sample can run anywhere from hundreds to many thousands of dollars, depending on what the owner arbitrarily thinks the potential sales traffic will bear”).

¹² Tom Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, Social Science Research Network, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=11456 (last visited May 20, 2005).

¹³ As Lunney observes:

Once we acknowledge the public good character of copyrighted works, then, from an economic perspective, fair use must necessarily balance, on the one hand, the potential public benefit of additional or better works from prohibiting the use at issue, and on the other, the potential public benefit from the use itself. In applying this balance, we should not tie ourselves to a set of restrictive factors developed in the nineteenth century to address a particular type of use against the background of the technology available at that time. Rather, we should consider directly what the public has to gain and what it has to lose for the use at issue given today’s technology and associated market structures. *Under this balancing approach, a use should be found unfair and hence infringing only where the copyright owner has proven by the preponderance of the evidence that society has more to gain than it has to lose by prohibiting the use at issue.*

Glynn S. Lunney, *supra* note 9, at 1030 (emphasis added). Though Lunney makes a compelling case for this broad interpretation as a matter of policy and even doctrine, it is unlikely that the Supreme Court will adopt it any time soon. Having applied the four-factor fair use test in leading fair use cases for at least the past 20 years, the Court is unlikely to abandon it now. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Stewart v. Abend*, 495 U.S. 207 (1990); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Sony*, 464 U.S. 417 (1984). However, this article does advance a method for addressing some of Lunney’s concerns in copyright jurisprudence on the fourth fair use factor.

value of the copyrighted work”¹⁴—remains largely unexplored and unrealized.¹⁵ In this area, *Sony*’s example—the elevation of a careful and detailed district court record finding no demonstrated negative effect on sales for the work—has been all too often ignored by appellate courts reluctant to examine the full range of economic effects flowing from a given use.

After introducing the fair use doctrine generally in Part 2, this piece focuses on the debate between the dissent and the majority in *Sony* over the fourth fair use factor in Part 3.¹⁶ Part 4 sketches an economic rationale for the *Sony* majority’s fourth factor analysis, focusing on network effects, externalities, and the impossibility of forcing compensation for all complementarity in a modern market economy.¹⁷

Sony’s lesson for analysis of the fourth factor is clear. Assessing the effect of a new technology on the value of a copyrighted work always involves the evaluation of several markets for the work—some of which may only be possible *due to* the technology at issue, and all of which are bound to be affected in different ways and to a different extent if the use becomes widespread. Courts should not cut the analysis short by simply focusing on one negatively affected market.

I. FAIR USE’S ACHILLES HEEL: CIRCULAR EFFECT ON THE MARKET ANALYSIS

In the 1976 Copyright Act, Congress codified the fair use doctrine as the first of fourteen statutory limits on the powers of copyright holders. The fair use doctrine guarantees the right to use copyrighted material without the permission of its owner. The meaning of the fair use doctrine is deeply unsettled. The statutory test codifying the doctrine requires courts to address four factors:

¹⁴ 17 U.S.C. § 107(4) (2004).

¹⁵ The best recent scholarship on fourth factor analysis includes Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665 (2004); Africa, *supra* note 11; and Lydia Loren, *infra* note 80. Africa, Loren, and Duhl advocate the expansion of fair use doctrine in order to reflect the social benefits of unauthorized access. This piece builds on their work by offering an argument for a particular method of fourth factor analysis that promises to expand fair use, respect the genuine commercial interests of copyright holders, and rescue the relevant portion of the Copyright Act from repeated misinterpretation by appellate courts.

¹⁶ The Appendix offers a schematic representation of this debate.

¹⁷ This piece does not focus on the question of whether, as a matter of construing doctrine *extant in 1984*, the *Sony* majority or dissent was “right” about its treatment of the fourth factor. So much has happened in fair use case law since then that such an inquiry would be of mere academic interest today.

Notwithstanding the provisions of sections 106 and 106A [enumerating copyright holders' rights], the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁸

However, neither the statute nor its legislative history give much guidance on how to apply the factors, or on their proper weight.¹⁹ As technologies of copying have exponentially increased in availability and effectiveness,²⁰ so too have the number and diversity of fair use defenses to copyright infringement actions.²¹ The resulting doctrinal disarray has provoked both scholars and judges to propose reforms.²²

¹⁸ 17 U.S.C. § 107.

¹⁹ David Nimmer, *'Fairest of Them All' and Other Fair Use Fairy Tales*, 66 LAW & CONTEMP. PROBS. 263 (2003) (observing that "Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.").

²⁰ Richard P. Adelstein & Steven I. Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L REV. L. & ECON. 209, 223 (1985) (noting that it took approximately one man-year to copy a book on paper in 1000 A.D., but took less than an hour to photocopy the same in the late twentieth century); see also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 268 (2002) (outlining in great detail the declining cost of copying).

²¹ Julie Cohen and her coauthors classify three broad types of fair use cases: cultural interchange, consumptive/productive use, and technical use. See Cohen, *supra* note 11, at 496.

²² Many commentators have convincingly argued that the proper policy here is to split the right to compensation from the right to control. If courts were able to permit innovators to appropriate certain IP, while assuring some fair return to its owner, both opportunities for present innovation and incentives for past innovation could be preserved. So far only Congressional action has led to such compulsory licensing schemes, but courts could in principle impose such remedies.

Recognizing the emptiness of the second and third factors,²³ and the manipulability of the first,²⁴ the Supreme Court and several appellate courts have focused on the fourth factor in fair use cases.²⁵ The factor's prescribed "effect on the market analysis" has assumed great importance: it was called "undoubtedly the single most important element of fair use" in the landmark decision, *Harper & Row Publishers, Inc. v. Nation Enterprises*,²⁶ and has been critical to the holding in several cases. As the Nimmer treatise states, "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."²⁷

Like the fair use doctrine generally, "effect on the market" analysis is in flux. There are a few fixed guideposts: clearly commercial uses are suspect, and "transformative" or "productive" uses are treated more favorably than mere copying.²⁸ Courts must keep in mind not

²³ *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 522 (7th Cir. 2002).

Factors (1) and (2) are empty, except that (1) suggests a preference for noncommercial educational uses, picking up the reference earlier in the statute to "teaching . . . scholarship or research." Factor (3) is inapplicable to Beanie Babies, each one of which is copyrighted separately, so that there can be no partial copying as a matter of fact (no one, we imagine, wants a photograph of part of a Beanie Baby).

Id. Ironically, to the degree that the home tapers copied the entire work and watched *all* of it (including the ads, in the manner the plaintiffs hoped they would), that may well have counted against them in the third factor inquiry (the amount and substantiality of the use).

²⁴ The key determinations in the first factor are commerciality (which goes to the purpose of the use) and transformativeness (which goes to the character of the use). Definitions of commerciality are notoriously divergent. Compare *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (characterizing private copying as commercial) with *Sony*, 464 U.S. 417 (characterizing such copying as noncommercial). The vanishingly thin line between parody and satire is a classic example of the degree of judicial discretion permitted in the "transformativeness" determination. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

²⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); see NIMMER, *supra* note 7, at § 13.05[A][4] ("If one looks to the fair use cases, if not always to their stated rationale, this emerges as the most important, and indeed, central fair use factor."); *but see* the Second Circuit's rejection of this idea:

Prior to *Campbell*, the Supreme Court had characterized the fourth factor as "the single most important element of fair use," *Harper & Row*, 471 U.S. at 566; *accord* 3 *Nimmer on Copyright* § 13.05[A][4], at 13-183. However, *Campbell's* discussion of the fourth factor conspicuously omits this phrasing. Apparently abandoning the idea that any factor enjoys primacy, *Campbell* instructs that "[a]ll [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright."

Amer. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 926 (2d Cir. 1994) (quoting *Campbell*, 510 U.S. at 576 (1994)). The Nimmer treatise continues to advance the effective primacy of the fourth factor, via its proposed "functional test" for fair use. NIMMER, *supra* note 7, at § 13.05[A][4].

²⁶ 471 U.S. 539 (1985).

²⁷ NIMMER, *supra* note 7, at § 1.10[D]; see also NIMMER, *supra* note 7, at § 13.05[A] (collecting cases).

²⁸ "If the intended use is for commercial gain, [the] likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated." *Sony*, 464 U.S. at 451. However, "[n]o 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for

only the case at hand, but also its potential ramifications: a use is not fair if "it would adversely affect the potential market for the copyrighted work" should it "become widespread."²⁹ The assessment is rife with hypotheticals: the court has to assess effect on the *potential* market for the work and for *derivative works*, if the examined use *were to become widespread*.³⁰

These three elements of the determination require courts to predict the future development of the use at issue. Assessing the effect of an allegedly infringing use or derivative work on the "marketability" of copyrighted material is a difficult task. Similar factual situations have been treated differently by the courts. Internet catalogs of photos are a fair use,³¹ yet catalogs of very brief clips of films are not.³² A dull and complicated collector's guide is a fair use, while a more colorful and simple one is not.³³ The resulting uncertainty has dampened both innovation and the equitable distribution of extant technology. Fair use could be an important tool in combating this trend, if innovators had a better idea of its meaning and extent. Recovering the *Sony* majority's effort to strengthen and clarify fair use would be an important step toward promoting equitable legal approaches to innovation.

