Et Tu, Fair Use?
The Triumph of Natural Law Copyright

By John Tehranian*

* A.B., Harvard University, 1995; J.D., Yale Law School, 2000; Associate Professor, University of Utah, S.J. Quinney College of Law. I would like to thank the University of Utah College of Law Research Fund for its support.
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I. Introduction

Since its advent in 1841, the fair use doctrine has been hailed as a powerful check on the limited monopoly granted by copyright. Fair use, we are told, protects public access to the building blocks of creation and advances research and criticism. This Article challenges the conventional wisdom about fair use. Far from protecting the public domain, the fair use doctrine has played a central role in the triumph of a natural law vision of copyright that privileges the inherent property interests of authors in the fruits of their labor over the utilitarian goal of progress in the arts. Thus, the fair use doctrine has actually enabled the expansion of the copyright monopoly well beyond its original bounds and has undermined the goals of the copyright system as envisioned by the Framers.

In supporting this claim, this Article first charts the anti-monopolistic impetus for federal copyright protection and reflects on the original understanding of copyright as epitomized by a series of early cases on the rights of translation and abridgement. To the Framers, copyright was a form of compensation—a quid-pro-quo for a benefit granted to society—not a natural right to which authors were inherently entitled for their creative efforts. Specifically, the Copyright Clause of the Constitution, the 1790 Copyright Act, and the early jurisprudence of the Republic envision copyright as a property right limited in both scope and duration with the particular goal of encouraging the dissemination of knowledge. Thus, while early copyright laws prohibited slavish copying of a protected work, there was no such interdiction against transformative uses of a protected work, as such uses were considered accretive to progress in the arts. Ultimately, however, this notion of copyright infringement would undergo a radical transformation.
Justice Story’s fair use test set into motion a striking departure from this original heuristic by reintroducing long-spurned natural law elements into the copyright calculus. Transformative uses were no longer non-infringing per se. Instead, any use of a copyrighted work, whether partial or complete, literal or non-literal, was considered potentially infringing, excusable only after the alleged infringer proffered an effective fair use defense. The fair use elements, which included the amount and substantiality purloined from the copyrighted work, the nature of the copyrighted work, and the harm done to its economic value, focused more on what was taken from a copyrighted work than what use was made with the copyrighted work.

Thus, fair use privileged the inherent property rights of an author in the fruits of her intellectual labor above all else, including the central goal of the federal copyright system—progress of the arts. As a result, this Article calls for a serious reassessment of the role of fair use in the infringement calculus, especially in an age where networked computers and malleable digital content has enabled new forms of artistic and post-modern experimentation.

II. The Seeming Triumph of Instrumentalism: Copyright Law in the Early Years

Before assessing the radical transmogrification in copyright jurisprudence precipitated by Justice Story’s fair use test, it is critical to understand copyright law in the years prior to 1841. To this effect, an examination of the origins of copyright law, the text of the Constitution and the first Copyright Act, and the reasoning adopted by a series of cases analyzing the rights to translate and abridge copyright works is particularly instructive.

A. The English Background
First, the context in which the Framers drafted the Copyright Clause in 1787 serves to illuminate the philosophical underpinnings of federal copyright law. Indeed, copyright protection originally stemmed from profoundly anti-monopolistic impulses.¹ Prior to the enactment of the world’s first copyright statute, the British Crown had issued royal letters patent that had granted the Stationers’ Company, a guild of booksellers and printers, a virtual monopoly in publishing in England. Under the letters patent system, the Stationers’ Company (rather than authors) alone held copyrights in works, and these copyrights lasted perpetually. As the sole guild licensed to publish in England, the Stationers’ Company also acted as a royal censor by denying publication to controversial writings.

Parliament sought to break up the publishing monopoly with the passage of the Statute of Anne. First, the Statute granted authors, rather than publishers, the copyright in their works and the exclusive right to publish their intellectual creations.² Second, the duration of copyright was severely curtailed, going from perpetuity to a mere 14 years³ (with the possibility of a single renewal if the author were still alive at the end of the 14-year term)⁴ for all new works. Meanwhile, existing works received 21 years of copyright protection.⁵

² Statute of Anne, 1709, 8 Anne, ch. 19 (Eng.).
³ “[T]he author of any book or books already composed, and not printed or published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of first publishing the same, and no longer.” 8 Anne, ch. 19 (1710).
⁴ “[A]fter the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.” Id.
⁵ “[T]he author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or
The Statute of Anne’s anti-monopolistic origins were inextricably tied to the utilitarian philosophy underlying the Act. The perpetual copyright formerly enjoyed by publishers at common law and through the Crown’s letters patent was legitimated through an appeal to the natural rights of authors in their labor, regardless of the impact on progress in the arts. The Lockean logic was seemingly irrepresible: By putting labor into their intellectual creations, authors automatically earned a natural property right in their works. This right was perpetual, just like the right to real property or chattel, and it passed, undiminished, to publishers when they purchased works from authors.

The Statute of Anne explicitly rejected this notion. The title of the Statute reflected its true purpose. As “[a]n act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned,” the Statute sought to maximize the encouragement of learning, not to protect the inherent property rights that authors (or publishers) possessed in their works. In fact, a preamble concerning “the undoubted property” of authors was removed prior to the Act’s passage. Thus, to the extent that property rights were granted in intellectual creations, they were endured by legislative fiat, not natural law, and were tolerated for instrumental purposes.

books, in order to print or reprint the same, shall have sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer.”

*Id.*

6 See 2 JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT §§ 24-51 (1924). LOCKE, supra note , at 305-06. As Locke argued, “Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are property his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.”

7 Ochoa & Rose, *supra* note 1, at 683.

8 Statute of Anne, 1709, 8 Anne, ch. 19 (Eng.).

Despite passage of the Statute of Anne, the guild of publishers continued to insist upon the natural rights of authors in a perpetual copyright in their creative works. As they argued, the Statute of Anne merely appended a statutory copyright system on top of the existing, natural and perpetual right to one’s creations. The knell for this view ultimately rang in 1774 with *Donaldson v. Becket*, in which the House of Lords determined whether the copyright granted by the Statute of Anne merely co-existed with the prior common law copyright scheme for creative works or supplanted it. As the House of Lords ruled, copyright was a mere statutory construct developed for instrumental reasons by the legislature, not a natural and perpetual right; or, in the parlance of French legalese, copyright was deemed privilège rather than propriété. Thus, the task first undertaken with the Statute of Anne appeared complete.

**B. The Creation of American Copyright**

It is within this context that the Framers drafted, without much recorded debate or controversy, the Constitution’s Copyright Clause. The Copyright Clause of the Constitution is clearly grounded in an instrumentalist discourse, granting Congress the power to "promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Reflecting a utilitarian, rather than a natural law, impulse, the language

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12 See Irah Donner, The Copyright Clause of the U.S. Constitution: Why did the Framers Include It with Unanimous Approval?, 36 AM. J. LEGAL HIST. 361, 361 (1992); Edward C. Walterscheid, To Promote the Progress of the Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. INTELL. PROP. L. 1, 26-27 (1994). Indeed, the only mention of the Copyright Clause in the Federalist Papers is a brief reference in Federalist 43 that simply states what an obvious need there is for federal copyright and patent protection. See PUBLIUS, FEDERALIST #43.
of the Copyright Clause was borrowed directly from the Statute of Anne. Beyond this expressly utilitarian rationale, the Clause advances no notion of the inviolability of intellectual property rights and explicitly limits copyright and patent protection to a finite duration, not perpetuity. Thus, the Copyright Clause carefully eschews any embrace of a natural law, labor theory of intellectual property—a fact made all the more remarkable by the rather heavy influence of Lockean hermeneutics on the Framers.  

The utilitarian intent behind the Copyright Clause is further revealed through the various niceties of the first Copyright Act, passed in 1790 pursuant to the authority of the Copyright Clause. The title of the Act is thoroughly instrumentalist in bent, emphasizing the ends of the law and the temporary nature of the monopoly granted therein: “An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned.” Moreover, the federal copyright scheme adopted by Congress only conferred protection upon publication, or when a work was first made available to the public. The instrumental quid-pro-quo was therefore explicit: In return for publishing work and disseminating it to the public, a writer would receive a limited monopoly for exclusive exploitation of the publication. Additionally, by making the benefits of copyright protection available only to American citizens and residents, Congress eschewed a natural law vision of copyright as inherent property right.  

All told, the “[t]he limited monopoly granted to authors by [the Copyright Act] was justified by the need to maximize the production of new works for public

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15 See 1 Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831) (emphasis added).
16 Of course, this policy choice also reflected profoundly protectionist impulses.
consumption, and its scope was measured by that justification.” It was copyright’s ability to serve the public needs that made its monopoly defensible, not the moral claims of the author. This view is reflected in the writings of James Madison and Thomas Jefferson, both of whom were loathe to tolerate monopoly in any form. As Thomas Jefferson once poignantly noted,

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone . . . He who receives an idea from me receives instruction himself without lessening mine . . . That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man . . . seems to have been peculiarly and benevolently designed by nature.

James Madison was in accord. In a manuscript published posthumously, James Madison balanced his distaste for monopoly with the need for copyright protection to encourage dissemination. “Monopolies though in certain cases useful ought to be granted with caution, and guarded with strictness against abuse,” he warned.

The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given?

