Part II, Chapter 4

Fair Use vs. Fared Use*

Introduction

"Information wants to be free," claim those who decry the overpowering grasp of copyright law.[1] But they cannot mean what they say. *Information* wants nothing at all.[2] The epigram speaks not to what information wants, but rather to what *people* want: people want information for free.[3]

So restated, the catch-phrase still rings true. Who would not prefer to get information—that increasingly vital good—at no cost? But, alas, information never comes for free. We can only account for its costs as fully as possible, try our best to minimize them, and allocate them fairly.

Copyright users necessarily bear costs when they search for, interpret, and collect information. This holds true even when—perhaps *especially* when—the fair use defense allows users to avoid paying *cash* for the right to use a fixed expressive work. Copyright holders likewise bear costs when they create, copy, and distribute works. Unsurprisingly, they seek remuneration of those costs and, if possible, profit.

Just as copyright itself represents a response to market failure,[4] so does fair use. Increasingly, however, markets have begun catching up with fair use. Courts say that the doctrine should give up ground where opportunities to purchase or license copyrighted

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* Most of this chapter comes from edited portions of *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N. CAROLINA L. REV. 557 (1998).

[1] *See* David Stipp, *The Electric Kool-Aid Management Consultant*, FORTUNE, Oct. 16, 1995, at 160, 166 (characterizing "information wants to be free" as the "cyberhacker rallying cry," and attributing it to Stewart Brand).

[2] To hold otherwise would require one to embrace a sort of digital animism, and so attribute cognitive states to mere collections of bits, or to rely on an outmoded, scholastic notion of causation. *See, e.g.,* ARISTOTLE, PHYSICS, Book II, ch. 3, 194a33 (c. 335-320 B.C., R.P. Hardie & R.K. Gaye trans.), *in* THE COMPLETE WORKS OF ARISTOTLE, at 332 (Jonathan Barnes, ed., 1984) (describing final causation as "the sense of end or that for which a thing is done . . . .").

[3] In defense of Brand, he actually came fairly close to this sense in an early formulation of his now-widespread *dictum*: "Information wants to be free because it has become so cheap to distribute, copy and recombine--too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient." STEWART BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT M.I.T. 202 (1987).

[4] *See supra* Chapter 1.

works advance.[5] If you can buy the right to use an expressive work at a market-clearing price, courts reason, you have little excuse to use it without paying. Fair use avails you nothing; you should license the work or go without.

Unfair? Not really. Fair use is not free use. Users have to pay somehow, whether in lost opportunities or cash. Thanks to technological advances—digitalization, computers, and the internet—buying permission to use an expressive work often costs less than using it without permission. Thus has Apple's iTunes service flourished. As such *fared* use expands, *fair* use does and should give way.

Still, fair use will and should remain potent when a copyright holder entirely refuses to license access. Markets then do not simply fail; they fail to even exist. In such a case, fair use might well excuse the unpaid and unauthorized use of a copyrighted work. This holds especially true with regard to critical reviews, parodies, and investigative reporting.

What if copyright holders employ common law tools, such as licenses or automated rights management, to bar even the fair use of a work? In that case, we might well judge that copyright policy fails, on net, to promote the general welfare, the progress of science, or the useful arts. To remedy that wrong, however, we should not attack common law rights. If copyright and common law combine to give copyright holders too much power, we should trim back the former. As a special exception to common law, the Copyright Act remains, at best, no better than a necessary evil.

This chapter argues, in sum:

- The scope of fair use will shrink as fared use grows, though objectionable uses will remain fair uses;
- Copyright holders may use common law to limit fair uses; and
- If in combination copyright and common law restrict too much expression, we should not throw out the latter with the former.

A. Fair Use

Fair use limits copyright's power. A party who engages in the fair use of a copyrighted work enjoys a legal defense against claims that the use infringes copyright. Section 107 of the Act codifies the doctrine.[6] Despite that codification, fair use remains a notoriously uncertain defense, the scope of which depends crucially on claims of fact. We often can only guess about whether a given use qualifies as "fair" under § 107. For

[5] *See, e.g.*, American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994); Princeton University Press v. Michigan Document Services, Inc. 99 F.3d 1381 (6th Cir. 1996).