II. SONY'S FOURTH FACTOR ANALYSIS

After a long silence on the issue, the Supreme Court attempted to clarify the meaning of the fair use doctrine in *Sony* by determining whether home videotaping of freely broadcast television programs was a fair use of the programs. Addressing the first factor, the majority found that while the character of the use (mere copying) was non-transformative (a strike against fair use), the purpose of the use was noncommercial, and therefore the first factor militated in favor of the copiers. The majority essentially ignored the second and third factors, asserting without argument that they did not weigh against time-shifting even though normally one might expect that each would.³⁴

commercial purposes." *Campbell*, 510 U.S. at 591 (giving the benefit of the doubt to "productive" or "transformative" uses).

²⁹ *Sony*, 464 U.S. at 451 (the more transformative the use, the less the "effect on the market" analysis matters); see *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 n.14 (9th Cir. 2003), (quoting *Campbell*, 510 U.S. at 579).

³⁰ *Iowa State Univ. Research Found., Inc. v. American Broad. Cos.*, 621 F.2d 57 (2d Cir. 1980); see also *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977) (discussing harm to market for derivative works).

³¹ *Kelly*, 336 F.3d at 811.

³² *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1052 (2004).

³³ *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002).

³⁴ "[W]hen one considers the nature of a televised copyrighted audiovisual work, see 17

The majority reserved its most comprehensive analysis for its discussion of the fourth fair use factor, “the effect of the use upon the potential market for or value of the copyrighted work.”³⁵

Given that the use at issue was noncommercial, the burden was on the plaintiffs to demonstrate that home videotaping impaired the marketability of their work.³⁶ Opting decisively for a complex analysis of the multiple markets for copyrighted films, programs, and serials at issue, the district court examined in some detail the videotape recorder (“VTR”)’s effect on each of the markets. Since the *Sony* majority relied heavily on the district court’s analysis in its own fair use discussion, it is helpful to review the district court’s approach in some detail before discussing the conflict between the *Sony* majority and dissent.

A. *The District Court’s Analysis of the Effect of the VTR*

Universal Studios and Disney launched the case against the VTR’s manufacturers, advertisers, and a sample of users accused of taping programs. The district court offered a detailed account of the plaintiffs’ complaint,³⁷ and sketched the business model of the industry plaintiffs. This effort to understand the full scope of sales and contracts for the copyrighted audiovisual works at issue was essential to its effort to assess the full range of effects of the VTR.

Explaining Universal’s business model, the district court noted that the studio licensed films in at least five different markets:

- Theater and television (first run)
- Network telecasts (two or three runs)
- Local telecasts (three to eight runs)
- Theater redistribution

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.” *Sony*, 464 U.S. at 449-50.

³⁵ 17 U.S.C. § 107(4).

³⁶ *Sony*, 464 U.S. at 484.

³⁷ *Id.* The plaintiffs offered a detailed complaint, charging one defendant’s son had made tapes of “Pluto’s Quinuplets” and another defendant had copied “This is Your Life Donald Duck”.

- Rentals to consumers, schools and institutions in the “non-theatrical 16 mm and 8 mm exhibition markets.”³⁸

Successive distribution to each of these outlets reflected the studios’ exploitation of price discrimination according to willingness to pay.³⁹ Like the more-expensive hardcover that precedes paperback works, more-expensive access to movies (via tickets) comes before network telecasts (which only “cost” the consumer a viewing of commercials). The district court also noted that Universal had begun “marketing theatrical motion pictures on prerecorded videodiscs.”⁴⁰

This survey of the main methods of commercial exploitation of the works at issue results in two important current markets for the work (theater showings and television broadcasts) and one potential market (sale of videodiscs). The district court patiently examined the effect of VTRs on all these markets, based on the record then available. After that analysis, it examined the effect of VTRs on the market for prerecorded videodiscs.⁴¹

1. Overall Demand for Live Television and Theater Exhibitions

The district court reviewed the plaintiff’s evidence on the effect of the VTR on movie theater releases in a focused but skeptical manner. The court noted that this evidence indicated that “83.2% reported their frequency of movie going was unaffected by Betamax.”⁴² The remaining respondents were discounted by the district court. As it explained,

[p]laintiffs predict that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative. Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish

³⁸ *Id.* at 433.

³⁹ For a general discussion of this practice see RICHARD CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* (2000).

⁴⁰ *Universal City Studios v. Sony Corp. of Amer.*, 480 F. Supp. 429, 432 (Cal. Dist. Ct. App. 1979).

⁴¹ The dissent’s proposed standard would permit the plaintiffs to prevail on the fourth factor, “effect on the market” analysis simply by demonstrating that VCR-copied tapes would substitute for commercially sold tapes for some identifiable segment of consumers. Even more tautologically, the narrow approach endorsed by the dissent would deny a positive “fourth factor” finding to any “group” to which the copyright holder wanted to deny access and end the case simply by looking at the effect of the VTR on the videodisc market.

⁴² *Sony*, 480 F. Supp. at 439.

to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance.⁴³

Strictly speaking, the survey showed *some* negative effect—not every respondent claimed their viewing habits were unaffected. However, the effect was deemed trivial by the district court.

The district court's skepticism was warranted by microeconomic theory, which predicts not only competitive, but also symbiotic results arising from the introduction of new viewing options into the market for entertainment. In classic microeconomic terms, we might classify the potential effects of VTR usage on live TV and theater viewing as either substitutional or complementary.⁴⁴ To the extent the plaintiffs' predictions of reduced viewership held true, the VTR would be a substitute for live viewership. However, to the extent that VTRs encouraged viewers to become more dedicated to certain programs or stars, or whetted their appetite for audiovisual works generally, they would complement live viewership. Demand for VTR-recorded material would then "spill-over" into demand for more live material, instead of "compensating" for its lack.⁴⁵

Elevating the importance of the fourth fair use factor (and the Nimmer treatise's "functional test"⁴⁶), Judge Posner held in *Ty, Inc. v. PIL* that

copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work.⁴⁷

⁴³ See EATON, ET AL., MICROECONOMICS 97 (2002) ("[m]ovies and popcorn . . . are . . . examples of complements Coke and Pepsi . . . might be thought of as substitutes."). Formally speaking, the demand for a good rises when the price of its complement falls or when the price of its substitute rises. *Id.*

⁴⁴ See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002), for a full explanation of the distinction between substitutional and complimentary.

⁴⁵ Jon Elster's delineation of "compensation" and "spill-over" effects is less economic than the average substitute/complement analysis, and is particularly helpful in analyzing "creative industries." See JOHN ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES (1989).

⁴⁶ NIMMER, *supra* note 7, at § 13.05.

⁴⁷ *Ty, Inc.*, 292 F.3d at 517, citing NIMMER, *supra* note 7, at § 13.05[B][1]; see *Davis v. The Gap, Inc.*, 246 F.3d 152, 175-76 (2d Cir. 2001); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001) (concurring opinion); *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983); Gordon, *supra* note 9, at 1643 n.237 (1982).

As the VTR shows, many uses can have *both* complementary and substitutive effects—for example, recordings may substitute for live viewing, or may whet viewers' appetites for more of it. In cases like this, courts tend *either* to focus their attention on the one substitutive effect (the narrow approach), or to weigh the relative strength of the complementary and substitutive uses. Aided by the district court's comprehensive analysis, the *Sony* majority was able to complete the latter, fairer analysis. Its method suggests that, where substitutional and complementary effects of a use are plausible, and roughly the same in magnitude, the fourth fair use factor should not weigh in favor of the plaintiff.

2. Advertising

The bulk of the district court's "effect on the market" analysis focused on the VTR's impact on the value of advertising sold by the stations which bought the programs from Disney and Universal. Both sides in the litigation appeared to agree that the primary monetary value of the content was to generate viewership of advertising.⁴⁸ The plaintiffs worried that the VTR would upset this classic business model, and had some evidence to back up their worries, including expert testimony and an extensive survey of VTR use. However, the district court ultimately concluded that all of the potential future harms depended on far too many assumptions to be recognized as clearly reducing the value of the works in question.

a. Measurement of Advertising Audiences

The plaintiffs first worried that Arbitron and Nielsen would not count the viewership of recorded programming, so that they would not be compensated for the viewers delivered to advertisers during that viewing time. The district court observed that the problem of measurement was crucial to the question of compensation,⁴⁹ but ultimately dismissed the plaintiffs' measurement concerns as speculative. Since "[b]oth Nielsen and Arbitron have conducted pilot surveys with videotape recorder owners in order to develop a framework for additional survey work," the district court was confident they would eventually resolve the measurement issue.⁵⁰

⁴⁸ *Sony*, 480 F. Supp. at 440-41.

⁴⁹ See *Universal City Studios*, 480 F. Supp. at 440-41 ("[T]he fees which advertisers pay networks and stations to show their commercials (sometimes measured in "cost per thousand," e.g., \$5/1000 households) are influenced substantially by the size and demographics of the audience which the programs (and hence the commercials) are expected to reach."). *Id.*

⁵⁰ *Id.* at 441.