Madison’s statement on the nature of the copyright monopoly is both revealing and instructive. First, Madison’s thoughts are grounded in an instrumentalist discourse that

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20 JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999).
envisons copyright as a form of compensation, a quid-pro-quo for a benefit granted to society, not as a natural right to which authors are entitled for their creative efforts. Moreover, Madison emphasizes the temporary nature of the monopoly and its key role in providing encouragement for the sharing of knowledge. Thus, intellectual property monopolies would be tolerated under the Constitution only to the extent that they served a clear instrumental purpose that benefited society.

C. **Wheaton: The Apparent End of Natural Law Copyright**

Any lingering doubts about the viability of natural-law vision of copyright ostensibly vanished in the United States with *Wheaton v. Peters.*\(^{21}\) In the case, the United States Supreme Court followed the lead of the House of Lords in *Donaldson* and rejected the natural-rights view that held that all published creative works imbued in their authors a perpetual, common-law monopoly right. The facts of *Wheaton* were readily familiar to the Court. Peters had succeeded Wheaton as the Supreme Court reporter. Since Wheaton had not undertaken the proper procedures to obtain copyright protection under federal law,\(^{22}\) he argued that he owned a copyright in his reports by virtue of the common law right (justified under natural law theory) that predated the establishment of the statutory copyright. As Wheaton maintained, “The import of the act of congress of 1790 is, that before its enactment, there were legal rights of authorship existing; it provides for existing property, not for property created by the statute. . . . That law is not one of grant or bounty; it recognizes existing rights, which it secures.”\(^ {23}\) The Court rejected his argument and held that, with respect to published works, there was only one copyright:

\(^{21}\) 33 U.S. 591 (1834).

\(^{22}\) Wheaton, 33 U.S. at 664-68.

\(^{23}\) Wheaton, at 653.
federal statutory copyright. After all, if copyright were a common law right, the statutory grant would be thoroughly superfluous.

The upshot of the Court’s ruling was its rejection of a strong, natural law, property-based vision of copyright. Under the natural law view, “[t]he right of an author to the production of his mind is acknowledged every where. It is a prevailing feeling, and none can doubt that a man's book is his book—is his property.” By contrast, the Court held that copyright was an instrumental construction of the state that granted strictly delimited rights to authors; published works came under the exclusive jurisdiction of federal, statutory copyright protection, which aimed to reward authors with a limited monopoly term in their creative works to encourage their dissemination to the public and to advance progress in the arts. The Court thereby confirmed the Framers’ intention for a limited-duration copyright that served the public interest.

It is critical to note that the Wheaton Court did acknowledge one exception to this framework—as at common law, authors continued to retain rights in unpublished manuscripts since unpublished works remained outside of the purview of the Copyright Act. This common law protection for authors’ unpublished writings continued until 1976 and, significantly, it was not rationalized on strict property or natural law grounds. Instead, it was “an instance of the enforcement of the more general right of the individual

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24 Wheaton at 661.
25 Wheaton at 661 (“Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.”).
26 Wheaton at 653.
27 See Ochoa & Rose, supra note 1, at 675.
28 Wheaton, at 657 (“That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted.”).
to be let alone.”\textsuperscript{30} As Samuel Warren and Louis Brandeis argued in their famous article on the right of privacy: “The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality,”\textsuperscript{31} or, put another way, the right of privacy. This is why it is the very act of publication that changes the nature of authorial rights in a work—publication constitutes a waiver of the right to privacy and subjects the work to the limited intellectual property rights dictated by the Copyright Act.

All told, by the mid-nineteenth century “the constitutional principle of copyright was that one is entitled to only a limited monopoly of material taken from the public domain and then only if its use benefits society.”\textsuperscript{32} With \textit{Wheaton}, it appeared that the utilitarian vision of copyright had triumphed. As a consequence, the infringement test developed by courts reflected this instrumentalist interpretation of the Copyright Clause and the Copyright Act by embracing the principle of a \textit{limited} monopoly in two different senses. First, there was temporal limitation to the monopoly. Second, even during its duration, the monopoly was limited by a stringent notion of infringement. It is this second limitation that is our focus.

\textbf{D. The Early Copyright Decisions: Abridgement, Translation and the Focus on Transformative Use}

A series of rulings on the right to abridgement and the right to translation epitomizes the utilitarian understanding of copyright embraced by the Founders and

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\textsuperscript{31} Id. at 205.
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enforced in the United States until the early part of last century. Operating from the
notion that copyright was a statutory construct with an instrumentalist bent, not a natural-
law property right, courts viewed the act of infringement in a light largely unfamiliar to
us. Consequently, the focus in these cases was not on the value of the material wrested
from the original author but the transformative use made of the original work by the
defendant.

The starting point of this examination is the early judicial interpretations by the
English courts of that country’s Statute of Anne, the antecedent for the Constitution’s
Copyright Clause. The first substantial question addressed under the Statute was whether
a complete word-for-word translation of a copyrighted book automatically constituted a
form of infringement. The English courts ultimately held in the negative. In the seminal
case of Burnett v. Chetwood, Lord Mansfield reasoned that “a translation might not be the
same with the reprinting the original, on account that the translator has bestowed his care
and pains upon it.”33 Ultimately, this observation prevailed and became the law.34
Proceeding from the premise that translations were formidable intellectual enterprises,
English courts held that their transformative quality transcended the original work and
granted a tremendous benefit to the public. As a result, translations were not copyright
infringements.

The translation rule is significant for what it reflects about the nature of
infringement and the power granted by copyright: There is no infringement so long as an
accused infringer creates a substantial work of authorship with her use of the original

33 Burnett v. Chetwood, 2 Mer. 441, 35 Eng. Rep. 1008-9 (Ch. 1720)
34 KAPLAN, supra note 11, at 10-12.
work. The focus of infringement was therefore not on the inherent property rights held by an original work’s creator; rather, it was on the transformative application undertaken by subsequent users.

The English view of translation carried across the Atlantic. The case of *Stowe v. Thomas* best illustrates this westward migration in jurisprudence. In 1853, when Harriet Beecher Stowe sued the author of a German translation of her celebrated work, *Uncle Tom’s Cabin*, for copyright infringement, American courts were apparently faced with the translation question for the first time. Drawing from the available English jurisprudence, Justice Grier found no infringement. His reasoning, particularly in light of the facts of the case, is significant.

In the case, Harriet Beecher Stowe argued for the court to adopt a distinctly natural-rights vision of copyright, arguing that “[t]he right is original, inherent; a right founded on nature, acknowledged, we think, at common law; a right which stands on better ground and is more deeply rooted than the right to any other property whatever. . . . What a man earns by thought, study, and care, is as much his own, as what he obtains by his hands.” Operating from a premise that copyright grants absolute property rights to its owner, Stowe argued that the transformative value of the translation to society should be irrelevant to the court’s infringement analysis. Instead, the court should acknowledge that Thomas’s translation was free-riding on Stowe’s intellectual efforts—and trampling upon her natural property rights stemming from those efforts. Thus, translation inherently constituted infringement of the natural right to one’s intellectual property, as

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35 As Kaplan argues, the rule that emerged in this time was that “if an accused book was a work of authorship, it could not at the same time infringe.” KAPLAN, supra note, at 10.
36 23 F. Cas. 201 (C.C. Pa. 1853).
37 “The question is novel.” Stowe, 23 F. Cas. at 201 (Stowe’s attorney).
38 Id. at 202 & n.2 (1853).
“[t]he translator aims to convey to the mind of his reader the ideas and thoughts of the author; nay, the very shades of his ideas and thoughts; his exact manner and form of expression, and even his words, so far as represented by similarly constructed expressions in the new language.”

As the causal chain of Stowe’s argument reveals, the philosophical underpinnings of a court’s view of copyright would ultimately determine the result. If copyright were conceptualized as a natural law property right, translation would constitute infringement. By contrast, if copyright were viewed as utilitarian in nature, then the transformative nature of the translation process would lead to a finding of no infringement.

Besides the natural-rights appeal of her argument and popularity of her work, the circumstances surrounding the Stowe case were particularly favorable to Ms. Stowe. When a translator is rendering an author’s work into a foreign language, the translation effectively introduces a new audience to the work and perhaps even stimulates the market for the original work. Thus, barring plaintiff’s intention to enter the translation market, there is little or no harm done to the original work. This certainly was not the case in Stowe, however. Prior to defendant’s translation of Uncle Tom’s Cabin, Harriet Beecher Stowe had commissioned and authorized a German translation so that her book could be purchased and read by the large German-speaking population in the United States at that time. In fact, her husband even helped put together the translation. Stowe had every intention of profiting in the translation market for her book, and defendant’s translation caused her direct market harm: The German translation by Thomas had virtually killed the market for the translation authorized by Stowe as a result of its superior readability.

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39 Id. at 202.
40 Id. at 201.
In a remarkable conceit, the defendants happily acknowledged this fact: “The sale of [Stowe’s] translation, indeed, was impaired [by defendants’ work].”41

However, rather than using this fact as a basis for finding infringement (due to the market harm to Stowe’s work and her right to reap the just rewards for her intellectual labor), the court drew upon this fact as a reason for finding no infringement. The court first squarely rejected Stowe’s philosophical position regarding her natural exclusive right to use and exploit of her creation. In language that is virtually unthinkable to a modern observer, the court noted that

[b]y the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. [Uncle Tom and Topsy are as much publici juris as Don Quixote and Sancho Panza.] All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. [They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished.]42

The fact that Thomas’s German translation caused market harm to Stowe garnered no sympathy from the court, thereby reflecting just how strongly the infringement test embraced a utilitarian analysis that assessed the intellectual use made of a work. As the defendants argued, the injury to Stowe’s translation was the simple result of the competitive forces of the marketplace. As they observed, “the reason why [her authorized translation] is injured, is that her translation has less genius than ours.”43 The court seized upon this observation when it performed its utilitarian calculus on the infringement claim. “To make a good translation of a work,” noted Justice Grier, “often requires more learning, talent and judgment, than was required to write the original.