[6] It reads, in relevant part: "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."17 U.S.C. § 107.

all that, though, most legal authorities regard fair use as a crucial part of copyright policy.[7] Fair use counterbalances the over-enforcement of copyright, promoting the general welfare and progress in the sciences and useful arts by classifying certain expressive acts as non-infringing.

Fair use thus has the salutatory effect of freeing the flow of information. That boon does not come for free, however. Because it decreases copyright's potential power, fair use perhaps dampens the ardor of some would-be authors . In a world without fair use, after all, copyright holders would enjoy the privilege of enjoining or licensing almost any use within the scope of § 106's panoply of exclusive rights, including reproducing, preparing derivative versions of, publicly distributing reproductions of, publicly performing, or publicly displaying expressive works. Without fair use, singing a parody in the shower could thus land you in jail.

Who wants to live in that world? Even copyright holders would probably find it irksomely constraining. Almost all new works recycle old works, somehow and to some degree. Echos of genius resound through our culture. May it remain so. If we punish new voices for harmonizing with old ones, we might never hear fresh music.

Fair use protects us from that tragedy. Whatever its costs, it evidently offers a good deal for the public welfare. All of us—even copyright holders—can celebrate that. Fair use looks likely to shrink in coming years, though.

1. Fair Use is Not Free Use

A combination of extant law and technological advances will make it easier for copyright holders to demand and receive licensing fees. Consumers have no sound reason to object to paying market-clearing rates for the permission to use copyrighted copies, however. Granted, consumers might at first feel aggrieved to find that they must now pay for uses that formerly they enjoyed free of charge. We should not confuse fair use with free use, however. In fact, fair use never comes for free.[8] Fared use merely makes copyright's costs more obvious.

Because a copyright does not give its holder the right to require licensing fees for uses falling within the scope of § 107,[9] parties availing themselves of *fair* use typically regard it as *free* use. But fair use seems free only because copyright holders do not demand money for it. One way or another, in fact, we have to pay when we use a copyrighted worked. Even if fair use excuses us from paying the copyright holder, we incur costs when we photocopy and distribute a newspaper stories for spontaneous classroom use, for instance, or when we search for quotes and type them into a footnote.

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[7] *See, e.g.,* Eldred v. Ashcroft, 537 U.S. 186, 220 (2003) (describing fair use as one of copyright law's "built-in First Amendment accommodations.").

[8] I thank Jane C. Ginsburg for first bringing this argument to my attention, during a conversation in the winter of 1996.

[9] 17 U.S.C. § 107 (codifying the fair use defense).

It makes no difference that we pay licensing fees in *money* whereas we pay fair use's transaction costs in *lost opportunities*. Economically speaking, a cost is a cost.[10]

Paying licensing fees might easily prove cheaper all told, than paying fair use's costs. Not too long ago, you might have invoked fair use to make cassette copies of your albums, allowing you to listen to your favorite music on-the-go. These days, you would probably instead pay iTunes for the right to load copies of your favorite songs to your iPod.

Before you did not pay; now you do. Has that made you worse off? Surely not. Consumer demand demonstrates that Apple's *fared* use offers a better deal than analog's *fair* use. We would thus fall prey to pessimism were we to assume that fare use imposes a *net* cost on consumers. To the contrary, fared use offers considerable likelihood of providing more and better verified, organized, and interlinked information, at less cost, than fair use does now.[11]

2. Fixing Market Failure

Sometimes transaction costs make contracting to sell or license access to a copyrighted work prohibitively expensive. Copyright holders might decline to license a use simply because the trouble of so doing exceeds the prospective revenue, for instance, or would-be users might calculate that obtaining permission to use a work poses too much of a hassle. Fair use corrects those sorts of market failures by permitting such uses, free of charge. [12] As Professor Gordon describes it, "courts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market."[13]

Understanding fair use as a response to market failure does much to explain the vagaries of its development in the case law. Consider the holding in *American*

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[10] Posner describes as "one of the most tenacious fallacies about economics" the notion "that it is about money. On the contrary, it is about resource use, money being merely a claim on resources." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (1986).

[11] Some commentators claim that reducing the scope of fair use would impose costs on society at large by reducing public access to and reuse of copyrighted works. *See, e.g.,* Neil A. Netanel, *Copyright and a Democratic Civil Society,* 106 YALE L. J. 283, 297 (1996) (claiming that impact of expanded copyright enforcement on "democratic discourse . . . carries a social value far in excess of the aggregate price that consumers would pay for personal access to transformative works.") Frustratingly, however, these same commentators fail to support their claims with hard—or even soft—numbers. Indeed, their arguments typically deny that the claimed costs even admit objective evaluation. *See id.*, at 339 ("[C]opyright's constitutive role in underwriting the conditions for a democratic society [is] a social benefit that can neither be measured nor reflected in terms of consumer purchasing decisions.").