With this determination, the burden of improving measurement methods was essentially internalized to the content providers as opposed to the VTR hardware makers. The court could perhaps have required the VTR makers to track viewership, but made no effort to do so, recognizing that the VTR could have as many positive as negative effects on the relevant copyright holders.

b. Loss of Advertising Audience

The plaintiffs' more serious challenge to the VTR was their claim that users would simply skip advertising by fast-forwarding through it. If that happened, and Nielsen and Arbitron were able to measure it, the viewing audience might be significantly reduced. The plaintiffs put forward survey evidence to demonstrate that fast-forwarding was, if not a practice of a majority of viewers, at the very least widespread. The district court, however, saw the glass as half full rather than half empty, observing that "58.3% of the owners eliminate commercials from the recording either 'sometimes,' 'rarely,' or 'never'; 56.1% use the fast-forward to pass commercials either 'sometimes,' 'rarely,' or 'never.'"⁵¹ There was not much evidence offered on the relative prevalence of hometaping,⁵² and it's unclear exactly how valuable it would have been, since the fourth factor requires consideration of the effect on the potential value of the work "if the use were to become widespread." Perhaps the court's doubt about the impact of such "message evasion" arose from the common experience of ignoring commercials or exiting the room or changing the channel when they are aired during normal broadcasts. In any event, *even if the plaintiffs could demonstrate a more significant impact on their advertising revenue*, the court was skeptical about how conclusive that should be to the overall fourth factor analysis:

⁵¹ *Sony*, 480 F. Supp. at 439:

To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them.

Id. at 468. In his 1982 Congressional testimony, Motion Picture Association of America President Jack Valenti claimed that "86.8 percent of all these owners erase or skip commercials." *Home Recordings of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, H.R., and H.R. 5705 Before the House Comm. on the Judiciary*, 97th Cong (1982), available at <http://cryptome.org/hrcw-hear.htm> (statement of Jack Valenti, President, Motion Picture Association of America).

⁵² The district court, citing the \$875 cost of the machine however appeared to be skeptical of its prevalence at least one point in the opinion. *Sony*, 480 F. Supp. at 451.

[Plaintiffs' concerns] surface from a system of marketing which developed because producers and broadcasters could control the time at which the public views materials beamed to them over public airwaves. The Betamax reduces that control, and plaintiffs predict that harm will result. Because this prediction of harm is based on so many assumptions and on a system of marketing which is rapidly changing, this court is hesitant to identify "probable effects" of home-use copying.⁵³

The district court's skepticism applied not merely to the plaintiffs' claims about advertising, but also to their case as a whole. It observed a long list of assumptions that were both central to the plaintiffs' case and "to some extent inconsistent and illogical."⁵⁴

For example, the plaintiffs claimed that the more viewers watched the original showing of a program via VTR, the smaller the ensuing rerun audiences and royalties for syndication. However, as the district court observed, these royalties were themselves based on the size of the original audience. So the more people who watched the program (either via VTR or directly broadcast), the higher these licensing fees would be.⁵⁵

⁵³ *Id.* at 451-52.

⁵⁴ *Id.* at 451. To wit:

1. Plaintiffs first assume that a large proportion of the 75 million television households in this country will in the near future own the Betamax machine which today costs approximately \$ 875.
2. [T]hen they assume that a significantly large number of these Betamax owners will have both the financial ability and the desire to buy many Betamax tapes (today costing approximately \$20 each) to record movies and episodes from TV series.
3. [A]nd that they will keep these tapes for repeat viewing over many years.
4. They further assume that a viewer will watch these Betamax playbacks at a time when he would otherwise be watching live television.
5. Plaintiffs also assume that even if the tapes were not kept over a long period of time, Betamax owners will still injure the value of their copyrights by deleting commercials from movies and television series.
6. Furthermore, plaintiffs assume that because the Betamax allows more persons to view the original telecast, fewer persons will be in the rerun audience...[s]ome of these assumptions are based on neither fact nor experience, and plaintiffs admit that they are to some extent inconsistent and illogical.

Id.

⁵⁵ *Id.* The district court further observed that Plaintiffs fear that time-shifting will reduce audiences for telecast reruns. The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters for rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original

Yet the internal inconsistency of some of the plaintiffs' more aggressive claims was not fatal to their case. Far more damaging was an insistence that the courts move in to prohibit purely private uses of copyrighted work *merely in order to preserve existing methods of doing business*. The district court refused to permit a fair use finding to hinge on the particular methods of doing business that happened to be prevalent at the time:

[P]laintiffs claim that this copying indirectly reduces the revenue by affecting ratings and advertising. If this is true, plaintiffs have marketing alternatives at hand to recoup some of that predicted loss. They stand ready to make their product available in cassettes and compete with the VTR industry. They have proven resilient to change in market practices arising from other technological inventions, E. g., cable television, pay television.⁵⁶

The district court did not burden the defendants with demonstrating the existence of such "marketing" options, nor did it try to specify them itself. Rather, it distinguished between a claim for protecting copyrights and a claim for insulating prevailing business practices from market and technological pressures.

The district court's words here may only look prescient with the benefit of hindsight; no one predicted in the pleadings the rapid rise of the video rental market, which has generated tens of billions of dollars for the studios since the mid 1980s.⁵⁷ The *dei ex machinae* Blockbuster and Netflix cannot by themselves justify the district court's arguments here. However, no matter what one thinks of the ultimate *result* of the district court's inquiry, respect for its *method* is warranted. Judge Ferguson carefully considered the evidence offered by the plaintiffs, and critically examined it in light of prevailing industry practices, contradictory evidence, and a baseline expectation of the reasonable rate of return necessary to foster creative work in a given industry. Despite the difficulty of the task, the district court took very seriously the statutory mandate to consider all potential effects of the use on the value of the relevant copyrighted works.

audiences may increase and, given current market practices, this should aid plaintiffs rather than harm them.

Id. at 466.

⁵⁶ *Sony*, 480 F. Supp at 452.

⁵⁷ William Fisher, *Don't Beat Them, Join Them*, N.Y. TIMES June 25, 2004, at A23.

B. The Appellate Opinion

Nevertheless, the Ninth Circuit had little tolerance for the district court's searching inquiry. To the appellate panel, the fourth factor finding was obvious: "Since the copies made by home videorecording are used for the same purpose as the original, a finding of fair use is not justified."⁵⁸ The panel's eminently contestable characterization of the home taping as commercial—a first factor finding—was dispositive as to the fourth factor inquiry as well. Having little patience for the district court's appreciation of the evolution of the broadcasting industry and emerging marketing alternatives, the panel focused on a narrow market (the sale of tapes) and one particular effect of taping (the potential for tape libraries to crowd out later authorized sales of tapes).⁵⁹ Since "home users assign economic value to their ability to have control over access to copyrighted works," the panel concluded that "[t]he copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market."⁶⁰

The appellate opinion's cursory consideration of the fourth factor foreshadows the *Sony* dissent's descent into full-fledged circularity. Assuming that consumer practices revealed a commodifiable preference for "control" over broadcast works, the appellate panel went on to presume that the copyright holder must not only have the right to exploit that market, but to hold liable any party *aiding* the evasion of that right. There is no sense of the principle implicit in the method of the district court opinion—that the fourth factor analysis requires an assessment of *all* the effects of a contested use on the *value* of the copyrighted works at issue, including all markets for those works. It is difficult to see how, under the Ninth Circuit's methodology, *any* use could be fair. As Part IV on the legacy of the *Sony* dissent demonstrates, just such reasoning has emerged to threaten classic educational fair uses⁶¹ and creative or innovative uses that even theoretically usurp the empire of licensing the appellate panel would mechanically protect.⁶²

⁵⁸ *Universal Cities Studios v. Sony*, 659 F.2d 963, 974 (9th Cir. 1981) (noting the troubling trend, echoed in Blackmun's language, toward assuming that a negative fourth factor finding should lead to no fair use at all).

⁵⁹ *Id.* ("The district court seems to recognize, on several occasions, that appellants will have to take affirmative steps to compete with the appropriated versions of their work.").

⁶⁰ *Id.*

⁶¹ See *Princeton Univ. Press v. Mich. Document. Servs.*, 99 F.3d 1381 (6th Cir. 1996) (holding that a commercial copyshop who reproduced works for "coursepacks" violated the fair use doctrine).

⁶² *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003) (holding that an artist producing and selling photographs containing Mattel's "Barbie" doll nude and in danger of being attacked constituted fair use); *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132

C. *The Sony Majority: Negative Effect on One of Many Markets Not Relevant*

The Ninth Circuit's narrow view of fourth factor analysis has continued to gain currency in the courts of appeals in part because the *Sony* majority's dismissal of the plaintiffs' version of that argument was deflected into a footnote to the court's discussion of the *first* factor—the purpose and character of the use. The plaintiffs had claimed that “‘consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the homemade tape because the consumer will not buy tapes separately sold by the copyright holder.’”⁶³ Since the argument works just as well to demonstrate a necessarily negative effect on at least one potential market for the copyrighted works—namely, “tapes separately sold by the copyright holder”—it would be enough to guarantee a negative fourth factor finding, according to the Ninth Circuit.

Such a ruling would automatically discount the potential positive effects of the VTR. As the district court noted, the copyright holders lost sales to “time-shifters-turned-archivists” who would have purchased an authorized tape but for the VTR might be more than offset by other marketing alternatives created by the VTR.⁶⁴ The *Sony* majority pushed this argument a step further:

The time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter. Indeed, no live viewer would buy a prerecorded videotape if he did not have access to a VTR.⁶⁵

(2d Cir. 1998). (holding that the *Seinfeld Aptitude Test*, a trivia quiz book that tests its readers' recollection of scenes from *Seinfeld* unlawfully copies from the show and this copying does not constitute fair use).