41 Id. at 206.
42 Id. at 208.
43 Id. at 206.
Many can transfer from one language to another, but few can translate. To call the translations of an author’s ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation.”

While the court suggested that a word-for-word mechanical translation might constitute infringement, it held that a learned rendition, such as Thomas’s work, clearly did not run afoul of copyright law. The reason was plain to the court: At the core, copyright was not about protection of an authorial monopoly based on a natural-rights theory of property; instead, it was about striking a utilitarian balance that enables authors to reap economic rewards for publishing and disseminating their creations while also enabling others to make progressive uses of these disseminated work for the public benefit. Thus, the intellectual craft undertaken in the creation of the translation was central to the court’s decision. Instead of looking at what was taken from the plaintiff, the court examined what use the defendant made of that work and how it impacted the promotion of the arts. Since the availability of a superior translation advanced progress in the arts, Stowe lost her infringement claim.

The jurisprudence on abridgement during copyright’s early years is similarly revealing. The English courts were first forced to address the issue of abridgement in *Gyles v. Wilcox*. In the case, the publisher owning the copyright for Sir Matthew Hale’s *Pleas of the Crown* pursued an infringement suit against the publishers of *Modern Crown Law*, accusing them of abridging Hale’s work. The language of the opinion is highly

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44 *Id.* at 207.
instructive. According to presiding Lord Chancellor Hardwicke, a work only “colourably
shorted” constituted piracy.\(^46\) However, as he cautioned, this principal

must not be carried so far as to restrain persons from making a real and
fair abridgement, for abridgements may with great propriety be called a
new book, because not only the paper and print, but the invention,
learning, and judgment of the author is shown in them, and in many cases
are extremely useful, though in some cases prejudicial, by mistaking and
curtailing the sense of an author.\(^47\)

Hardwicke therefore expounded the notion that an abridgement could constitute a new
work of authorship, imbued with invention, learning and judgment, despite how heavily
an abridger borrows from a copyrighted work. Although he did not fully adjudicate the
instant case,\(^48\) Lord Hardwicke did provide guidance for an infringement test that would
focus less on what was taken from the copyrighted work and more on the nature and
extent of the defendant’s use of the copyrighted work. As a consequence, courts would
eschew any recognition of plaintiffs’ inherent, natural law-based property right in the
creations of their mind and instead look to an instrumentalist calculation of how that
work was being used by the allegedly infringing party: If the use was transformative and
helped to promote progress in arts, then a court should find no infringement. This
fundamentally utilitarian analysis still allowed for authors and publishers to obtain just
rewards on their intellectual labors—just returns that came from the exclusive right of
plaintiffs to have their work, as it existed, published in the marketplace.

Drawing on Hardwicke’s opinion in *Gyles*, the act of abridgement was not found
to infringe an author’s copyright in *Newbery’s Case*.\(^49\) In the suit, Newbery had

\(^{46}\) *Id.* at 957.
\(^{47}\) *Id.*
\(^{48}\) Ultimately, Lord Hardwicke recommended the case to arbitration, where the plaintiff lost. *See* KAPLAN, *supra* note 11, at 11.
\(^{49}\) *Newbery’s Case*, Lofft 775, 98 Eng. Rep. 913 (Ch. 1773).
condensed and abstracted Hawkesworth’s *Voyages*.\(^{50}\) Just as Chancellor Hardwicke had done, Lord Chancellor Apsley, the presiding judge in *Newbery*, argued that an abridgement preserving “the whole” of a work constituted “an act of understanding . . . in the nature of a new and meritorious work.”\(^{51}\) As a consequence, Newbery escaped liability for infringement. Remarkably, as Benjamin Kaplan points out, “Newbery was not only exculpated but congratulated for reducing Hawkesworth and preserving the substance in different language perhaps better than the original.”\(^{52}\)

As with translation, abridgement was considered an intellectual exercise, which, when performed with superior competence, only improved an original work. As a consequence, it advanced the central jurisprudential concern in an infringement suit—progress in the arts. Thus, the act of abridgement could not be an act of infringement. The abridgement rule, like the translation rule, was also adopted in the United States.\(^{53}\) In *Wheaton*, the plaintiff even acknowledged the right of an individual to create an abridgment.\(^{54}\) Similarly, Judge Story’s well-chronicled decision in *Folsom v. Marsh* affirmed the vitality of the abridgement rule.\(^{55}\)

As epitomized by the translation and abridgement cases, our examination of eighteenth and nineteenth century copyright jurisprudence demonstrates that the notion of

\(^{50}\) Hawkesworth’s work was itself based on a reconstruction of the original journals of several notable explorations, including Captain James Cook’s first circumnavigation of the globe.

\(^{51}\) *Newbery’s Case*, Lofft 775, 98 Eng. Rep. 913 (Ch. 1773).

\(^{52}\) *KAPLAN*, supra note 11, at 12.

\(^{53}\) See, e.g., *Story v. Holcombe*, 23 F. Cas. 171 (C.C.D. Ohio, 1847) (No. 13,497) (finding that “[a] fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment”).

\(^{54}\) See *Wheaton v. Peters*, 33 U.S. 591, 651 (1834) (“An abridgement fairly done, is itself authorship, requires mind; and is not an infringement, no more than another work on the same subject.”). The plaintiffs, however, argued that the Condensed Reports at issue in the case did not constitute an abridgement: “The [defendant’s] Condensed Reports have none of the features of an abridgement, and the work is made up of the same cases, and no more than is contained in Wheaton’s Reports.” *Id.* at 652.

\(^{55}\) See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C. Mass. 1841) (No. 4,901) (noting that a “real, substantial condensation” of a work did not constitute an act of infringement so long as “intellectual labor and judgment [was] bestowed thereon.”). As we shall see, however, this affirmation was somewhat disingenuous, as the opinion fundamentally altered copyright law. *See infra.*
transformation lay at the heart of any infringement analysis. Whether appropriation of someone’s work resulted in a finding of infringement depended largely upon the benefit of the use to society. As a consequence, the value of an expropriated copyrighted work was often irrelevant to a court’s infringement calculus. This is not to say that all natural law supporters of authors’ rights, both in the law and in society at large, had been silenced. However, the infringement test was largely utilitarian in bent, as the Constitution and Copyright Act intended. All that would change over the next century and a half and the morphing of copyright law began, most centrally, with Justice Story’s decision in *Folsom v. Marsh*.56

III. Natural Law Redux: The Development of the Fair Use Doctrine

A. *Folsom v. Marsh*: Justice Story and the Betrayal of a Utilitarian Vision of Copyright

Any student of copyright recognizes the *Folsom v. Marsh*57 decision as the origin of the fair use test. Although the word ‘fair use’ was not bandied about in the decision, it is the first case to set out the modern balancing test for fair use analyses.58 Celebrated by many observers as a triumphant victory for the public domain,59 *Folsom* achieves nothing of the sort. Quite to the contrary, *Folsom* represents a fundamental betrayal of two hundred years of copyright law and a re-embrace of the monopolistic, natural-rights based vision of copyright rejected by the Constitution, the Framers, and by the

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56 9 F. Cas. 342 (C.C.D. Mass. 1841).
57 Id.
58 According to Justice Story, in deciding questions of infringement, courts should “look to the nature of and objects of the selections made, the quantity and value of the materials use, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” See *Folsom*, 9 F. Cas. at 348. This test is closely replicated in the current fair use provisions of the Copyright Act. See 17 U.S.C. § 107.
59 See, e.g., Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’y 1 (2002) (praising fair use as “as one of the most important limits on the monopoly of copyright owners over the use of their copyrighted expression”).
jurisprudence of the time. It is for this reason that at least one scholar has hailed *Folsom* as the worst intellectual property decision ever.\(^{60}\) Unfortunately, it is also the most cited case in copyright law and the foundation of modern copyright jurisprudence.

As L. Ray Patterson notes, there are two prevalent myths surrounding the *Folsom* decision. First, it is claimed that *Folsom* created fair use. Instead, it merely redefined what constituted infringement.\(^{61}\) Secondly, *Folsom* is viewed as having diminished the rights of copyright holders. In fact, argues Patterson, “the case enlarged those rights beyond what arguably Congress could do in light of the limitations on its copyright power and, indeed, fair use today continues to be an engine for expanding the copyright monopoly.”\(^{62}\) Far from creating fair use and carving a hole into the copyright monopoly, the *Folsom* decision by Justice Story transformed copyright law and expanded its monopoly. As Patterson argues, Story accomplished this coup by categorizing copyright as a subset of property law grounded in natural rights instead of a subset of public domain law characterized by a limited statutory monopoly: “Since the law of which copyright is a subset is the source of copyright rules, the choice has important consequences. Whether copyright is a statutory monopoly or a proprietary right is significant for both copyright owners and users of copyrighted material. The former concept provides greater, the latter less, leeway for use by others.”\(^{63}\)

The tenor and logic, rather than the actual (and probably rightful) outcome, of *Folsom* is most salient. In the case, plaintiffs argued that Jared Sparks’s 6763 page, twelve volume *The Writings of George Washington*, a collection of Washington’s official


\(^{61}\) *Id.* at 431.

