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Randal C. Picker

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## Fair Use v. Fair Access

Randal C. Picker\*

I want to make four points:

1. The Copyright Act defines use rights, not access rights. That overstates slightly—especially with the Digital Millennium Copyright Act in the copyright title—but the core of copyright law addresses how works can be used assuming that legal access has been obtained. Other law addresses the circumstances under which works can be accessed.
2. Nothing in copyright law itself suggests that use rights should trump access rights; indeed, our core access principles suggest just the opposite. We frequently speak of a fair use “right.” I am doubtful about that on its own terms but even if we find something there, a fair use right isn’t an access right. Fair use does not equal fair access.
3. The scope of rights given to an initial author will affect the timing and scope of investment she will make in creating a work. For many works, those investments can be made in discrete lumps. As a society, we want investments to be made incrementally rather than as one large lump, as doing so allows us to get feedback from the market on the value of a work. We don’t want to throw good money after bad, and if we learn that, for example, the English version of a work is a failure, we don’t want to bother translating it into Mandarin. In addition, we will delay the time that works reach the market if we create an incentive to make large, lump-sum investments rather than a sequence of investments coupled with market feedback. Authors start with one monopoly: their unique access to the work that they have created. If we do not give authors control over these follow-on works, authors will overinvest upfront in the works, since that is the only way that they can gain a return on their initial monopoly over access to the work. In that situation, we are better off to hand the author a statutory monopoly over the follow-on work, rather than see the author invest real resources in creating a property right over that work.
4. Fair use is a form of rights bundling. If we decide, for instance, that format-shifting is fair use or is otherwise a permitted use—you sell me a music CD and I have a use right to make a personal copy on a

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cassette or my iPod—we are making a decision about the rights that we are bundling together. The nature of bundles is that everyone gets stuck buying the same set of rights. These bundles can be inefficiently large. Consumers would often be better off if instead we allowed rights to be unbundled, so that consumers could buy just those rights that they wanted rather than being forced to take unwanted rights. Doing that requires a narrow conception of fair use.

## I. COPYRIGHT MAGIC: ACCESS AND USE

When I talk to a new group about copyright, I usually feel as if I am performing a magic act. I start by asking the audience for a blank piece of paper. I then ask for the piece of paper as a gift, so that ownership of the paper transfers to me. With that work done, I then compose a poem live, usually an ode to some object in the room or a current event: four or five lines of epically bad poetry, but a poem nonetheless. Next, I ask the question of interest: do I have a copyrighted work? I follow with a quick discussion of section 102 of the Copyright Act which requires an original work of authorship (OWA)—the poem that I just made up—fixed (F) in a tangible medium of expression (TME)—the writing on the paper. The copyright “equation,” as I think of it, is  $OWA + F + TME = \text{©}$ .

I emphasize that unlike the patent system, copyright does not filter for quality. There is no requirement that the poem be good enough to get a copyright. It can be a very, very bad poem—mine always are—and yet it still enjoys all of the benefits of copyright. There is also no requirement that I first present the poem to a government official before I can receive rights in the poem, though I do mention the benefits of registration. This is the core of our current scheme of copyright: it arises on fixation, at the very instant that I write the poem on paper.

I then turn to the distinction between use and access. When I hold a blank piece of paper in my hands, I think that we have a pretty good understanding of my ownership rights in that paper under applicable state property law. I control access to the paper; third parties have no right to access the paper. What changes when I write a poem on the paper? In the language of the statute, copyright subsists at that point, but the fact that copyright status has attached doesn’t change our prior rules that applied when the paper was blank. I continue to control the paper and, through that, access to the work. Third parties have no right to access to the paper, no right to insist that I publish the work and somehow make it available to everyone.

I then continue the hypothetical. I take the poem home and put it in my desk. A deranged student wants to blog about my poem, so he breaks into my house, rifles through my desk, and then copies one line from the poem on a piece of paper he brought with him. He then goes home and blogs about the poem and quotes the line he copied before. He then gets arrested for breaking and entering into my house. Where does that put us?

That is the distinction between use and access. We should start with the big picture: traditional copyright is about *use* of works; it doesn’t establish rights about *access* to works. The copyright act defines allowed and disallowed uses of works

but it doesn't create access rights or otherwise regulate controls over access. This overstates somewhat, especially as more provisions have been dumped into the statute. The 1996 Digital Millennium Copyright Act is codified in Title 17, the Copyright Title and it is very much about rules of access to copyrighted works, but it also is a very non-traditional "copyright" statute. With the addition of the DMCA, the statute now validates certain controls on access, but the core notion that the copyright act itself doesn't confer access rights hasn't changed. The core copyright laws lay out rights regarding uses of a copyrighted work—the right to copy a work or to distribute it or to perform it in public—or the right to engage in certain fair uses of a work given access, but nothing in copyright creates a right to access to the work in the first place. And you can't engage in fair use of the work if you don't have access to it.