⁶³ *Home Recording of Copyrighted Works: Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 97th Cong., 1250 (1982) (memorandum of Prof. Laurence H. Tribe). Virtually the same argument was accepted by the *Napster* court, which characterized private copying in that case as commercial because it substituted for purchase of the materials. *Napster*, 239 F.3d at 1014-15. Since a copyright holder will always license material at *some* price, such a broad interpretation of commerciality would of course render nearly every putative fair use commercial.

⁶⁴ *Sony*, 480 F. Supp. at 452 (“[P]laintiffs have marketing alternatives at hand to recoup some of that predicted loss”).

⁶⁵ *Sony*, 464 U.S. at 793. The majority offers no empirical evidence of the proposition that “the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter.” *Id.* There is not even a reference to the district court's findings. The majority should have left this point alone, or at least prefaced it with the more proper observation that the respondents failed to demonstrate via a preponderance of the evidence that time shifting does not dampen

The first point needed a bit more exposition—namely, that the copyright holders weren't branding those who ignored commercials as "free loaders" deserving a lawsuit, and that a certain percentage of missed commercials seemed to be built into their business model. Certainly it was bound to lose some force as technologies of fast-forwarding advanced. Yet there is an unmistakable moral appeal to the second argument—that the copyright holders would not even be able to exploit the market for tapes *in any way* if it weren't for the invention (and prevalence) of the VTR.

Whatever the validity of the court's predictions about the viewing habits of time-shifters, its equitable point still resonates to this day. The majority did not allow the usual binary, property-rule logic of copyright to dictate copyright holders' effective control over every new technology of dissemination.⁶⁶ As the glacial progression of HDTV has shown once again, disruptive⁶⁷ new technologies of dissemination often face a chicken-and-egg problem: no one wants to buy the hardware until they can be assured that the content will be there; but no one wants to develop the content until they know the hardware will be available. Here, the Court effectively rewarded Sony for developing and marketing a new technology without getting absolute assurance that it would be sued out of existence. A similar dynamic promoted the rise of the radio and cable television industries, which are great sources of advertising and revenue for content providers.

Complementing the moral appeal of this point, the majority offered sound economic reasoning for declaring time-shifting a fair use. Like the district court, it "rejected respondents' prediction 'that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative,'" observing that "[t]here is no factual basis for [the underlying] assumption."⁶⁸ The majority also agreed with the district court's conclusion that, the Studios had "marketing

demand for prerecorded videotapes.

⁶⁶ See Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001) (arguing that when copyright holders attempt to eliminate a new kind of dissemination, courts will not find infringement when the courts do not deem the dissemination to be harmful).

⁶⁷ PEER TO PEER: HARNESSING THE POWER OF DISRUPTIVE TECHNOLOGIES (Andy Oram, ed., 2001); see also CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997) (discussing disruptive technologies in several industries).

⁶⁸ *Sony*, 464 U.S. at 452-53. The majority stated that the district court "rejected respondents' fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease by observing that current measurement technology allows the Betamax audience to be reflected." *Id.* at 452.

alternatives at hand to recoup some of that predicted loss,"⁶⁹ since "[plaintiffs] stand ready to make their product available in cassettes and compete with the VTR industry."⁷⁰ In other words, the onus was on the copyright holders to adjust to the new technology, and not vice versa.

Assuming the development of future "marketing alternatives" may appear to be a facile response to copyright holders' concerns about losing control of their work. However, the *Sony* court could rely on evidence that the VTR had already enhanced the value of the copyrights at issue in many ways, and would continue to do so. The fast-forwarding audience lost to advertisers may well have been offset by those who, once consigned by work or "counterprogramming,"⁷¹ to miss shows, now would be able to view them later.⁷² Quoting the district court's summary of its fair use finding, the majority explained:

The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts.⁷³

Here the majority explicitly acknowledged the very real possibility of lost viewers and advertising dollars for the plaintiffs.⁷⁴ However, it also factored in the potential benefits of widespread VTR distribution, and presciently concluded that these new opportunities would swamp its negative effects. The *Sony* majority recognized that "effect on the market" analysis should not end with a determination that a contested use would potentially have negative effects on a potential market for copyrighted work. Potential positive effects are relevant as well.

⁶⁹ *Sony*, 480 F. Supp. at 452.

⁷⁰ *Id.*

⁷¹ *Id.* (discussing this industry practice of placing two or three highly rated shows in the same, desirable time slot to compete against one another).

⁷² For a nice list of potential economic effects of the VCR, with particular attention to the economics of advertising, see S. J. Liebowitz, *The Economics of Betamax: Unauthorized Copying of Advertising Based Television Broadcasts* (1985), at <http://www.utdallas.edu/~liebowit/intprop/betamax.pdf> (listing potential economic effects of the VCR with particular attention to the economics of advertising).

⁷³ *Sony*, 464 U.S. at 454 (quoting from district court).

⁷⁴ *See id.* Compare *id.* with *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (refusing to acknowledge positive effects once the court determined that Napster would harm the plaintiffs' entry into digital distribution markets).

D. *The Narrow Approach of the Dissent*

Against this comprehensive examination of the effects of the VTR, Justice Blackmun's dissent insisted that a putative infringer can only prove fair use by "demonstrating that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work."⁷⁵ As an extremely strong version of the "market failure" approach to fair use,⁷⁶ such an approach would eviscerate the fair use doctrine and restructure fair use doctrine in an absurd way.⁷⁷ First, the dissent appeared to forget that "effect on the market" is only one face of the fair use inquiry. To insist that the plaintiff need prevail on this factor, in order to demonstrate fair use overall, is not a position that even the most aggressive copyright expansionist would take today.

Second, the dissent deployed a disarmingly simple interpretive strategy in order to advance its extremely restrictive idea of fourth factor analysis. A lengthy quote is necessary in order to illuminate the dissent's misinterpretation:

The District Court's analysis of harm, moreover, failed to consider the effect of VTR recording on "the *potential* market for or the value of the copyrighted work," as required by § 107(4). The requirement that a putatively infringing use of a copyrighted work, to be "fair," must not impair a "potential" market for the work has [an important implication]. [A]n infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work.⁷⁸

⁷⁵ *Sony*, 464 U.S. at 485 (Blackmun, J., dissenting) (emphasis added).

⁷⁶ See *Africa*, *supra* note 11 (arguing that the market failure theory does not adequately account for valuable uses of copyrighted work).

⁷⁷ See Michael Smith, *Is That All There Is?* (Draft for Journal of Ethics Special Issue on Joel Feinberg), available at <http://www.princeton.edu/~msmith/mypapers/Is%20that%20all%20there%20is.pdf> (Mar. 18, 2005) (writing that in absurd activities "there is no relationship between [the activity] and anything that has value . . . Absurd attitudes are epitomised by beliefs that are arrived at on the basis of clearly fallacious reasoning.").

⁷⁸ *Sony*, 465 U.S. at 484-85.

The dissent facilely equates the statutory requirement to consider the effect of the use on “the potential market for or the value of the copyrighted work” with an examination of the effect of the use on one potential use of the work—namely, that which would have to be licensed if the use at issue were not to be declared fair. If section 107(4) did not effectively define “market” broadly by equating it with the “value of” the copyrighted work,⁷⁹ this decision to define “market” as a small subdivision of potential licensees would perhaps be defensible purely as a matter of cabining the meaning of an ambiguous term.

However, such a crabbed interpretation would be illogical in the larger context of fair use analysis. As Lydia Pallas Loren has noted, “[t]he argument that ‘lost’ permission fees are proof of fourth factor harm has as its premise the legal conclusion at issue: that the use at issue is not a fair use and, therefore, the owner is allowed to charge permission fees for such use.”⁸⁰ Proof of lost licensing revenue is possible in any contemporary fair use case. It’s in the very nature of a “test” or “factor” that it be possible for it to go in either direction; however, Justice Blackmun’s interpretation means it can only militate against the defendant, barring a concession from the plaintiff that the work does not reduce the value of the work.

Unfortunately, a milder version of Blackmun’s narrow approach crept into the latest Supreme Court pronouncement on fair use, *Campbell v. Acuff-Rose*.⁸¹ In that case, the plaintiff sued the group 2 Live Crew for appropriating parts of the Roy Orbison song “Pretty Woman” into a Rabelaisian mockery of unattractive and unfaithful women.⁸² The case is largely remembered for its first factor analysis affirming the importance of parody in fair use jurisprudence. Despite finding 2 Live Crew’s rap to be a parody, the Court remanded the case for further consideration by the district

⁷⁹ In § 107(4), we are clearly not dealing with the disjunctive “or” but with the synonymous “or” denoting the equivalence of the terms “potential market” and “value of.” “Or” is often “[u]sed to indicate a synonymous or equivalent expression.” The American Heritage® Dictionary of the English Language, Fourth Edition (2000), via Dictionary.com.

⁸⁰ Lydia Pallas Loren, *Redefining the Market Failure Approach To Fair Use In An Era Of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1 (1997), available at <http://www.lclark.edu/~loren/articles/fairuse.htm>; see also NIMMER, *supra* note 7, at § 13.05[A][4] (extensively discussing the circularity problem); Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 359 (1997) (“[T]he ability to charge by itself cannot possibly determine legal rights. A hoodlum might have the ability to charge protection fees, and yet no one would argue that this in itself gives him a right to do that Absent an underlying theory of rights, the ability to charge is normatively meaningless.”).