\(^{62}\) *Id.*

\(^{63}\) *Id.* at 432.
and private papers with additional narrative and editorial notes, was infringed by the Rev. Charles Upham’s 866 page, two volume *The Life of Washington*, which lifted 255 pages directly from the former work. Justice Story of the United States Supreme Court, acting in his capacity as a Circuit Court Judge, heard the case.

Story’s bent is clear from the outset of the opinion, when he immediately emphasizes that Sparks’s work “has been accomplished at great expense and labor, and after great intellectual efforts, and the very patient and comprehensive researches, both at home and abroad.” Only a few lines into the decision, it becomes clear that the court focuses not on the value of the defendant’s use to society, but instead on the plaintiff’s property right stemming from the creation of the work. This is a radical departure from prior jurisprudence, especially as reflected in the translation and abridgement cases discussed earlier.

Story’s legal analysis shows little regard for the potential benefit that dissemination of the allegedly infringing work may have for society. In fact, he readily concedes the value of the defendant’s work to society: With his “very meritorious labors” in this “great undertaking,” the defendant has “produced an exceedingly valuable book,” admitted Story. However, the admitted value of the defendant’s work had little bearing on his analysis or decision. Instead, Story likened the act of borrowing to an act of stealing, a clear violation of property rights. To any potential borrower or “free-rider,” Story sternly warned, “None are entitled to save themselves trouble and

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64 The 255-page statistic excludes official documents and documents that had appeared in publication prior to Sparks’s own use.
65 *Folsom*, 9 F. Cas. at 345.
66 *Id.* at 349.
67 *Id.* at 349.
68 *Id.* at 348.
expense, by availing themselves, for their own profit, of other men's works, still entitled

to the protection of copyright.”  

With this natural-law based view of copyright guiding his opinion, both the potentially transformative use by the defendant and the benefit to public were of little import—a stark contrast to and departure from the translation and abridgement jurisprudence of the time.

Story’s property-based analysis became more pronounced further along in the decision. Adopting strong natural-rights language, Story maintained that “[t]he entirety of the copyright is the property of the author; and it is no defense, that another person has appropriated a part, and not the whole, of any property.”  

With these words, Story explicitly expanded copyright protection to prevent filching of parts of a work, rather than the slavish duplication of an entire work. However, this alone is not necessarily a dangerous, or even inappropriate, position. It is the next step in Story’s logic that is particularly pernicious. All of a sudden, an act of borrowing, either whole or part (to the tiniest bit), was presumed to constitute an act of infringement. After all, to Story, the borrowing party was usurping control of someone else’s property. Borrowing could still be excused, but only if it did not amount to conversion—if, in fact, the borrowing was de minimus and did not affect the value of the property taken. Thus, under Folsom, the act of borrowing might be excused by effectively proffering a defense of fair use.

In numerous respects, this is a striking reversal of the previous copyright jurisprudence. Previously, courts viewed acts of borrowing, if they were sufficiently transformative, as simply non-infringing uses. In other words, the burden of persuasion remained on the copyright holder to demonstrate that the work was infringing and not

69 Id. at 349 (quoting Lewis v. Fullarton, 2 Jur. (London) 127 [3 Jur. 669], 2 Beav. 6).
70 Id. at 348.
transformative. Under Folsom and its progeny, once a prima facie showing of borrowing was made, the burden then shifted to the alleged infringer to demonstrate that their use was excusable.

Second, a showing of transformative use no longer constituted a legitimate defense to an infringement claim. Instead, the transformative use of a copyrighted work would become, at best, one of several criteria used in determining whether a proper fair use defense had been proffered. To determine fair use, courts, according to Story, should look “to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”71 The factors enumerated by Justice Story, and later codified into the Copyright Act,72 were grounded in a natural-rights vision of copyright, focusing on what was borrowed from the original work and on Lockean protection of the original work’s value, not on the use made through the act of borrowing. Thus, the paramount purpose of the infringement action became assurance of the rights of an author in the commercial value of her intellectual labors, not the balancing of a fair return on intellectual creations with the public’s right to make transformative uses of them and advancement of the arts. All told, fair use introduced natural-rights based factors explicitly into the judicial calculus on infringement. As I discuss later,73 these distinctions were vital to the outcome of copyright disputes as they altered the fundamental nature of the infringement equation.

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71 Id. at 348.
73 See infra, section on fair use and failure of it to allow for transformative uses outside of parody.
Moreover, there is a disingenuous air permeating Story’s opinion. As Patterson points out, Justice Story was on the Supreme Court at the time of the Wheaton decision. Yet Folsom utterly ignores Wheaton and rewrites the law of copyright:

Since the two theories—natural law and statutory monopoly—were fully argued and considered in Wheaton when Story was a member of the Court, he must have been familiar with them and conscious of the fact that the Court had rejected the natural law theory in favor of the statutory monopoly theory. Against this background, one is justified in concluding that Story’s use of natural law copyright ideas in deciding Folsom is a classic case of intellectual dishonesty, and that the Wheaton case was one of his targets.\footnote{Patterson, supra note 60, at 442.}

Patterson may overstate his case. After all, Story’s shifts in the infringement calculus were subtle. Moreover, courts after 1841 were totally free to ignore Folsom and follow Wheaton as well as the previous translation and abridgement cases. What is most significant, however, is that subsequent courts did not ignore Folsom, and Folsom laid the groundwork for a fundamental change in infringement analysis. With its embrace of a natural law, property-rights vision of intellectual property and its development of a fair use test based thereon, Folsom v. Marsh marked a basic reversal in copyright jurisprudence through its reinterpretation of the infringement test. In fact, instead of limiting the scope of the copyright monopoly, the fair use test expanded the property rights of copyright holders, thereby frustrating copyright’s utilitarian goals.

Significantly, Justice Story’s revised formulation of the infringement test and his fair use criteria in Folsom did not emerge from thin air. Rather, Story’s jurisprudence in the copyright arena reflected a recurring desire to protect the property rights of authors in their creations under a natural law vision. Just as in Folsom, in Gray v. Russell,\footnote{10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728).} Story focused the infringement calculus on what a defendant had taken from the original work,
not on the use made of that work by the defendant. Although he acknowledged the well-established abridgement rule in *Gray*, Story stated that, in determining what is a bona fide use of an existing work versus a copyright infringement, one must examine the value of the selections made and the probable effect on the market for the original work. It was on the basis of these criteria that, in the end, he found the use at issue in *Gray* (which another court may well have characterized as an abridgement) infringing.

Similarly, in his first major infringement suit following *Folsom*, Story further developed his natural law vision of copyright. In that case, *Emerson v. Davies*, Story faced a dispute over the alleged infringement of a map. Acknowledging the existing state of law, Story conceded that he “who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copy-right therein; if the variations are not merely formal and shadowy, from existing works.” However, just as in *Folsom*, he acknowledged the existing law with one hand while altering it with the other. By broadly defining what variations were merely “formal and shadowy,” Story was able to find the defendant’s work infringing, despite the rhetoric of his previous proclamation. In the end, his decision profoundly strengthened the rights of copyright owners in largely factual works such as maps and did so on Lockean grounds: “A man has a right to the copy-right of a map of a state or country, which he has surveyed or caused to be complied from existing materials, at his own expense, or skill, or labor, or money.” With his rulings in *Folsom*, *Gray* and *Emerson*, Justice Story paved the way for a radical alteration in the modern copyright infringement inquiry.

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76 *See id.* at 1038-39.
78 *Id.* at 619.
79 *Id.*
B. The Hegemony of Natural Law Copyright: Fair Use and Its Progeny

All told, the rulings of Justice Story unleashed a steady morphing in copyright law that would fully take shape in the twentieth century. According to Hannibal Travis, copyright law has transformed along two axes during the past 150 years.\(^{80}\) First, the definition of copyright infringement expanded from merely proscribing unauthorized duplication of a copyrighted work to forbidding literal copying of small fragments of a work. This trend began with *Folsom v. Marsh*, which found infringement in the borrowing of only a portion of a work, and, according to Travis, perhaps reached its nadir in *Harper & Row*.\(^{81}\) Second, copyright protection expanded from protecting the literal language of a work to non-literal elements such as characters and scenes.\(^{82}\) Like Justice Story in *Folsom*, judges have rationalized each step of the expansion by appealing to the need to safeguard an author’s natural right to the fruit of her intellectual labors.

However, the two axes identified by Travis can really be characterized as one significant mutation in copyright law: The focus in the infringement test has shifted from the product created with the allegedly infringing use to the original copyrighted work itself. This shift in the focus eventually led to the reversal of both the abridgement and translation rules. As our previous discussion has revealed, abridgement and translation were non-infringing acts precisely because of their transformative quality. However, with the diminished importance of transformative use and the development of a fair use test based on largely natural law criteria, abridgement and translation activities were now


\(^{81}\) See Travis, *supra* note , at 819.

\(^{82}\) See id.
infringing actions not excused by fair use. First, such uses inherently drew too greatly
(both in terms of quantity and value) on original copyrighted works. Second, such uses
had the ability to destroy the market for the original work and, more importantly, its
derivatives.

Consequently, in 1870, Congress overturned the Stowe decision by statute, explicitly adding to the list of exclusive rights guaranteed to a copyright owner the right
to translate one’s work. Meanwhile, the protection afforded to abridgement and
commentary has shrunk markedly over the past century, particularly in recent years,
despite the enunciation of an explicit fair use test in the 1976 Copyright Act. In short,
abridgement is no longer considered a non-infringing act or even fair use.