[12] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 357-58 (1989); 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, 1613-23 (1982).

[13] Gordon, *supra* note [[cite]], at 1601.

Geophysical, where the court reasoned that "a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use."[14] In other words, the scope of the fair use defense rises and falls with the transaction costs of buying access to copyrighted works.

3. Maintaining Copyright's *Quid Pro Quo*

As courts and commentators often have noted, the Constitution demands a public benefit as the price for the limited statutory privileges created by the Copyright Act.[15] In contrast to the view that the fair use doctrine represents a second-best response to pervasive market failure, therefore, some commentators regard it as an integral part of this constitutional *quid pro quo*.[16] On that view, fair use provides a public benefit—unbilled access to copyrighted works—to balance the copyright privilege.

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[14] American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994). *See also* Princeton University Press v. Michigan Document Services, Inc. 99 F.3d 1381, 1387 n. 4 (6th Cir. 1996).

[15] Courts and commentators have given a variety of formulations to what sort of *quid* will balance the *quo* of copyright's statutory monopoly. *Compare*, Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the *ideas and information conveyed by* a work.") (citations omitted, emphasis added), *with*, Sony Corporation of America, et al. v. Universal City Studios, Inc., et al., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant . . . . is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius *after the limited period of exclusive control* has expired.") (emphasis added), *and with*, Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 20 (1995) ("The constitutional goals of copyright are the advancement of learning and knowledge. The means to achieve those ends is the incentive system which induces authors *to create and disseminate their works*.") (emphasis added). *See also* 1 PAUL GOLDSTEIN, COPYRIGHT § 1.14 (2d ed. 1996) (discussing generally how U.S. copyright law strives to achieve a balance between incentives and access) [[need to update Goldstein cite]].

[16] *See* Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 521 (1997) ("Fundamental federal copyright policy" includes fair use as part of "the quid pro quo that benefit[s] the public in exchange for the public's recognition of the exclusive rights of copyright."); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (describing fair use as "a necessary part" of the copyright monopoly); Laura N. Gasaway, *et al.*, *Amicus Advocacy: Brief* Amicus Curiae *of Eleven Copyright Law Professors in* Princeton University Press v. Michigan Document Services, Inc., 2 J. INTELL. PROP. L. 183, 203 (1994) (claiming "fair

The spread of fared use at first appears to threaten this bargain. It seems to impose new limits on the public's access to copyrighted works without offering any public benefit in return. More careful consideration of the issue shows, however, that fared use appears likely to benefit copyright holders and copyright users alike.

By reducing transaction costs throughout the market for copyrighted expressions, fared use benefits the public both directly and indirectly. Having emanated from an intentionally vague statute[17] and developed in various, occasionally contradictory cases,[18] the fair use doctrine necessarily blurs the boundary between valid and invalid copyright claims. Though the resultant uncertainty obviously harms producers and sellers of copyrighted works, it also harms consumers. Academics, artists, commentators, and others desirous of reusing copyrighted works without authorization must borrow at their peril, consult experts on fair use, or, sadly, altogether forego such reuse altogether. The

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use . . . required by . . . Copyright Clause"); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 2 (1987) (fair use "necessary for the partial fulfillment of the constitutional purpose of copyright--the promotion of learning").

These scholars arguably read too much into the *quid pro quo* of the Copyright Clause, however. The plain language of that provision does not require fair use. Nor do the origins of the Copyright Clause support the view that it mandates limited unlicensed access to copyrighted works. Early formulations of the Copyright Clause did not allude to *any sort* of public *quid pro quo*, much less fair use. James Madison initially suggested that the Constitution provide Congress with the power "To secure to literary authors their copy rights [sic] for a limited time." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (C.C. Tansill, ed. 1920, *reprinted in* Koch, ed. 1967). Simultaneous with Madison, Charles C. Pinckney moved, with unanimous consent, for the following copyright clause: "To secure to Authors exclusive rights for a certain time." *Id*. at 478. Both Madison and Pinckney treated the subject matter of patents separately. *Id*. at 477-78. The Copyright Clause does not require that the fair use defense assume any particular form. For that matter, strictly speaking, it does not require a fair use defense *at all*. Courts and congress have created fair use in their discretion and in response to wholly contingent matters of fact.