⁸¹ 510 U.S. 569.

⁸² *Id.* at 572-73.

court, including a fourth factor inquiry into the degree to which 2 Live Crew's rap reduced the value of the song via displacement (rather than disparagement)⁸³:

2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals. . . . [Therefore, each side should submit on remand] evidence or affidavits addressing the likely effect of 2 Live Crew's parodic rap song on the market for a nonparody, rap version of 'Oh, Pretty Woman.'⁸⁴

Of course, the Court only deemed the derivative market for rap music "a proper focus of enquiry," not *the* proper focus of enquiry (as the *Sony* dissent would have it). *Campbell* did recognize the validity of 2 Live Crew's submission of evidence that its version of the song did not harm the market for the original song, and might actually increase its notoriety.⁸⁵ However, the majority's insistence that "a silent record on [the derivative rap market] dis-entitled the proponent of the defense, 2 Live Crew, to summary judgment" elevated the importance of derivative markets to an unfortunate extent.⁸⁶ As David Nimmer's recent survey of fair use cases has shown, appellate courts have been quick to seize on harm to narrowly construed derivative markets as the key to fourth factor inquiry, and have ignored *Campbell's* parallel approbation

⁸³ This classic distinction in fair use law is intended to exempt certain negative affects on the market from being considered in the fourth factor inquiry. If a scathing review or cutting parody reduces sales for a work, it has most likely done so by disparaging the work. This kind of market harm is not counted. However, an abridgment of the work or unauthorized copy may usurp sales simply by substituting for the work. *That* market harm is counted in the fourth factor inquiry. See *Campbell*, 510 U.S. at 592. ("Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,' the role of the courts is to distinguish between 'biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'")

⁸⁴ *Id.* at 593 (citing see *Harper & Row*, 471 U.S. at 568); *Nimmer*, *supra* note 7 § 13.05[A][4], p. 13-102.61 ("a substantially adverse impact on the potential market"); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 697-98 (1992) (same).

⁸⁵ *Campbell*, 510 U.S. at n.21.

⁸⁶ *Campbell*, 510 U.S. at 590. "Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets. In moving for summary judgment, 2 Live Crew left themselves at just such a disadvantage when they failed to address the effect on the market for rap derivatives, and confined themselves to uncontroverted submissions that there was no likely effect on the market for the original".

of defense evidence showing positive effects on the market for the work.⁸⁷

This misinterpretation of *Campbell* has most likely tempted courts because of its ease of administration. Most judges are not experts on the valuation of intellectual property.⁸⁸ However, as the district court in *Sony* demonstrated, courts are capable of a careful analysis of the overall effect of a contested use on the potential market for or value of the copyrighted work. The work of the district court in *Sony*, affirmed by the Supreme Court, is a model for resolving fourth factor analysis.

III. THE ECONOMIC BASIS FOR BROAD FOURTH FACTOR ANALYSIS

Sony's broad fourth factor analysis has reflected the district court's deep appreciation of the economic background of the case. The Court refused to assume that the market for entertainment goods would remain static, and instead focused on the new commercial possibilities enabled by the contested use. This patience proved wise in retrospect, although, as I've already acknowledged, no one could have predicted at the time just how profitable tape rentals would have been for the plaintiffs. Nevertheless, the rapid development of information economics provides current courts with good reason for being skeptical about copyright holders' claims of imminent ruin on account of new technologies of dissemination.

Before delving into more recent research, it's helpful to defamiliarize the *Sony* plaintiffs' complaint by situating intellectual property in the larger scheme of commercial relationships prevalent in a market economy.⁸⁹ Like symbiosis and parasitism in ecology, complementarity and competition pervade every economic system. Just as early courts resisted conceptualizing competition as a tort (thereby refusing to force a market entrant to compensate incumbent firms for business lost due to its entry), we now believe that a viable market cannot stand too many efforts to internalize all the positive effects of

⁸⁷ Nimmer, *supra* note 7.

⁸⁸ Courts may not be entirely to blame here. Copyright defendants are often strapped for resources and unable to find the kind of economic experts capable of developing "positive effects" evidence. However, even when they do, skeptical trial courts may fault the methodology of the studies or the credentials of the expert. See district court opinion in *Napster* (refusing to credit the expert evidence of Napster's economist).

⁸⁹ This is an aesthetic and argumentative strategy devised by Russian Formalist literary critics, who argued that one of the main social functions of literature was to "defamiliarize," to "counter the deadening effect of habit and convention by investing the familiar with strangeness and thereby deautomatizing perception." Greig E. Henderson & Christopher Brown, GLOSSARY OF LITERARY THEORY, at <http://www.library.utoronto.ca/utel/glossary/Defamiliarization.html> (last modified Mar. 31, 1997).

a product or service to its provider. Countering arguments that would later prevail in the case of digital audio tape ("DAT") technology, Stan Liebowitz argued that the case of Sony's "appropriation" of the value of televised content was no different than that of other situations where an ostensibly parasitic product actually established a symbiotic relationship:

VCR manufacturers earn revenues selling a product which would, for practical purposes, have little value if not for the existence of copyrighted intellectual products. Notice, however, that an identical argument can be made for the producers of television sets, TV guides, antennae, Nielsen ratings, TV stands, etc.. All these products are strong complements with television programming and are "exploiting" the television market to earn revenues. Should they all pay a portion of their revenues to copyright owners (as cable television owners now do for retransmission of over-the-air broadcasts)? . . . Perhaps copyright owners should pay part of their revenues to the manufacturers of these complementary products?⁹⁰

Seen in this light, the content providers appear like the avaricious candle-sellers of Bastiat's parody, who petition the government to block the sun in order to increase their sales.⁹¹ They are trying to

⁹⁰ Liebowitz, *supra* note 72, at 18. (concluding that the "net impact of VCR's" is ultimately negligible, and therefore "VCR use should be considered an exception to copyright infringement since no diminution of creative activity is likely to follow from VCR use and users would clearly benefit."). Liebowitz goes on to argue:

There are many other complementary products in the world (gasoline production/distribution and automobiles, electricity and appliances, floor cleaners and floors, etc.) and if one believes that the producers of one complementary good should pay producers of other complementary goods for the right to "exploit" the market for the joint product, there is no limit to the potential scope of taxes and subsidies. In addition, it is not at all clear on whom the taxes should be levied. After all, what would be the worth of television programs without the physical means of reproducing them over-the-air, or a guide to allow viewers to learn when particular shows were being broadcast?

Id.

⁹¹ See Frederic Bastiat, PETITION FROM THE MANUFACTURERS OF CANDLES, TAPPERS, LANTERNS, STICKS, STREET LAMPS, SNUFFERS, AND EXTINGUISHERS, AND FROM PRODUCERS OF TALLOW OIL, RESIN, ALCOHOL, AND GENERALLY OF EVERYTHING CONNECTED WITH LIGHTING (1845), at <http://bastiat.org/en/petition.html> [hereinafter *Petition*]. As the district court chided the plaintiffs:

[T]here is no way, nor should there be, for plaintiffs to limit the availability of alternatives to television viewing. Games, books, movies even people all divert potential viewers from the television set. It is impossible for plaintiffs or this court to isolate the diversion of Betamax from that of these competitors.

Sony, 480 F. Supp. at 466. Their position recalled that of the lighting industry lampooned by Bastiat:

leverage public concern about the classic “free-rider” problem of intellectual property production into control over the value of all positive externalities arising from their products.⁹²

As the story of the VCR demonstrates, this strategy may not only hurt society, but also prove self-defeating for the copyright holders themselves.⁹³ No doubt today’s industry associations and lawyers will brandish sophisticated revenue projections and threats of harm when they press their case against fair use in the courts. They will deride a *laissez-faire* approach as disrespectful of the property rights of their clients. However, the divergence of principals’ and agents’ interests may be distorting industry response to the P2P “crisis.”⁹⁴ Two aspects of contemporary information economics—network ef-

We are suffering from the ruinous competition of a rival who apparently works under conditions so far superior to our own for the production of light that he is *flooding* the *domestic market* with it at an incredibly low price; for the moment he appears, our sales cease, all the consumers turn to him, and a branch of French industry whose ramifications are innumerable is all at once reduced to complete stagnation. This rival, which is none other than the sun, is waging war on us so mercilessly we suspect he is being stirred up against us by perfidious [England].

Petition, supra note 91. The libertarian/right critique of expansive intellectual property rights has been developing for some time; see, e.g., Jesse Walker, *Copy Catfight*, Reason, Mar. 2000, at 44; James Boyle, Conservatives and Intellectual Property, Address Before the National Federalist Society Annual Meeting (2000) in 1 ENGAGE 83 (2000), available at <http://www.james-boyle.com/> (arguing that we should protect intellectual property only when it is necessary to protect future innovation).

⁹² See Mark A. Lemley, *Property, Intellectual Property, and Free Riding* (unpublished manuscript, Stanford Law and Economics Olin Working Paper No. 291), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582602 (Aug. 2004). Lemley explained:

The economics of property is concerned with internalizing negative externalities - harms that one person's use of land does to another's interest to it, as in the familiar tragedy of the commons. But the externalities in intellectual property are positive, not negative, and property theory offers little or no justification for internalizing positive externalities. Indeed, doing so is at odds with the logic and functioning of the market.