Besides the overturning of the abridgement and translation rules, the unwitting
hegemony of the property rights vision of copyright has been reflected in numerous other
trends. Historically, the courts and Congress have grounded the rationale for the
copyright clause in the discourse of use/access, not production rights. However, with the
notable exception of the rejection of the Lockean sweat-of-the-brow theory by the United
States Supreme Court in Feist, natural rights continue to taint the copyright equation,
increasingly dominating the direction of intellectual property laws.

84 The Act provided that “authors may reserve the right to dramatize or to translate their own works.” Id.
85 See, e.g., Twin Peaks Productions, Inc. v. Publications Int’l, Ltd., 996 F.2d 1366 (2d Cir. 1993) (finding
that defendants’ book about the television program Twin Peaks infringed the copyrights in the teleplays for
(holding that the Seinfeld Aptitude Test, a trivia book on all things Seinfeld, constituted an unauthorized
derivative work that infringed Castle Rock’s copyright in the Seinfeld television program).
86 See, for example, the recent suit by Scholastic, the owner of the Harry Potter copyright, against the New
York Daily News, which published a synopsis of the plot of the forthcoming Harry Potter and the Order of
the Phoenix book. See Keith J. Kelly, Scholastic Sues Daily News for $100M in ‘Pottergate’, N. Y. POST
at 37 (June 19, 2003).
First, in recent decades, the rhetoric of copyright law has changed. For example, in both academia and practice, we now talk about the field of “intellectual property.” The use of the term, clearly grounded in a discourse of property, is just a recent phenomenon. In fact, use of the term can only be traced to 1967. Moreover, as Mark Lemley has persuasively demonstrated, courts are increasingly foregoing detailed analyses of intellectual property cases and instead deciding copyright disputes based “earthly moralisms” that are grounded in a natural-rights discourse that inevitably favors plaintiffs.

In recent years, copyright doctrine has also expanded well beyond the point at which enhanced protection provides authors with greater incentives to create or publish their works. For example, it is far from clear how retroactive expansion of copyright terms under the Copyright Term Extension Act (“CTEA”) encourages more creativity from artists and benefits the public. However, the CTEA and the endless string of copyright term extensions that preceded it are entirely consistent with a natural-law vision of copyright granting authors an inherent property right in the fruits of their intellectual labors.

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89 See id. at 895 n.123.
91 Lemley, supra note 88, at 898 n.126.
92 See Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich. L. Rev. 1197, 1198 (“The notion that according copyright protection to architectural works will generate more creative architecture, for instance, is manifestly ridiculous. Even in [other] situations where instrumental justifications [for protection] remain plausible, their foundation is often shaky.”).
93 See 17 U.S.C. §§ 302(a), 302(c) & 304.
94 Even the majority’s decision in Eldred v. Ashcroft suggests this point. See Eldred, at 782-83 (noting that “we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA--which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes--is an impermissible exercise of Congress' power under the Copyright Clause.”)
Similarly, derivative rights have expanded significantly through the years. Under the 1831 Copyright Act, like the 1790 Copyright Act and the Statute of Anne before it, a copyright holder only possessed “the sole right and liberty of printing, reprinting, publishing, and vending” a work. In 1870, the right to dramatize or translate one’s work was added to the list of exclusive rights of copyright holders. The 1909 Act went even further, securing such derivative rights as novelization and musicalization for copyright holders. Finally, the 1976 Act gave authors the exclusive right to prepare all derivatives of their copyrighted works and provided an expansive definition of what constituted a derivative work.

Derivative rights appear much more justifiable on natural law, rather than utilitarian, grounds. As Stewart Sterk notes, the argument that derivative rights are necessary to help authors recover their costs is weak; such situations are exceedingly

95 Copyright Act of 1831.
96 Copyright Act of 1870.
97 See Act of March 4, 1909, ch. 320, 60th Cong., 2d Sess., 35 Stat. 1075. The Act gave authors the exclusive right to “translate the copyrighted work into other language or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.” See Act of March 4, 1909, ch. 320 § 1(b), 60th Cong., 2d Sess., 35 Stat. 1075.
99 Under the current (1976) Copyright Act, a derivative work is “a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adopted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” See 17 U.S.C. § 101.
101 On a related note, some theorists have even challenged the idea that copyright encourages innovation and creation. As Mark Nadel notes, very few creators ever reap significant financial rewards from copyright protections. See Mark S. Nadel, Questioning the Economic Justification for (and Thus Constitutionality of) Copyright’s Prohibition Against Unauthorized Copying: § 106, at 39, available at <http://www.ssrn.com>. In the winner-take-all entertainment, publishing, and software industries, only a precious few creators achieve extraordinary wealth through a hit record or bestseller. In these superstar-driven markets, copyright protection may simply enable publishers to support larger marketing campaigns and greater rents for powerful talents; these marketing costs and rents may well dissipate all of the increased revenues generated by copyright protection. Thus, borderline creators will never enjoy greater profits from copyright protection. See id. However, Nadel carries his point too far. While actual financial
As a consequence, it is not surprising that even derivative-rights advocates such as Landes and Posner have rejected this justification. Moreover, the two other justifications offered by Landes and Posner—that derivative rights prevent delays in production while authors simultaneously produce derivative works and that derivative rights reduce transaction costs by placing the copyright of the original work and any derivative rights in one person—are similarly untenable. As Sterk points out, the first justification can work both ways: Derivative protections may actually result in delayed production of the derivative works by an author in order to increase sales of the original. The second justification is also specious. If the original author has no derivative rights, then that reduces transaction costs just as effectively.

Moreover, the existence of derivative rights may, in individual cases, actually stifle artistic progress. Given that people at the upper echelons of wealth often face backward bending labor curves, it could be argued that copyright itself harms the rate of output by those creators of content deemed most valuable by society. On utilitarian grounds, therefore, we may not want to reward the biggest sellers in the content creation community quite so much, lest they become lazy, bloated rockers. For example, in the 1950’s and 1960’s, top music acts such as Elvis Presley and the Beatles routinely released at least one album per year. In those days, creators of copyrighted content rewards go to very few, it is possible that the promise and potential of huge financial rewards encourage individuals to create art. Thus, like a lottery effect, the promise of huge rewards may still incentivize artistic creation. Admittedly, the existence of derivative rights may further add to the incentives. However, the magnitude of this effect is uncertain and it may be more than offset by another effect noted by Nagel: the backward bending labor supply curve. See id. at 10.


See Sterk, supra note 100, at 1216-17.

See id. at 1217.

See Nadel, supra note 101, at 10.
received far lower rates of return on their creative output. With the advent of greater intellectual property enforcement, improved opportunities for licensing of derivative and original rights, and superior contract negotiations by content creators, artists such as Bruce Springsteen and U2 release a new album once every few years, if at all.

Derivative rights are, however, entirely consistent with a natural law vision of copyright that maintains that an author should have exclusive control over any works derived from her intellectual creations. Indeed, as derivative rights expanded, courts no longer considered the transformative value of the copyrighted work in infringement cases. Instead, the emphasis of the infringement inquiry was protection of the commercial value of original works, so long as a plaintiff demonstrated appropriation of her work by the defendant.

The jurisprudential basis for derivative rights is particularly revealing. In Daly v. Palmer, the first derivative rights case in American jurisprudence, a New York court found that Dion Boucicaut’s play After Dark infringed Augustin Daly’s play Under the Gaslight. Specifically, Daly claimed a copyright in the now all-too-familiar ‘Railroad Scene,’ wherein an evil character ties to a railroad track his victim, who is only rescued at the last second by our hero. Extensively citing Justice Story’s rulings in Folsom, Gray and Emerson, the Daly court issued an injunction preventing defendants from publicly performing any version of the Railroad Scene. The justification for such equitable relief was particularly significant. As the court rationalized, a dramatic work based on a

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107 See Jane C. Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 COLUM. L. REV. 1865, 1890 (1990). See also Kalem Co. v. Harper Bros., 222 U.S. 55 (1911); Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552); Dam v. Kirk La Shelle Co., 175 F. 902 (2d Cir. 1910) (holding that defendant's play infringed plaintiff's right to dramatize his story, even though the play borrowed only the story's central incident and contributed events, characters and dialogue of its own).

108 Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868).

109 Id. at 1133.
copyrighted play constitutes a piracy “if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.”  

Therefore conferred copyright in non-literal elements. Thus, it was no longer mere copying of a part or the whole of a work that constituted infringement. Rather, an infringement finding could result from a transformative use of a copyright work where the underlying non-literal elements of the copyright work were still recognizable. Derivative rights were therefore not so much about encouraging progress in the arts as they were about protecting the natural property rights an author had in both the literal and non-literal elements ascribed to her creation.

At the same time, even the Feist decision has drawn fire, as database compilers have lobbied Congress heavily for bills such as the Collections of Information Antipiracy Act (the “CIAA”). Such proposed legislation has sought to grant sui generis intellectual property rights to those who create databases lacking in sufficient originality and innovation to qualify for ordinary copyright protection. While some economists

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110 Id. at 1138.
have supported such protections on utilitarian grounds,\textsuperscript{113} natural law rights are at the core of the CIAA, which seeks to protect the hard work and labor that database owners put into their compilations of information.

Most importantly, the current infringement test and fair use scheme privileges the natural-rights view of copyright over a more instrumentalist vision.