[17] Section 107 of the Copyright Act of 1976 specifies that courts "shall include" its non-exhaustive list of factors in weighing the fair use defense. 17 U.S.C.A. § 107. As Congress explained in codifying fair use in § 107, "the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute." H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

[18] As Judge Learned Hand once observed, the fair use doctrine "is the most troublesome in the whole law of copyright . . . ." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Far from an outdated *dictum*, this quotation has been found "in nearly every major treatise, casebook, or law review article on the subject of fair use." Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1544 n.58 (1989). *See also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-156 (1997) (neither the case law nor § 107 "offers any firm guide as to when" the fair use defense applies.).

clarifying power of fared use directly benefits those who would reuse copyrighted works—and through them their public audiences—by creating harbors safe from the threat of copyright litigation.

Moreover, fared use benefits the public indirectly by increasing the transactional efficiency of the market for expressive works. Like other markets, the market for expressive works does not constitute a zero sum game. And, as Coase observed of markets in general,

> [i]t is obviously desirable that rights should be assigned to those who can use them most productively and with incentives that lead them to do so. It is also desirable that, to discover (and maintain) such a distribution of rights, the costs of their transference should be low, through clarity in the law and by making the legal requirements for such transfers less onerous.[19]

Fared use, by its systemic improvement of copyright's transactional efficiency, helps us discover and maintain a distribution of rights to expressive works that will increase net social wealth.[20] Fared use thus stands to benefit both producers and consumers.

Because fared use will increase the value of copyrighted works, moreover, it will encourage improvements in their quantity, quality, and availability.[21] Consumers will thus benefit. Although this cornucopia of expressive works may at first come only for a fee, some of it eventually will fall into the public domain. Copyright holders might very well offer limited free access to their wares in an attempt to draw more extensive (and expensive) uses. Inspired by the prospects of licensing, entrepreneurs will undoubtedly create other services, at present utterly and inevitably unforeseen, to attract and satisfy consumers of information.

Because fared use creates well-defined and easily obtained rights to expressive works, it puts the power of the market in the service of consumer demand. As Professor Goldstein explains, "there is no better way for the public to indicate what they want than through the price they are willing to pay in the marketplace. Uncompensated use inevitably dilutes these signals."[22] Fared use therefore probably will provide better public access to copyrighted works than fair use does or could. At any rate, no one can plausibly claim that fared use necessarily would serve the public interest any less well than copyright's current *quid pro quo*.

4. Fair Use Continues to Bar Copyright Censorship

Despite the inroads made by fared use, fair use will continue to trump censorship-by-copyright. The *American Geophysical* court allowed licensing to limit the fair use

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[19] Ronald H. Coase, *The Institutional Structure of Production*, reprinted in COASE, ESSAYS ON ECONOMICS AND ECONOMISTS 3, 11 (1994).
[20] *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 193 (1960) (discussing the effect of reduced transaction costs on the optimal distribution of resources).
[21] *See* Mark Stefik, *Trusted Systems*, SCI. AM., Mar. 1997, at 78, 78-79, 81; Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J. L. & PUB. POL'Y 867, 880 (1990).
[22] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 217 (1994).

defense only "when the means for paying for such a use is made easier."[23] The court thus conditioned its holding on the observation that "a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use . . . ."[24] In this, it followed the Supreme Court's reasoning in *Campbell*:

> The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.[25]

Therefore, although copyright holders might like to stop wags who evade technical and contractual restrictions to reuse "liberated" works in objectionable ways, the fair use defense would continue to shield such defendants from copyright infringement claims. Here, at least, fair use holds its ground.