The copyright act defines a complex set of use rights, conditioned on access. The copyright holder controls uses, which are set forth mainly in section 106, and if someone uses a copyrighted work and violates those rights, we call that infringement. That in turn gives rise to the remedies set forth in the statute. But in defining the uses of the work controlled by the copyright holder, we have also established a group of uses that will not trigger that remedy regime. The section 106 rights are limited by additional sections of the statute, including, for our purposes here, the uses considered fair under section 107.

Note the language just used, as I think it is important to be precise in the framing of section 107. All section 107 does is provide that certain uses that otherwise would be infringing will not be infringing, meaning that the remedies that copyright creates won't apply through copyright. This isn't some broad "right" to fair use, though fair use is often addressed in those terms by many, including myself on past occasions. Section 107 simply says that the remedies that would otherwise attach under copyright if certain uses took place will not be available. Copyright remedies won't be available through copyright law for the uses, but it doesn't say anything about whether the uses that won't be treated as infringing copyright somehow violate other applicable law—for example, defamation law or the law of obscenity—or whether remedies similar, but not equivalent, to those in copyright could be imposed through some source other than copyright (such as contract). Section 107 on its own does not provide any protection for those uses under any other applicable law. It does not call off contract law or tort law or obscenity law or any other laws that might be triggered by a use that qualifies as fair. If the copyright statute is going to do that, we'll have to look elsewhere. And section 107, like the rest of traditional copyright law (pre-DMCA law), says nothing about access rights.

But the copyright act's focus on use and inattention to access may just reflect the assumption that authors want to publish work and not hide it and the natural instinct to publish creates access to the work. An author can create a work and then never let it see the light of day; but if an author wants to be read, she has to release the work. The necessity of release means that that the natural desire of an author to be read will create some means of access and that in turn will create the possibility of use and then fair use. Indeed, it once was the case that the act of taking content

public—*publication* in a word—necessarily resulted in an object that someone could use. I could not distribute the work generally and retain control over it. If I wanted to maintain full control, I had to keep the work to myself.

## II. CONTROL AT A DISTANCE: LEGENDS, CONTRACTS AND TECHNOLOGY

What rules should apply concerning control and publication? Authors will seek to exercise control over a copy of a work even after it has been published. Until recently, authors relied mainly on legends and contracts to attempt to exercise control over works after they had been widely distributed. Copyright aficionados will quickly recall the legends addressing retail prices of books in *Bobbs-Merrill* and barring radio use of LPs in *Whiteman*.<sup>1</sup> Legends are the easiest technology to allow control at a distance. Until recently, actual technological controls were impossible; that is still true today for works published on paper, such as newspapers and magazines. Paper is also still the dominant method for accessing books. Actual contracts with consumers are pretty clumsy for most mass produced copyrighted works (printed works again and music and video distributed on CDs and DVDs), though the shift to digital distribution of works through downloading makes click-thru contracting with individual consumers much more plausible.

Focus on the way in which we might regulate three instruments for controlling published works: legends, contracts and technology. Each of these tools might allow for control at a distance over a published work. Start with legends and revisit the classics to make sure that we understand their boundaries. In 1904, Bobbs-Merrill published Hallie Erminie Rives's book *The Castaway*, a story of "three great men ruined in one year—a king, a cad and a castaway." You can buy a new copy today on Amazon for \$38.65<sup>2</sup> or an original in the used-book market for substantially less. But in 1904, Bobbs-Merrill wanted to make sure that it sold at retail for a \$1.00, and just below the copyright notice, Bobbs-Merrill added the following legend: "The price of this book at retail is One Dollar net. No dealer is licensed to sell at a less price, and a sale at a less price will be treated as infringement of the copyright."<sup>3</sup> The second sentence is the interesting one. Does the first clause attempt to create some sort of license or contract regarding the sale of the book? Or does it purport to describe a state of affairs created by a separate contract somewhere else? The second clause seems to be a claim about how copyright applied to the situation.

That claim turned out to be wrong. Macy's had been selling *The Castaway* for 89 cents, and for 11 cents a copy, Bobbs-Merrill went to the Supreme Court. The

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1. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341 (1908); *RCA Mfg. Co., Inc. v. Whiteman*, 114 F.2d 86, 87 (2d Cir. 1940).

2. See <http://www.amazon.com/Castaway-Hallie-Ermine-Rives/dp/0548029326/> (last visited Apr. 2, 2008).

3. HALLIE ERMINIE RIVES, *THE CASTAWAY: THREE GREAT MEN RUINED IN ONE YEAR – A KING, A CAD, AND A CASTAWAY*, legend page (Bobbs-Merrill 1904), available at <http://books.google.com/books?id=C0c1AAAAMAAJ&printsec=frontcover&dq=editions:ISBN1417935715#PPP14,M1>, (last visited Apr. 2, 2008).