IV. Transformative Use and Progress in the Arts

A. The Need for Transformative Use

As Marcel Duchamp pointed out at the beginning of last century, and as post-modern artists such as Negativland have argued at the beginning of this century, “the act of selection can be a form of inspiration as original and significant as any other.”\textsuperscript{114} One need not look much further than the work of pop artists such as Andy Warhol, and of appropriationist artists such as Barbara Kruger for illustration of this point. With the rise of digital technology and the potential for new forms of appropriation (and new forms of art based upon the act of appropriation), the dangers of the modern infringement test are even more significant. Digital technology has enabled a world of new transformative uses in the arts. However, public dissemination of these transformative, progressive, instructive, and enlightening uses are being restrained by the law. The infringement and fair use test delineated in \textit{Folsom} and adopted by the courts and Congress over the past 150 years comes dangerously close to an unadulterated embrace of a natural right in


\textsuperscript{114} See Negativland, \textit{Fair Use}, available online at http://www.negativland.com/fairuse.html.
intellectual creation, and it does so at the expense of the utilitarian rationale for copyright. The modern notion of copyright infringement operates from the premise that substantial similarity and illicit copying form a prima facie case for infringement which can then be refuted by a defendant, bearing the burden of persuasion, who offers a successful fair use defense. Such a gestalt ignores the origin of copyright as a privilege that is (1) bestowed through legislative act and (2) for utilitarian purposes. Indeed, in the modern copyright calculus, there is little room for considering transformative use and progress in the arts.

An examination of the way in which a federal court in New York resolved the novel issue of music sampling is particularly instructive and reflects how the modern infringement test, with its embrace of a property-based view of copyright, largely ignores the question of progress in the arts. In *Grand Upright Music v. Warner Brothers*, rapper Biz Markie was sued for unlawfully sampling *Alone Again (Naturally)*, a song written and performed on records by Raymond “Gilbert” O’Sullivan. In a rather brief decision, the court resolved the case by quoting Exodus and equating the Seventh Commandment with the law of copyright. “Thou shalt not steal,” stated the court, in a simplistic, property-based analysis of the case before it. However, the court failed to answer the (far from settled) threshold question: Were the actions of the defendants really akin to stealing? After all, the act of stealing is censured precisely because it makes a plaintiff worse off to make defendant better off and deprives a plaintiff of the use

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115 Simply witness the language of the Copyright Clause, the anti-monopolistic origins of American copyright law, and the early jurisprudence on copyright, including the unequivocal holding of the Supreme Court in *Wheaton*.
117 *Id.* at 183.
118 *Id.*
of his work. By contrast, the act of digital sampling does no such thing; a work can still be used by the plaintiff in any way she chooses (though, if allowed, digital sampling will not enable plaintiffs to gain exclusive benefit of any use of their copyright works).

Thus, courts have made it clear that the practice of digital sampling, used frequently in hip-hop and, increasingly, in other modern genres, requires the permission of a sound recording’s copyright owner.\textsuperscript{119} Depending on the quantity of the material copied, the sampling also may necessitate permission from the musical work’s copyright owner.\textsuperscript{120} However, in denying fair use to digital samplers, courts have not considered the impact of their decisions on progress in the arts, as clearly contemplated by the Constitution. Moreover, the digital sampling cases have epitomized how hegemonic the natural-rights vision of copyright has become. Sampling helps to create a new work—one that possibly advances the arts. Moreover, in most digital sampling cases, the allegedly infringing use actually makes a plaintiff better off economically by generating increased exposure for commercially passé artists such as P-Funk/Parliament/Funkadelic, Rick James, the Isley Brothers and James Brown. Yet, despite this fact, sampling without license is typically an act of infringement. This is a striking contrast to the result and reasoning in \textit{Stowe v. Thomas}, where the court found no infringement from the act of translation, even where the defendants happily conceded that their allegedly infringing work had killed plaintiff’s market for her translated work.\textsuperscript{121} A century and a half later, in the \textit{MP3.com} case, a court held that even if the MP3.com website had improved the market for a copyright owner’s work, there could not be fair use.\textsuperscript{122} As modern fair use

\begin{itemize}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{121} \textit{Stowe v. Thomas}, 23 F. Cas. 201, 206 (C.C. Pa. 1853).
\item \textsuperscript{122} \textit{See UMG Recordings v. MP3.com, Inc.}, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).
\end{itemize}
cases demonstrate, copyright is increasingly protected like real property and viewed as so
inviolable that a plaintiff need not even show real damages to recover on a theory of
trespass.  

B. The Failure of Fair Use to Protect Progress in the Arts

The fair use doctrine has played a central role in the move towards a natural-law
based protection of copyright. As the preceding analysis of Folsom revealed, fair use is a
resoundingly natural-rights based doctrine that subverts the utilitarian logic of copyright
protection under the United States Constitution. “If copyright is a statutory monopoly,”
notes Ray Patterson, “fair use should be viewed as a limitation on the monopoly in the
public interest, which means that it is an affirmative right, not excused infringement. The
paradox is that while U.S. copyright is a statutory monopoly copyright, fair use is treated
as a natural law right to protect that monopoly.”  

As an examination of relevant
jurisprudence reveals, a multitude of transformative uses that advance progress in the arts
cannot survive the modern fair use test.

To begin with, transformative quality constitutes only a meager fraction of the fair
use test. Transformative quality plays a role in only one of the section 107 factors, and
its weight in the balance is ambiguous. Admittedly, on a rhetorical level, transformative
use has grown increasingly important in the fair use calculus in recent years. In
Campbell v. Acuff-Rose, the Supreme Court extensively cited and adopted the
reasoning of Judge Pierre Leval’s influential article, Towards a Fair Use Standard,

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123 A cognizable trespass claim at common law has, of course, no actual damages requirement.
124 Patterson, supra note 60, at 451.
wherein Leval advocated making transformative use the focus of the first factor of the fair use test. 127 As the court held, the “central purpose” of the Court’s inquiry into the character and purpose of an allegedly infringing work should be to determine whether the allegedly infringing work is “transformative.” 128 However, such findings have not been sufficient to meaningfully reestablish transformative use into the infringement calculus.

To the extent that transformation has infiltrated infringement jurisprudence in recent years, it has done so under a limited definition of transformation. As Rebecca Tushnet notes, fair use has consistently favored criticism and parody over other transformative uses. 129 Thus, with the exception of parody, cases have repeatedly demonstrated that the slightest appropriation of a copyright work will result in a finding of infringement, even when the use is transformative and the result receives critical acclaim. 130

On this point, Rogers v. Koons 131 is instructive. In the case, celebrated artist Jeff Koons had found, in a tourist shop, a cheap postcard by Art Rogers entitled Puppies. Puppies featured a photograph of a couple and some puppies, posing in Rockwellian tranquility, embodying the quintessence of the American ideal. Koons appropriated the kitschy depiction of the couple and the puppies and accentuated various elements of the photography in order to create a work that served as a satire of the suburban American

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127 The Campbell Court, citing Leval’s work, emphasized the importance of transformative use in the copyright infringement calculus and the need to determine whether “the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” See Campbell, 510 U.S. at 579 (citations omitted).
128 Campbell, 510 U.S. at 578-80.
130 Naomi Abe Voegtil, Rethinking Derivative Rights, 63 BROOK. L. REV. 1213, 1216 (1997).
131 960 F.2d 301 (2d Cir. 1992).
aesthetic sensibilities. As Koons’s attorney, Martin Garbus, eloquently explained, Koon “saw sentimentality, inanity and kitsch. When he blew up the image to larger than life size, stuck daisies in the hair of the sickly sweet smiling couple (the flowers were not in the photograph) and painted the finished ceramic, the sculpture acquired a horrific quality quite distinct from the original.”¹³² This explanation of Koons’s transformative use of the work was no ex post facto rationalization. Indeed, it was utterly consistent with Koons’s artistic and philosophical leanings, as illustrated by his body of work.

However, despite Koons’s satirical and critical use of the Puppies photo to satirize suburban American aesthetic sensibilities, the court found no fair use and no transformative use. As the Koons Court reasoned, “It is the rule in this Circuit that though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.”¹³³ Other circuits have concurred with this logic.¹³⁴

Such a limited view of what constitutes transformative use is not surprising given the Supreme Court’s guidance in Campbell v. Acuff-Rose.¹³⁵ In Campbell, the Supreme Court offered a broad definition that allegedly categorized works as transformative if they do not “merely supersede the objects’ of the original creation,” but “instead add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹³⁶ Observers have either hailed¹³⁷ or criticized¹³⁸ this

¹³³ Koons, 960 F.2d at 310.
¹³⁶ Campbell, 510 U.S. at 579.
move as a dramatic reinvigoration of transformative use in the infringement calculus.

However, *Campbell* achieved no such thing. Significantly, the Court retreated on its own definition of transformation by restricting fair use to parodies, and not to other transformative uses. As the Court rationalized,

> For the purposes of copyright law, the nub of definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the composition, which the alleged infringer merely uses to get attention to avoid the drudgery of working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish). . . Parody needs to mimic an original to make its point . . . whereas satire can stand on its own two feet.

Thus, to the extent that an appropriationist work does not directly criticize the original, the “claim to fairness in borrowing from another’s work diminishes accordingly.”

The Supreme Court’s distinction between satire and parody in the application of the fair use test is ultimately unsatisfying, however. Such a formulation reduces fair use to a test about *necessity*. Thus, where use is necessary to produce a form of speech (parody), it reluctantly will be tolerated as fair. However, where use is unnecessary to produce a form of speech (satire), it will not be tolerated. Such a conceptualization of fair use is highly propertized, allowing borrowing only when conditions require it. Fair

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137 See, e.g., Pierre N. Leval, *Copyright in the Twenty-first Century: Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L. J. 19 (1994) (praising the elevation of transformation in the fair use analysis with the Supreme Court’s decision in *Campbell*).