Can you count on the fair use defense to excuse not only your objectionable reuse of a copyrighted work but also your refusal to pay for that use? Probably so. Reuses that qualify for the fair use defense do not, under § 107 of the Copyright Act, constitute infringement.[26] The Act would thus not obligate you to pay.[27]

Requiring payment in such circumstances arguably make more sense, for the same reasons that support the spread of licensing generally.[28] Furthermore, excusing non-payment might encourage over-production of reuses that aim, for purely economic reasons, to offend copyright holders.[29] True, parody and other criticism "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[30] But too much of a good thing is no good at all.[31]

Such theoretical considerations have yet to change copyright law, however. Unless and until they do, it looks as if information providers will have to suffer objectionable uses without remuneration, license them grudgingly, or try to prevent them by other means—including, most notably, by invoking their common law rights.[32]

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[23] 60 F.3d at 931.
[24] *Ibid*. *See also* Princeton University Press, 99 F.3d at 1387, n. 4 (quoting same).
[25] 510 U.S. at 592.
[26] "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C.A. § 107.
[27] "Today, the effect of declaring a use 'fair' is to make it free of charge." Ginsburg, *supra* note [[cite]], at 64.
[28] *See* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?* 46 J. COPR. SOC. 513 (1999).
[29] "We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original." Campbell, 510 U.S. at 599 (J. Kennedy, concurring).
[30] Campbell, 510 U.S. at 579.
[31] *Cf. Saturday Night Live* (NBC television broadcast, 1993-95 seasons).
[32] *See infra* at Part III.A (discussing such contractual techniques), and *infra* at Part III.B (discussing enforceability of resultant contracts).

B. Fared Use

Copyright holders generally try to exercise their statutory rights to recoup the costs of creating, copying, and distributing expressive works. Like most of us, they aim to win profits, too. Common law aids and abets that effort by offering a trusted body of time-tested and reasonably efficient default rules. Thus, for instance, an author might license the use of her copyright, relying on contract law to guide the deal. She would have a tort claim if she suffered fraud in the process. And she—or more likely, her licensor—might use common law property rights—in labs, workshops, and packaging—to put the copyrighted work under lock and key.

Some copyright holders might try to do still more with common law, employing it to win back rights that fair use would deny. Most copyright holders won't bother with such things, granted. In most cases, a contract that modifies fair use's default rules by allowing a copyright holder to censor offensive uses simply will not be cost-effective. The problem: an anti-criticism contract fails to provide the licensor with any greater monetary benefit than unconstrained licensing would provide, and may provide considerably less. Therefore, only a copyright holder with an overriding non-monetary objective, such as a powerful aversion to public criticism, will find anti-criticism contracts worthwhile.

Few copyright holders will. Most will instead put finance before honor.[33] If that sounds crass, keep in mind that anti-criticism contracts will not come cheaply. Licensors who want injunctive relief against offensive uses will not only have to forego licensing fees for such uses and (almost certainly) bear litigation costs; they will also have to offer consumers something extra to make such censorious contracts attractive in the first instance. That something extra probably will take the form of lower licensing fees for acceptable uses of copyrighted material. In sum, copyright holders so thin-skinned as to demand and enforce anti-criticism contracts had better have fairly thick wallets.

Nothwithstanding those caveats, let us assume that some copyright holders, at least some of the time, will want to combine their statutory rights with their common law rights in an effort to prevent the fair use of their works. Would such an effort succeed? It probably would, under current law. Should it? Only if the law respects common law rights over copyright rights.

If copyright and common law combine to give copyright holders too much power, only the former bears the blame. Copyright, recall, represents a statutory exception to our common law rights, a special privilege justified, at most, only as a necessary evil.[34] If copyright goes too far, it does so by transgressing our common law rights to our throats, pens, and presses. It thus makes no sense to condemn the common law for

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[33] Consider that the court in *Princeton University Press* reported only one instance of a publisher refusing to license copies; where "[t]he excerpt was so large that the publisher would have preferred that students buy the book itself . . . ." 99 F.3d at 1388. *See also* Bell, *supra* note 1, at 597 (discussing how and why the litigants in *Campbell* finally settled their dispute).

[34] See supra, chapter 3.

copyright's excesses. Rather, we should treat the cause of the problem, trimming back copyright rights out of respect for common law ones. The next chapter discusses how to do so.

Conclusion

Under current legal doctrine, fair use shrinks as licensing opportunities grow. In this way, markets fix copyright's limitations. We should welcome that sort of reform as both efficient and equitable. But fair use's power will endure, nonetheless. It will continue to protect such things as reviews that critically quote copyrighted works, disclosures of otherwise unrestricted information, or parodies. When fair use nullifies their statutory rights, copyright holders might resort to common law means of protecting their works. Perhaps that combination of copyright and common law rights will prove oppressive. In that event, though, we should respond by limiting the former and respecting the latter.