Id.; see also WILLIAM BAUMOL & ALAN BLINDER, ECONOMICS 613 (1991) (“An activity is said to generate a beneficial or detrimental externality if that activity causes incidental benefits or damages to others, and no corresponding compensation is provided to or paid by those who generate the externality.”).

⁹³ Fisher, supra note 57, at A23. Reviewing struggles between copyright holders and developers of new technologies, William Fisher observed:

It is noteworthy that the story with the happiest ending—both for the public and for the copyright owners—was the one in which the owners were denied any share in the revenues earned by the developers of the new technology but instead had to develop a new business model to take advantage of it (VCR's).

Id.

⁹⁴ Skeptics have long attempted to document some divergence between the interests of public interest lawyers and those they claim to represent. See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 341 (1991). It is not unimaginable that lawyers for content industries have more to gain from endless litigation over unauthorized use than from a less litigious business strategy focused more on maximizing paid uses rather than minimizing unauthorized use.

fects and demand analysis—demonstrate the complexity inherent in any determination of the effect of an unauthorized use on the market for a copyrighted work.

A. *Network Effects*

Regardless of the net social benefit of fair use decisions, there is growing evidence that the copyright holders' efforts to expand the scope of their control over their work is not only inefficient for the economy as a whole, but also for the *copyright holders themselves*. Given the complexity of information economics, any particular use of a copyrighted work is likely to have not only negative, substitution effects on the market for the work, but also positive, complementary effects.⁹⁵ For example, unauthorized users of a software program may help the program become an "industry standard," may suggest improvements to the program in user communities, or may eventually purchase a license (once they have the money to buy it—or the money to lose in an infringement action).⁹⁶ The *Sony* court presciently (albeit obscurely) grasped the power of such network effects and complementary goods in creative industries.⁹⁷ Network effects enable positive feedback loops in the consumption of both content and the media that carry it:⁹⁸

Network externalities⁹⁹ arise when the utility that a user derives from a product increases with the number of other individuals who also use the product. These externalities have

⁹⁵ See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) (discussing the distinction between complementary and substitutional copying). Building on his coauthored work *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003), Judge Richard Posner advanced the basic microeconomic concept of complementary and substitute goods in copyright law. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 121 (2003) (noting that *Ty, Inc.* is an example of negative harm-implied consent as the deliberate shortage of "Beanie Babies" creates a secondary market giving publicity).

⁹⁶ OZ SHY, *THE ECONOMICS OF NETWORK INDUSTRIES* 51-79 (2001). Shy has observed that "piracy has two economic impacts on software firms. First, piracy leads to a fall in direct sales. However, by increasing the size of the installed base, it may also boost the demand for the particular software." *Id.* (citing to Kathleen Reavis Conner and Richard P. Rumelt, *Software Piracy: An Analysis of Protection Strategies*, in 37 *MANAGEMENT SCIENCE* 125 (1991)).

⁹⁷ See CAVES, *supra* note 39, at 17 (1998) (discussing the idiosyncratic features of supply and demand for content); see also CARL SHAPIRO & HAL VARIAN, *INFORMATION RULES* (1999) (discussing supply and demand of information and the tools used for its distribution and storage).

⁹⁸ Mark Lemley and David McGowan, *Legal Implications of Network Economic Effects*, 86 *CAL. L. REV.* 479 (1998).

⁹⁹ See BAUMOL & BLINDER, *supra* note 92, at 613 ("An activity is said to generate a beneficial or detrimental externality if that activity causes incidental benefits or damages to others, and no corresponding compensation is provided to or paid by those who generate the externality.").

several sources. Direct network externalities exist when the number of users affects the quality of the product itself. Communications products such as telephones and fax machines exhibit this type of effect, as these products become more useful as more individuals obtain them. Indirect network externalities exist when the number of users affects the availability of complementary products and services, which in turn affects the value of the core product.¹⁰⁰

The more uses—authorized or unauthorized—of a product, the more noteworthy, popular, and important the product is likely to become.¹⁰¹

Network effects prevail in a variety of industries, including “the telephone, email, Internet, computer hardware, computer software, music players, music titles, video players, video movies, banking services, airline services, legal services, and many more.”¹⁰² As Oz Shy explains, all these industries exhibit “complementarity, compatibility, standards, consumption externalities, switching costs, significant economies of scale, and lock-in.”¹⁰³ Expanding on the traditional microeconomic definition of complementarity, Shy explains that “[c]omplementarity means that consumers in these markets are shopping for *systems* (e.g., computers and software, cameras and film, music players and cassettes) rather than individual products.”¹⁰⁴ Whenever this occurs, the increasing prevalence or standardization of any one component of the system can greatly increase the demand for other components of the system.

Just such a dynamic opened up the vast market of video rentals to film and television copyright holders after the *Sony* decision. In 1981, the President of the Motion Picture Association of America, Jack Valenti, claimed that “we are going to bleed and bleed and

¹⁰⁰ Dana R. Wagner, *The Keepers Of The Gates: Intellectual Property, Antitrust, and the Regulatory Implications Of Systems Technology*, 51 HASTINGS L. J. 1073, 1096 (2000).

¹⁰¹ The product may even become *necessary*, as in the case of telephones, email, or even lawyers:

Our major observation is that the fees collected by lawyers have increased significantly despite the rapid increase in the number of lawyers. This observation is rather puzzling since it seems to contradict the law of demand and supply which predicts that wages (attorney’s fees in the present case) should decline with the increase in the number of people in the profession

. . . .

. . . . In order to demonstrate this possibility, we will utilize a network model of attorneys where the increase in the number of practicing lawyers creates a disproportional increase in the demand for lawyers.

SHY, *supra* note 96, at 270 (2001).

¹⁰² *Id.* at 1.

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.* at 2.

hemorrhage, unless this Congress at least protects one industry . . . whose total future depends on its protection from the savagery and the ravages of this machine."¹⁰⁵ Ultimately, the reverse happened: the video rental business unleashed a transfusion of cash¹⁰⁶ to Hollywood as a vast new market for its works developed.¹⁰⁷ Moreover, movie ticket sales were not displaced. As Valenti himself put it (near the time of his retirement in 2004): "[I]n spite of this spiraling competition, unharnessed and unbounded, where new contenders for viewers' favor sprout up like kudzu, all aiming to lure consumers to their new enticements . . . the movie theater still enchants, still beckons, still prospers."¹⁰⁸

To be sure, had the film industry won the *Sony* case, some version of the VCR likely would have developed under its control. But like the digital video recorders hobbled by digital rights management,¹⁰⁹ or the MP3 players crippled by endless disputes over content controls,¹¹⁰ such a technology would likely have taken far longer to diffuse.¹¹¹ Like digital audio tape recorders, it may well have been done in by excessive regulation.¹¹² Fortunately for home viewers *and* the entertainment industry, neither the Supreme

¹⁰⁵ Home Recordings of Copyrighted Works: Hearings Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary, 97th Cong. (1982) (statement of Jack Valenti, President, Motion Picture Ass'n of Am.), available at <http://cryptome.org/hrcw-hear.htm>.

¹⁰⁶ This florid mixed metaphor is my tribute to Valenti's mastery of that form.

¹⁰⁷ See JAMES LARDNER, FAST FORWARD: A MACHINE AND THE COMMOTION IT CAUSED 313 (1987) ("the gross revenues from the sale and rental of videocassettes—a projected \$3.5 billion by 1985—were closing in on the gross revenues of the theatrical movie business.").

¹⁰⁸ Press Release, Motion Picture Association of America, Inc., Valenti Reports 2003 Box Office as Second Highest in History at ShoWest, available at <http://www.mpaa.org/jack/content.htm> (last visited March 23, 2004).

¹⁰⁹ See generally, *Am. Library Ass'n v. F.C.C.*, 401 F.3d 489 (D.C. Cir. 2005); *In re Digital Broadcast Copy Protection*, 17 F.C.C.R. 16, 027 (2002).

¹¹⁰ For the latest installment in a long, sad story (dating back at least to the collapse of the Secure Digital Music Initiative), see Derek Slater, *Sony Music-Tech Makes Me Wanna Retch*, available at <http://blogs.law.harvard.edu/cmusings/2004/05/10#a659> (May 10, 2004).

¹¹¹ For the leading analysis of technological diffusion in the legal literature, see Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH L. REV. 1035 (2002).

¹¹² Congress forced the manufacturers of this technology to install a "Serial Copyright Management System" and to pay royalties to copyright holders. Audio Home Recording Act ("AHRA") of 1992, 17 U.S.C. 1001-1010 (2000). Many commentators have concluded that the combination of a "duty to design" and a "duty to pay" in this context doomed the technology to obsolescence (although the rise of the CD was also a large part of the story). The sluggish growth of webcasting is also largely attributable to the crippling effect of laws like the Digital Performance Rights in Sound Recordings Act ("DPSRA") of 1995 and the royalties it established.

See Pub. L. No. 104-39, Sec. 1, 109 Stat. 336 (1995); Details of the act's operative mechanisms are available at <http://www.soundexchange.com>. In contrast, terrestrial radio was not hobbled by such regulation or court cases.

Court nor Congress decided to impose burdensome liability or regulation on VCR manufacturers.