138 See, e.g., Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677 (1995) (decrying the elevation of transformation in the fair use analysis with the Supreme Court’s decision in *Campbell*). As Laura Lape argues, “[t]he productive use doctrine is not a traditional part of fair use analysis; it stands in the way of sensible application of fair use and should be abandoned as a doctrinal dead-end.” *Id.* at 723.


140 *Campbell*, 510 U.S. at 580-81.

141 *Campbell*, 510 U.S. at 580.
use has now become privilege, not right, where copyright itself previously was viewed as a privilege, not a natural right. Under a utilitarian vision of copyright, fair use should not be about necessity. As a consequence, there is no inherent reason that satire should have different fair use rights than parody.\footnote{142}

Indeed, one need not address the original work itself (as in parody) to make “transformative” use of it. As many appropriationist artists have demonstrated, something new, expressive, and meaningful can emerge from the combination or alteration of copyrighted works of the past.\footnote{143} However, under the modern copyright infringement test with its fair use provisions, appropriationist art rarely will escape liability, barring use of only works already in the public domain or obtaining licensing for the original work’s copyright.\footnote{144} A simple examination of the jurisprudence following \textit{Campbell} is illustrative.

In \textit{Paramount Pictures Corp. v. Carol Pub. Group},\footnote{145} the owners of the \textit{Star Trek} copyright sued the publishers of \textit{The Joy of Trek}, a guide to all things \textit{Star Trek} which included brief descriptions of plots, major characters, technologies and alien races in the series, famous lines from the series, and accounts of the Trekkie movement. In holding that the book infringed on \textit{Star Trek}, the court found no transformative use, noting that the book was not a parody\footnote{146} and that “[a]sides such as [various quips] do not sufficiently

\footnote{142} According to Ernest Hemingway, we should also question the extent to which parody is truly transformative and productive: “The parody is the last refuge of the frustrated writer. Parodies are what you write when you are associate editor of the Harvard Lampoon. The greater the work of literature, the easier the parody. The step up from writing parodies is writing on the walls above the urinal.” Paul Hirshson, \textit{Names and Faces}, \textit{Boston Globe}, July 22, 1989 at 7. \textit{But see Suntrust Bank v. Houghton Mifflin Co.}, 268 F.3d 1257, 1277 (11th Cir. 2001) (Marcus, J., concurring) (noting that “[p]arodies and caricatures are the most penetrating of criticisms”).

\footnote{143} See infra, Section IV.A. and supra, Section IV.C.

\footnote{144} Naomi Abe Voegtli, \textit{Rethinking Derivative Rights}, 63 \textit{Brooklyn L. Rev.} 1213, 1227-28 (1997).


\footnote{146} \textit{Id.} at 335.
transform a summary that the book’s own cover admits is ‘everything a Star Trek novice needs to know.’” Such a statement reveals confusion about the notion of transformation. As Michael Bunker argues, *The Joy of Trek*

borrowed certain factual elements from the *Star Trek* story line and cosmology and combined those with humor, commentary, comic sociological analysis and other transformative elements. It seems fairly clear that a work dealing with, among other things, the idiosyncrasies of *Star Trek* fans and humorous interpretations of the television show’s plots and cosmology adds at least some new message and meaning to the original story, and therefore constitutes transformative use. However, the fact that *The Joy of Trek* did not constitute parody doomed it to losing the first factor of the fair use test and, ultimately, the case.

Such a restrictive notion of transformative use also determined the decision in another key copyright decision. In the *Dr. Suess* case, a satire of the O.J. Simpson murder trial, based on Dr. Suess’s *Cat in the Hat*, failed the fair use test. In considering the issue, the court found that the use was non-transformative and that there was market harm. On the first factor of the fair use inquiry, the court virtually equated transformative use with parody; as the court reasoned, since the book does not meet the definition of parody, it could not constitute transformative use. As noted earlier, this syllogistic logic is specious, as it ignores the fact that satirical works can be highly transformative, advance progress in the arts, and implicate free expression rights. On the fourth factor, the court inferred market damage from its conclusion that the work was

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147 *Id.* at 335.
149 11 F. Supp. 2d at 335.
151 109 F.3d at 1403.
152 109 F.3d at 1401.
153 *See infra* Section VI.
non-transformative,\textsuperscript{154} therefore compounding its error. Such a finding, even absent evidence on this point,\textsuperscript{155} is patently silly. The notion that Dr. Suess copyright owners were contemplating entering the market for satires of the O.J. Simpson trial does not pass the laughter test. Nevertheless, the appeals court affirmed a preliminary injunction against publication of the book.\textsuperscript{156}

Second, even where courts have heralded the importance of transformative use and adopted a broad definition of transformation that includes non-parodic uses, the other elements of the fair use test have limited the ability of transformative users to escape liability for copyright infringement. Consequently, the rhetoric supporting transformative use in the infringement calculus is frequently mere lip service. For example, a federal court in New York acknowledged that a book of trivia about the \textit{Seinfeld} television series was a transformative use for the purposes of the fair use test.\textsuperscript{157} As the court noted, the \textit{Seinfeld Aptitude Test} met the Supreme Court’s transformation test as enunciated in \textit{Campbell}: “By testing \textit{Seinfeld} devotees on their facility at recalling seemingly random plot elements from various of the show’s episodes, defendants have ‘added something new’\textsuperscript{158} to \textit{Seinfeld}, and have created a work of a ‘different character’\textsuperscript{159} from the program.”\textsuperscript{160} In so holding, the court repeatedly emphasized the importance of transformative use in the fair use balancing equation.\textsuperscript{161}

However, the court’s palaver regarding the importance of transformative use,

\textsuperscript{154} 109 F.3d at 1403 (reasoning that “[b]ecause, on the facts presented, [the defendants’] use of \textit{The Cat in the Hat} original was nontransformative, and admittedly commercial, we conclude that market substitution is at least more certain, and market harm may be more readily inferred”).
\textsuperscript{155} 109 F.3d at 1403.
\textsuperscript{156} 109 F.3d at 1400-01.
\textsuperscript{157} Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 955 F. Supp. 260 (S.D.N.Y. 1997).
\textsuperscript{158} \textit{Campbell}, 510 U.S. at 578.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Castle Rock}, 955 F. Supp. at 268.
\textsuperscript{161} \textit{Id.}
which the court later called “generous,”\textsuperscript{162} ultimately rang hollow. The court noted the expansive exclusive right to create derivative works granted under the Copyright Act and made a finding of infringement by rejecting the defendant’s fair use defense.\textsuperscript{163}

Two points in the court’s analysis are particularly salient. First, the court found that “without \textit{Seinfeld}, there can be no SAT,” and, as such, determined that the third element of the fair use test (amount of borrowing) strongly favored the plaintiff.\textsuperscript{164} However, such reasoning renders the purported importance of transformative use utterly null. After all, \textit{no transformative use can ever exist without the original work}.

Secondly, the court found that the fourth element of the fair use test (market harm) also strongly favored the plaintiff. As the court reasoned, while the transformative SAT did not hurt the demand for the \textit{Seinfeld} television program, it harmed the market for such derivative works as trivia books that the copyright owners of \textit{Seinfeld} might want to publish.

Once again, such logic crushes any hope that transformative uses have to constitute fair use. Since the inquiry for market harm “must extend to the potential market for as yet nonexistent derivative works,”\textsuperscript{165} virtually any transformative use will harm the potential market for as yet nonexistent derivative works, particularly under the expansive definition of derivative works adopted by the Copyright Act and the courts. The SAT may or may not have constituted a transformative work; however, the courts approach and analysis to that question presupposed the answer in the negative. Thus, even where transformative use is considered and its prominence in the first factor is

\textsuperscript{162} Id. at 272.
\textsuperscript{163} Id. at 271.
\textsuperscript{164} Id. at 270.
\textsuperscript{165} Id. at 271. See also Campbell, 510 U.S. at 591-93.
acknowledged, courts’ typical readings of the other fair use factors, as illustrated by
_Castle Rock_, render the importance of transformative use null.

At the same time, the other portion of the first part of the fair use test—which
determines whether a use is commercial or not—also undermines the impact that
transformation has in the fair use calculus. Courts repeatedly have bogged themselves
down in determining whether a use is commercial or non-commercial. Finding a
meaningful and consistent definition of commercial has proved an elusive goal. For
example, in the _Napster_ case, the Ninth Circuit held that peer-to-peer trading, a
quintessentially non-commercial sharing activity (if there is ever such a thing in our
society) with no quid-pro-quo attached,\(^{166}\) constituted commercial use of copyrighted
material.\(^{167}\) Whether trading music on Napster or any similar peer-to-peer network is
illegal or not, it is certainly not commercial activity in any meaningful sense. Similarly,
the same court held that giving away 30,000 free copies of a religious work constituted a
commercial activity since the defendant “profited” from the use of the work to attract
new members who ultimately contributed to the organization by tithing.\(^{168}\) With such a
definition, all use is commercial use since, at some level, any unpaid use of a copyright
work causes someone to lose potential revenue.

All told, most transformative-use defenses stand little chance of success under the
current infringement test, despite the influence of Pierre Leval and the Supreme Court’s
rhetoric in _Campbell_. However, since a natural-rights vision has firmly taken ahold of
modern copyright law, this result is not surprising. The dominant role in fair use to

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\(^{166}\) On Napster, users were free to simply act as “leeches” and download music from other people’s
computers without reciprocating or opening up their file folders to other users.

\(^{167}\) _A & M Records, Inc. v. Napster, Inc._, 239 F.3d 1004 (9th Cir. 2001).