Supreme Court ultimately understood the case to be a narrow one. The then-current copyright statute gave the copyright holder the sole right to “vend” a book: did that right make it possible for a subsequent sale of the book to be infringing when the copyright owner had voluntarily sold the book in the first place, even if the copyright holder included a legend of the sort set out above and a purchaser like Macy’s knew of the legend? The Court held that Congress didn’t intend for the statutory copyright to stretch that far. But the decision is just as important for what it doesn’t say: the Court repeatedly emphasized that there was no claim of contract in the case, that the issue was one purely of the reach of the copyright statute on its own.<sup>4</sup>

Consider *Whiteman* next. RCA was producing phonographs of Whiteman’s orchestra and selling those to the public. Radio broadcasters bought the records and played them over the air. RCA wanted to block that use, or, more likely, charge a separate price for it. RCA sought to unbundle the uses otherwise embedded in the physical record with the goal of implementing some form of price discrimination, charging one price to ordinary consumers who played the records at home and a second higher price for radio broadcasters. RCA implemented its use restrictions through legends on the LPs and the envelopes that came in and through contracts with its sellers.<sup>5</sup>

The Second Circuit, through Judge Learned Hand, overturned the restrictions. *Whiteman* was premised on an opt-in, quid-pro-quo vision of copyright. It started with the general premise that restrictions on chattels are *prima facie* invalid. It cited nothing for that proposition though it would have been easy enough to fill in turn-of-the-century cases such as *Bobbs-Merrill* in copyright and *Dr. Miles*<sup>6</sup> in antitrust, and *Dr. Miles* had traced the proposition back to Coke on Littleton in 1628. But whatever the status of the general proposition, according to Hand, federal copyright law was organized around a more specific premise: temporary monopoly in exchange for dedication. Copyright creators chose to bring their works within the Copyright Act created by Congress and thereby received a defined monopoly in their works. Once that monopoly expired, the works were dedicated to the public and no restriction could prevent that dedication. Yes, the records were themselves not registrable under the Copyright Act, but it would be “contrary to the whole policy of the Copyright Act and of the Constitution” to allow the legends to protect these inferior copyright objects when legends couldn’t protect works that enjoyed full federal copyright protections.

Hand then turned to the “much discussed” *International News Service v.*

4. “We do not think that the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.” *Bobbs-Merrill*, 210 U.S. at 350. Earlier in the opinion, the Court noted that “[t]he learned counsel for the appellant in this case, in the argument at bar, disclaims relief because of any contract, and relies solely upon the copyright statutes, and rights therein conferred.” *Id.* at 346.

5. Legends, available at <http://bixography.com/images/dardanellareissuelabel.jpg> (last visited Apr. 2, 2008).

6. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

*Associated Press*.<sup>7</sup> He had little use for it, seeing it as largely limited to its facts. Hand instead focused on the premise—and it was nothing more than that as he cited no sources—that an author had no natural rights and was “not free to make his own terms with the public.” Hand focused squarely on the issue of continuing control after general distribution: “there is nothing to justify *a priori* any continuance of their control over the activities of the public to which they have seen fit to dedicate the larger part of their contribution.”

Hand offers no sense of why when we turn to copyrighted works we should depart from our baseline regime of free contracting in the sale of goods and services. He certainly doesn't spend any time considering whether we might want to allow price discrimination in the sales of records in different markets.<sup>8</sup> Looking at the subsequent contract cases gives some sense of this. Start with doctrine: the critical issue is the interaction of contracts with copyright's preemption provision, set forth in section 301 of the statute.<sup>9</sup> That section preempts equivalent rights under state common law or state statutes. The courts haven't always found this provision easy to apply but the majority of courts look for an “extra” element beyond items that always would arise with copyright and a contract has typically, though not always, qualified.<sup>10</sup>

*ProCD*, an early and influential case in the pro-contracts camp, offers a good example of the utility of contractual use limitations and goes exactly to the sort of price discrimination that Hand didn't consider in *Whiteman*.<sup>11</sup> *ProCD* put together a computer database of more than three thousand telephone directories. This was hard work, to be sure, but, as we know, quite probably not copyrightable under *Feist*.<sup>12</sup> *ProCD* wanted to offer multiple versions of the database, one to the commercial market and a second to the consumer market. This sort of versioning is quite common with copyrighted works and databases and clearly can be useful. Absent the ability to separate markets, *ProCD* might have only sold a high-priced version to commercial users, and consumers would have been out of luck. Consumers can gain access to the database at a favorable price, if—and this is the big if—*ProCD* could keep the two markets at a distance successfully.