B. Demand Analysis

Industrial economist Richard Caves has investigated the organization of creative activities—“why some creative activities occur in ongoing organizations (‘firms’), and others in one-off deals (‘the market’).”¹¹³ Caves’s rich empirical study of various “creative industries” (those in which the product or service “contains a substantial amount of artistic or creative endeavor”) is organized around several common themes. On the demand side, the uncertainty of demand leads to the “nobody knows” problem: “[t]here is great uncertainty about how consumers will value a newly produced creative product, short of actually producing the good and placing it before them.”¹¹⁴ Since costs are often sunk,¹¹⁵ “the risk associated with any creative product is high.”¹¹⁶

This uncertainty is often cited as a reason for guaranteeing strong IP rights. Without such rights, IP producers may not be given adequate incentives to produce such goods. However, markets for information have also developed methods of dealing with uncertain demand that depend on robust exceptions and limitations to IP rights. For instance, reviewers are allowed to quote freely from a text in the course of reviewing it. Such “fair uses” are not obviously helpful to the book in question—harsh reviews may drive down sales. However, unlicensed reviews are, in general, an essential tool for generating more information about books and encouraging sales.¹¹⁷

Reviews are but one of many ways buyers and sellers overcome the problem of assessing the value of experience goods—those which must be experienced before a buyer can understand its value or appeal.¹¹⁸ As Hal Varian and Carl Shapiro demonstrate, there are many

¹¹³ CAVES, *supra* note 39, at 1-2.

¹¹⁴ CAVES, *supra* note 39, at 2.

¹¹⁵ A sunk cost is a cost

[t]o which a firm is precommitted for some limited period, either because the firm has signed a contract to make the payments or because the firm has already paid for some durable item (such as a machine or a factory) and cannot get its money back except by using that item to produce output for some period of time.

BAUMOL & BLINDER, *supra* note 92, at 493. Less formally, a sunk cost may be considered one that has already been made and cannot be recovered; for example, the performance of an actor in a film, or the copyright for a song that is played during the film.

¹¹⁶ CAVES, *supra* note 39, at 3.

¹¹⁷ See *infra* Part IV.B.2. (addressing the economic benefit of general right to review and quote).

¹¹⁸ See Hal R. Varian, *Markets for Information Goods*, at

<http://www.sims.berkeley.edu/~hal/Papers/japan/index.html> (last visited Mar. 25, 2005). Cf.

strategies that makers of an information good can deploy in order to overcome consumers' unwillingness to buy an experience good they have not experienced.

1. *Previewing/Browsing*

When consumers can preview and browse works, they are far more likely to purchase them than when the goods are essentially a black box. Several publishers have responded to this phenomenon by making their works available online for browsing. For example:

The National Academy of Sciences Press found that when they posted the full text of books on the Web, the sales of those books went up by a factor of three. Posting the material on the Web allowed potential customers to preview the material, but anyone who really wanted to *read* the book would download it. MIT Press had a similar experience with monographs and online journals.¹¹⁹

Like a phonebook that identifies all the providers of services in a given area, previewing and browsing services give customers some sense of what is available and what they are buying. Major music retailers now brag that one can sample nearly every CD on their shelves.¹²⁰

This model of owner-approved or—organized browsing works well when consumers¹²¹ have a clear idea of what they are looking for. Given the exponential expansion of literary, film, music, and software offerings, this is not always the case. In such markets, retailers, “buffs”¹²² and others with educated tastes or an interest in selling the work can be crucial to solving collective action problems. Recently, Amazon announced a revolutionary cataloging feature that allows site visitors to search for words and phrases in all the pages of

CAVES, *supra* note 39, at 3 (describing the particularly acute “experience good” problem in the context of creative goods: “A creative product is an ‘experience good’ like these, but the buyer’s satisfaction will be a subjective reaction The organizational problem is to deal with symmetrical ignorance, not asymmetrical information.”).

¹¹⁹ *Id.*

¹²⁰ Barnes and Noble at 12th and F in D.C.; Manhattan Union Square.

¹²¹ Consumers may not be a broad enough term—*cf.* article on user rights, and my general theme that the purchasers/users of IP may be creators themselves (esp. in context of fan fiction, amazon.com reviews, etc.); *cf.* Tim Wu, *Harry Potter and International Order of Copyright*, at <http://www.slate.msn.com./id/2084960/> (last visited Mar. 25, 2005).

¹²² See CAVES, *supra* note 39, at 185-86 (describing buffs as “people who cultivate exhaustive knowledge of the activity and likely possess some training or experience in creative activity.”).

a digitized collection of approximately 100,000 books that Amazon offers for sale:

The copyrights to these titles are spread among countless owners. How was it possible to create a publicly accessible database from material whose ownership is so tangled? Amazon's solution is audacious: The company simply denies it has built an electronic library at all You can find the page that responds to your query, read it on your screen, and browse a few pages backward and forward. But you cannot download, copy, or read the book from beginning to end. There is no way to link directly to any page of a book. If you want to read an extensive excerpt, you must turn to the physical volume—which, of course, you can conveniently purchase from Amazon. Users will be asked to give their credit card number before looking at pages in the archive, and they won't be able to view more than a few thousand pages per month, or more than 20 percent of any single book.¹²³

Amazon has both the market power and the savvy transactional lawyers to avoid lawsuits over the service.¹²⁴ However, other innovators have not been so lucky. Arriba Soft, the creator of an archive of internet images, has been in litigation over its site with one holdout—an obscure landscape photographer—for years.¹²⁵ Video Pipeline's archive of brief clips from movies was effectively shut down by a recent district court opinion affirmed by the Third Circuit.¹²⁶ The *Arriba Soft* panel took seriously the positive effects of a previewing service on the market for intellectual property previewed in it, while the *Buena Vista* panel effectively ruled that owners of the previewed IP must consent to its (or any part of its) inclusion in any database—extending the logic of Justice Blackmun's fourth factor “analysis” into a per se rule against unauthorized uses with commercial potential.

¹²³ Gary Wolf, *The Great Library of Amazon*, at http://www.wired.com/wired/archive/11/12/amazon_pr.html (last visited Mar. 27, 2005).

¹²⁴ Although it has caved to pressure from the authors guild to prevent print-outs of the pages found via the “look inside the book” feature. *Wired.com, Amazon: Look But Don't Touch*, at <http://www.wired.com/news/business/0,1367,61057,00.html> (last visited Mar. 27, 2005).

¹²⁵ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). This is a classic hold-out problem, making fair use appropriate as an eminent domain type strategy. See Michael A. Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 *DUKE L.J.* 1 (2004).

¹²⁶ *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp 2d 321 (D. N.J. 2002), *aff'd*, 342 F.3d 191 (3rd Cir. 2003), *cert. denied* 540 U.S. 1178 (2004).

2. Reputation and Reviews

Varian also notes that many producers of information products overcome the “experience good” problem by consistently providing an excellent product, thus building a reputation for quality.¹²⁷ I’ve rarely seen an issue of the *New York Times* without at least one interesting article, so I continue buying it; weblogs like politicaltheory.info and aldaily.com have also earned a spot in my “Favorites” directory by consistently pointing me to new ideas or well-written articles. The power of reputation is even stronger in movies and music, where established star performers (as well as writers, producers, and even costumers) can command princely sums for their services. Buyers of computer software are often afraid of purchasing products from unknown companies, and are generally willing to pay a premium in order to buy an established brand.

The law of intellectual property primarily responds to the importance of reputation in “creative industries” by providing strong trademark protection.¹²⁸ Trademarks and trade dress can clearly designate the source of products because their owners have a cause of action against anyone who causes confusion or “dilutes” the mark.¹²⁹

However, when we move beyond the field of source designation to the protection of products themselves, adequate institutional signals of reputation may also depend on owners’ *inability* to strictly control all uses of their work—particularly with respect to the rights afforded by copyright protection. For example, book reviews would mean little if they could only quote from a book after obtaining permission from the book’s copyright owner.¹³⁰ I would rarely send articles from the *New York Times* website to friends if I had to pay a fee each time I sent one.¹³¹ And it is likely that the bloggers who now generate traf-

¹²⁷ Richard Lethin, *Reputation*, in PEER-TO-PEER, *supra* note 70, at 341.

¹²⁸ See Trademark Act of 1946 (Lanham Trade-Mark Act), 15 U.S.C.A. §§ 1051-1141 (2005) (creating protection for trademarks and providing a cause of action for an infringement); Federal Trademark Dilution Act of 1995, 15 U.S.C.A. §§ 1125-1127 (2005) (providing a cause of action for dilution of the distinctive quality of famous marks).

¹²⁹ See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995):

[T]rademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions, 'for it quickly and easily assures a potential customer that [a particular item] is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past

(second alteration in original) (quoting 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2.01[2] (3d. ed. 1992)).

¹³⁰ See note *supra* 33 and accompanying text.

¹³¹ Admittedly, micropayments may lessen that problem. See Gordon, *Fair Use as Market Failure*, *supra* note 9. The problem, though, is that the copyright owner is ill-equipped to judge whether the micropayment revenues are adequate to offset the reputational advantages accruing to the publication from unauthorized distribution by those who note—that may be why the *Los*

fic for such sites would not do so if they were not allowed to link to such sites.¹³² A restaurant guide unable to reproduce photographs of restaurants would be much less valuable to epicureans who also seek to know something of the ambiance of where they will be dining.