\(^{168}\) _See Worldwide Church of God, v. Philadelphia Church of God, Inc._, 227 F.3d 1110, 1117-18 (9th Cir.
protect the natural rights of an author in a work is best illustrated by the Supreme Court’s declaration in recent years that the fourth factor (market harm) of the fair use test is the most important.\footnote{See Harper & Row Pub., Inc. v. Nation Enters., 471 U.S. 538, 566 (1985); Stewart v. Abend, 495 U.S. 207 (1990).} Despite the judicial authority cited for this proposition, the explicit guidance by Congress in 1976 that the fair use factors be balanced makes this assertion somewhat curious. Presumably, if Congress had intended to make one factor in the fair use test more important than any other, it would have said so. Nevertheless, the Court has deemed that the economic harm caused by a potentially infringing use of a copyrighted work is paramount in ascertaining whether use of a copyrighted work is fair.\footnote{But see American Geophysical Union v. Texaco Inc., 60 F.3d 913, 926 (2d Cir. 1995) (suggesting that Campbell’s omission of language emphasizing the fourth factor as the most important may indicate an abandonment of the idea that “any factor enjoys primacy”).} However, such a reading of fair use, especially under the expansive notions of market harm espoused by modern courts, is anathema to the utilitarian origins of copyright.

After all, before considering a fair use defense, a court has to make a finding of infringement and it accomplishes this by determining substantial similarity between the original copyrighted work and the use. Unfortunately, however, substantial similarity itself is a proxy for the fourth factor. The more similar the two works, the more likely it is that the secondary use will subvert the commercial market for the copyrighted work. Thus, by considering the issue of market harm in the fair use test, and particularly by elevating market harm to the highest level in that test, the court is largely duplicating a task already accomplished when the threshold requirement of substantial similarity is considered. The elevation of the fourth factor to the forefront of fair use is entirely consistent with the natural law vision of copyright, however, which seeks to protect the
property rights of an author in his works even if it clashes with the advancement of the arts. The increasing natural-law bent of copyright certainly has strengthened the ability of copyright owners to profit from their creations. However, under the current fair use test, where most transformative uses are proscribed, modern copyright law has done so at a great price to progress in the arts.

C. Borrowing and Progress in the Arts: Smells Like Teen Spirit

Critics of the modern copyright system frequently point to the fact that many of Shakespeare’s greatest works would never have been written if Elizabethan England had embraced our stringent notion of authorial protection. Shakespeare, they argue, could not have existed under the modern copyright regime. The point is a fair one. The modern notion of plagiarism did not exist in Elizabethan times, when imitation (though not mere “servile imitation”) was truly considered the greatest form of flattery. However, one need not confine one’s analysis to the Elizabethan era to demonstrate the negative impact on progress in the arts from a strict notion of copyright protection. A more current example poignantly highlights just how much creativity and development in the arts we may be missing as a consequence of the expansive ambit of our modern copyright paradigm. Take the band Nirvana and their 1991 hit song Smells Like Teen Spirit, arguably the most important and critically lauded musical work of the past few decades.

The song’s syncopated rhythm and charged lyrics constituted a scathing indictment of pop culture, the mass media, and cliquish society, and played a critical role in altering the landscape of modern music. The song was nothing short of a “progress in

the arts,” as deserving as any song of copyright protection and widespread dissemination. Yet for all of its lyrical and musical originality, the song never would have been released to the public had it not been for a peculiar series of circumstances that allowed Nirvana to eschew copyright infringement litigation. A little background to the inspiration of the song sheds light on this point. The lyrics to Smells Like Teen Spirit are, depending on your perspective, either inspired by or plagiarized from Thomas Pynchon’s acclaimed novel Gravity’s Rainbow. Indeed, the similarities are eerie.

In a section of Gravity’s Rainbow, one of Pynchon’s characters hums a whimsical ditty, inspired by the spirits of teenage woman: “Ah, they do bother him, these free women in their teens/their spirits are so contagious.” With these words by Pynchon, the title of Nirvana’s Smells Like Teen Spirit was born. Moreover, the actual lyrics found in Gravity’s Rainbow are strikingly similar to those of Smells Like Teen Spirit.

The chorus to Pynchon’s song, replete with textualized intonations adopted by Nirvana, goes:

I’ll tell you it’s just –out, -ray, -juss
Spirit is so –con, -tay, -juss
Nobody knows their a-ges

With a similar rhyme scheme, phrasing, and syncopation, the chorus to Smells Like Teen Spirit reads:

With the lights out it’s less dangerous
Here we are now

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174 A book that is much more frequently cited and discussed than read, Gravity’s Rainbow has been simultaneously hailed as a masterpiece and dismissed as utter nonsense. Winner of the National Book Award, the novel was also unanimously recommended for a Pulitzer Prize by the Pulitzer jury. However, the Pulitzer trustees overturned the decision on the grounds that the work was turgid and unintelligible. See William Gaddis, Agape Agape 61 (2002).

175 Thomas Pynchon, Gravity’s Rainbow 538 (Viking Edition).

176 Of course, Nirvana was also referring to the product Teen Spirit, a deodorant noxiously marketed by Mennon (and oft advertised on MTV) to teens of the era.

177 Thomas Pynchon, Gravity’s Rainbow 538 (Viking Edition).
Entertain us

I feel stupid and contagious
Here we are now
Entertain us

The rejoinder to Pynchon’s song utters the phrase ‘nevermind’ repeatedly, reading:

Nev –ver, --mind, watcha hear from your car
Take a lookit just –how --keen –they are,
Nev –ver, --mind, --what, your calendar say,
Ev-rybody’s nine months old today! Hey

Meanwhile, the album on which Smells Like Teen Spirit resides is entitled Nevermind and that phrase is mentioned in the song as Kurt Cobain repeatedly sings “well, whatever, nevermind . . .” Moreover, the rejoinder to Smells Like Teen Spirit invokes a similar intonation and pattern:

An albino
A mullato
A mosquito
And a beetle! Hey

Thus, in appropriating and transforming Pynchon’s lyrics, Nirvana took a course of action that could have subjected them to a cognizable copyright infringement suit. The unique and unusual phrasing in the Gravity’s Rainbow lyrics as well as their intonations certainly would be enough to raise an inference of remarkable similarity and borrowing. This is particularly true in light of recent decisions that have upheld the viability of an infringement action based entirely on a theory of subconscious filching—the precise result when a federal court found George Harrison liable for plagiarizing the Chiffon’s perky hit He’s So Fine with his somber and reflective ballad My Sweet Lord.

179 THOMAS PYNCHON, GRAVITY’S RAINBOW 538 (Viking Edition).
Moreover, a court would likely find no fair use under the modern balancing test. As a commercial and non-parodic use, *Smells Like Teen Spirit* would decidedly lose the first factor. Since Pynchon’s song was a creative and original work, the second factor would also go against Nirvana. The lifting of significant lyrics and the unusual and unique syncopated rhythm of Pynchon’s song would weigh the third factor against Nirvana. Finally, a court would likely infer economic harm as Nirvana would be occupying the market for setting Pynchon’s copyrighted song to music. All told, Nirvana would, at the very least, face a serious infringement suit for creating an authorized derivative work.

However, a unique series of circumstances enabled Nirvana to appropriate Pynchon’s lyrics with little regard for the legal consequences. Pynchon is an infamous recluse. In fact, until some recent stalkings of Pynchon,\(^{182}\) no picture of him had been published since his high school yearbook photo from a half-century ago.\(^{183}\) His desire to avoid publicity and the public eye is so great that, instead of personally accepting the prestigious National Book Award in 1973, he sent famed clown Bozo in his place. In fact, in his entire career, which has spanned over four decades, Pynchon has never granted an interview.

Consequently, Pynchon is as unlikely as anyone to pursue an infringement suit. Such an action would be far too public for a man who assiduously has averted efforts by the media to track him down.\(^{184}\) The idea of him testifying in court, appearing for depositions, or engaging in any kind of public appearance is unthinkable. Hence,


\(^{184}\) Just to avoid a brush with publicity, Pynchon once defenestrated from an apartment when a reporter tracked him down in Mexico City. See John Yewell, *Tracking Thomas Pynchon Through Space and Time*, available online http://www.metrocactive.com/papers/metro/10.01.98/cover/lit-pynchon-9839.html.
Nirvana could borrow, without threat of a suit—which, if waged, may have prevented Nirvana from ever writing and releasing *Smells Like Teen Spirit*. At the very least, the threat of a plausible suit would have discouraged a garage band from Seattle, Washington and its record label from taking a chance at bankrupting litigation.

The Nirvana example illustrates the social benefits from the reiterative process of works building upon one another. However, under the modern infringement regime, such a reiterative process cannot occur. Since most copyright owners are not Thomas Pynchon, transformative works will not enter the public sphere without a significant up-front price. Such a system is not only detrimental to progress in the arts; it also curtails expressive freedoms.

V. Conclusion

All told, this examination of fair use in an historical context reveals that, far from championing the right of the public to access creative works, the fair use doctrine has played a key role in the expansion of the copyright monopoly. As a consequence, this Article suggests the need to rethink the modern test for infringement, with its fair use defense as a method of ostensibly incorporating First Amendment and public access concerns into copyright law. Quite simply, the fair use doctrine has transformed federal copyright from a utilitarian system of compensation—a carefully delimited quid-pro-quo for a benefit granted to society—into a natural law right to which authors are entitled for their creative efforts. Such a vision of copyright not only betrays the intentions of the Framers; it comes at a great price to progress in the arts.