Admittedly, in each of these cases it is difficult to assess the relative contribution of each party to each party's economic success. Perhaps bloggers like *freerepublic.com* or *andrewsullivan.com* are ultimately parasites on established publications like the *New York Times*; or perhaps they would command an audience even without such links and quotes and the *Times* free-rides off the publicity they provide. It's hard to even imagine a behavioral study that could settle questions like this. However, a relationship of symbiosis or commensalism is indisputable—both sides benefit from a vital information ecology where journalists, bloggers, reviewers, and established publications can freely quote, cite and link to each other's work.

IV. CONCLUSION

A specter haunts fair use scholarship—a defeatist intuition that fair use cases are essentially untheorizable. In his 1990 article "Fair's Fair," Lloyd Weinreb offered the leading version of this argument. Weinreb counsels complacency in the face of the complexity—and outright contradictions—evident in leading fair use cases.¹³³ Since every case is different, every application of the four fair use factors is going to be renewed afresh. There's little room for the treatise-writer, much less the theorist, to order matters—especially given new technological developments that can scarcely be predicted months in advance, let alone the years and decades that theoreticians aspire to influence.

However, even if we accept the equitable character of fair use determinations, and the exceptionally context-sensitive application of the fair use factors, there are nevertheless some ideas of order that emerge from the cases. A particularly persuasive analysis of the

Angeles Times and *The Washington Post* settled the *Free Republic* suit on such good terms for the other side (namely, payment of only nominal damages of roughly \$5,000 to each plaintiff).

¹³² See Shirky, *supra* note 9; but see Liebowitz's endorsement of micropayment systems in Stan Liebowitz, *Policing Pirates in the Networked Age*, Cato Inst. Policy Analysis No. 438, 17 (May 15, 2002), available at <http://www.cato.org/pubs/pas/pa-438es.html> (last visited Mar. 27, 2005) (praising DRM systems for producing price discrimination closely keyed to users' willingness to pay).

¹³³ Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990) (recalling other defenses of "muddy" as opposed to "crystalline" property law. Cf. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Marc Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

“purpose or character” of the use—like Judge Posner’s treatment of reviews and collector’s guides in *Ty Inc. v. PIL*—may thereafter privilege a certain category of use as fair.¹³⁴ And as I have argued above, a deeply insightful analysis of the effect of a use on the market for the affected copyright—such as *Sony*’s treatment of this fourth fair use factor—may disclose a method appropriate in a wide range of fair use cases.

Sony’s effect on the market analysis is exemplary for two reasons. First, the case considered not only the negative, substitutive effects of the contested copying on the market for the copyrighted works, but also examined the positive, complementary effects. Against the copyright owners’ complaints that VTR-owners would not buy tapes of their programs once they had the opportunity to copy them off broadcast television, the Court noted that there would be no market for the tapes were it not for the VTR’s prevalence. Second, *Sony* either limited the range of “traditional, reasonable, or likely to be developed” markets that could be claimed by the copyright owner, or determined that negative effects in one such market would likely be swamped by positive effects in other markets—thereby leading to a fourth factor finding in favor of the defendants. Either interpretation of the case expands the range of evidence that must be considered before a court can deny a fair use defense.

Skeptics are sure to grumble that the broad method of market analysis exemplified in *Sony* may overwhelm courts.¹³⁵ However, the *Sony* dissent’s alternative only achieves simplicity at the cost of disrespecting the will of Congress and forsaking the judicial role of examining the full scope of the effects of a contested use on the value of the works at issue. The narrow method is also circular, assuming the very legal conclusion it purports to be determining.

Although Justice Breyer has done much to try to rationalize copyright law in his scholarship¹³⁶ and opinions¹³⁷ in copyright disputes, his work in administrative law most directly inspires my work on the topic. In his *Breaking the Vicious Circle*, Justice Breyer explained how small increases in expertise and economic analysis at key gov-

¹³⁴ *Ty Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512 (7th Cir. 2003), cert. denied 537 U.S. 1110 (2003).

¹³⁵ William Fisher discussed this possibility in fair use analysis in his *Reconstructing Fair Use* article. Sensitive to the problem of the non-representative litigant, William Fisher proposed that courts consider “the universe of activities vis-a-vis” the copyrighted work when deciding individual fair use cases. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1706 (1988).

¹³⁶ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

¹³⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting).

ernment agencies could promote vastly better policy outcomes.¹³⁸ The *Sony* majority, affirming a method of “market analysis” that calls upon litigants to fully research the effects of a use, ultimately came to a similar conclusion with respect to fair use cases. Copyright disputes are likely to influence the structure of the information economy in profound ways. It is time for courts (and litigants) to treat them accordingly. One good first step would be to finally forsake the vicious circularity of narrow fourth factor analysis for the comprehensive approach envisioned by the drafters of the 1976 Copyright Act and employed by the *Sony* majority.¹³⁹

APPENDIX: RIVAL VIEWS OF THE MARKET EFFECTS OF VCR-ENABLED TAPING OF TELEVISION PROGRAMMING IN *SONY*

Area of Conflict	<i>Sony</i> Majority	<i>Sony</i> Dissent
Initial Characterization of Taping	Noncommercial (fair) vs. Commercial (unfair) Use	Ordinary (unfair) vs. Productive (fair) Use
Burden of Proof	“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. . . . If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.” ¹⁴⁰	“Although the District Court found no likelihood of harm from VTR use, I conclude that it applied an incorrect substantive standard and misallocated the burden of proof. . . . The Studios have demonstrated a potential for harm, which has not been, and could not be, refuted at this early stage of technological development.” ¹⁴¹
Speculation	“Because the Studios’ prediction of harm was ‘based on so many assumptions and on a system of marketing which is rapidly changing,’ the [district] court was ‘hesitant to identify probable effects of home-use copying.’” ¹⁴²	“[A] particular use which may seem to have little or no economic impact on the author’s rights today can assume tremendous importance in times to come.” ¹⁴³
Advertising	“[The district court] rejected respondents’ prediction ‘that live television or movie audiences will	[A]dvertisers may be willing to pay for only ‘live’ viewing audiences, if they

¹³⁸ STEVEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1994).

¹³⁹ Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2004).

¹⁴⁰ *Sony*, 464 U.S. at 451 (emphasis added).

¹⁴¹ *Id.* at 483-84 (citations omitted).

¹⁴² *Id.* at 484 (citing 480 F. Supp. 429, 468 (1979)).

¹⁴³ *Id.* at 482 (alterations in the original) (dissent, quoting Register’s Supplementary Report

	<p>decrease as more people watch Betamax tapes as an alternative," with the observation that "[t]here is no factual basis for [the underlying] assumption."¹⁴⁴</p> <p>"To the extent any decrease in advertising revenues would occur, the court concluded that the Studios had 'marketing alternatives at hand to recoup some of that predicted loss."¹⁴⁵</p>	<p>believe VTR viewers will delete commercials or if rating services are unable to measure VTR use; if this is the case, VTR recording could reduce the license fees the Studios are able to charge even for first-run showings."¹⁴⁶</p> <p>"[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."¹⁴⁷</p>
Market for Reruns	<p>"Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters from rerun rights [I]f ratings can reflect Betamax recording, original audiences may increase and, given market practices, this should aid plaintiffs rather than harm them."¹⁴⁸</p>	<p>"Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present the 'real danger . . . of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.' Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use."¹⁴⁹</p>
Potential Markets for the Work	<p>"[R]espondents' suggestion that 'theater or film rental exhibition of a program will suffer because of time-shift recording of that program lacks merit."¹⁵⁰</p> <p>"By definition, time-shift recording entails viewing and erasing, so the program will no longer</p>	<p>[T]he Studios and their amici demonstrate that the advent of the VTR technology created a potential market for their copyrighted programs. That market consists of those persons who find it impossible or</p>

¹⁴⁴ The district court "rejected respondents' fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease, by observing that current measurement technology allows the Betamax audience to be reflected." *Id.* at 452 (citing 480 F. Supp. 429, 466 (1979)) (alterations in the original).

¹⁴⁵ *Id.* at 484.

¹⁴⁶ *Id.* at 483.

¹⁴⁷ *Id.* at 482 (citing S. REP. No. 94-473, at 65 (1975)).

¹⁴⁸ *Id.* at 453 n. 38.

¹⁴⁹ *Id.* at 482 (alterations in original) (citations omitted).

¹⁵⁰ *Id.* at 453.

	<p>be on tape when the later theater run begins."¹⁵¹ [The majority also points out that the only reason for the market for tapes is the creation of the VTR.]</p>	<p>inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTRs and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders. The Studios correctly argue that they have been deprived of the ability to exploit this sizable market.¹⁵²</p>
<p>Level of Harm Necessary to Enjoin Contested Use</p>	<p>"Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant level of imprecision involved in the calculations."¹⁵³</p>	<p>"[E]ven a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work. Second, the fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder."¹⁵⁴</p>

¹⁵¹ *Id.* at 453 n. 39.

¹⁵² *Id.* at 485.

¹⁵³ *Id.* at 452 (citing 480 F. Supp. 429, 468 (1979)).

¹⁵⁴ *Id.* at 485 (citing *Iowa State Univ. Research Found., Inc. v. American Broad. Cos.*, 621 F.2d 57 (2d Cir. 1980)).