*ProCD* relied on contract to do that. Given the problems with copyrighting the database itself, it needed to use contract, but even if the underlying work had been copyrightable, *ProCD* would have needed a contract to separate uses of the work across markets. The standard rights of the copyright holder under section 106 don't, for example, make it possible for the copyright holder to claim that a

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7. See generally *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

8. I have made this point before in explaining why price discrimination might be useful in these markets. See generally Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281 (2003).

9. 17 U.S.C. § 301 (2000).

10. See, e.g., *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005) (collecting cases and concluding that “[m]ost courts have held that the Copyright Act does not preempt the enforcement of contractual rights”). But see *Ritchie v. Williams*, 395 F.3d 283, 287-88 n.3 (6th Cir. 2005) (more skeptically noting the difficulty of applying the extra elements test).

11. See generally *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

12. See generally *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

particular commercial use is copyright infringement. Section 106 doesn't say anything general about separating commercial and consumer uses, and that is what ProCD wanted to do. Judge Easterbrook understood all of that, and read section 301 as not barring the licenses in use in *ProCD*.

We also should consider how the First Amendment interacts with this sort of contracting. *Cohen v. Cowles Media Company* may be the leading decision on how our ordinary contracting regime intersects with the First Amendment.<sup>13</sup> *Cohen* holds that the First Amendment itself does not operate to limit the general applicability of contracts or other laws. In the midst of the 1982 Minnesota race for governor, Dan Cohen approached two newspapers in the Twin Cities to dish some dirt on one of the candidates. Cohen offered to provide the information on the condition that the newspapers didn't disclose his identity. When they did, Cohen was immediately fired. Cohen sued the newspapers alleging, among other things, breach of contract and a jury returned a verdict in his favor of \$200,000 in compensatory damages and \$500,000 in punitive damages. But the Minnesota Supreme Court believed that result was inconsistent with the rights of the newspapers under the First Amendment and it overturned the verdict.<sup>14</sup>

In a 5-4 decision, the Supreme Court reversed. "Generally applicable laws" said the Court, did "not offend the First Amendment simply because their enforcement against the press has incidental effects on the ability to gather and report the news."<sup>15</sup> The Court noted that "the press may not with impunity break and enter an office or dwelling to gather news"<sup>16</sup> and that "we conclude that the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law."<sup>17</sup> In the case at bar, the applicable Minnesota law did no more than enforce promises voluntarily made, and the press could control these obligations by not making the promises in the first place. Although the Court didn't say this, this also seems like a situation where the press wants the promise to be unenforceable only after the fact. If the press can't meaningfully promise confidentiality to sources, it will almost certainly lose access to many stories. *Cohen* was a 5-4 decision, and the Court doesn't have a well-developed case law on the interaction of the First Amendment and contract. But *Cohen* clearly rejects the notion that there is a flat inconsistency between contract and the First Amendment.<sup>18</sup> As the breaking-and-entering example suggests, *Cohen* is premised on the notion that the ordinary underlying rules of property control access.

Unlike both copyright and legends, contracts operate one by one. Copyright arises through status and is good against the world. Legends could operate that way as well, but as *Bobbs-Merrill* and *Whiteman* suggest, courts have been

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13. See generally *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

14. See generally *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990).

15. *Cohen*, 501 U.S. at 669.

16. *Id.*

17. *Id.* at 672.

18. See generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (the Court failing to address the interaction of copyright and contract).

unwilling to allow legends to operate fully. Given those problems with contracts and legends, a better technology for enforcing use restrictions would be quite attractive, and copyright holders have turned to technology itself to implement use and access restrictions. The topic of digital rights management and the Digital Millennium Copyright Act is obviously a large one<sup>19</sup> and it would be silly to attempt a full discussion, so I will focus on one key point.

DRM—or, if you prefer, technological protection measures (TPM)—is precisely about the question of whether we will allow authors to exercise control at distance over works that they wish to distribute more generally. Recall where we started this discussion. Authors can maintain full control over a work by never distributing it in the first place. That is a high price to pay; in the past, publication of the work created access and the possibility of use followed. If contracts and legends were too cumbersome or blocked by the courts, authors would lose control through publication.

DRM changes that. DRM makes possible control at a distance, meaning that an author can distribute a work generally and yet still exercise control over how the work is used. To be sure, that operates well only for works that are intermediated through technology. The morning newspaper that shows up on the stoop of my house can't be shrinkwrapped (actually, of course, it arrives wrapped in plastic to keep it dry, but I usually successfully get beyond the plastic). Works delivered on paper are still published as they always have been. But works that are intermediated by technology—music and video and increasingly text—those are works as to which the possibility of control at distance exists and that puts the utility or disutility of that control squarely on the table.

### III. ACCESS AND USE REGIMES

Return to my earlier hypothetical involving my new poem and the deranged student who breaks into my house to copy it. Where do we stand when the cops catch the student? Does she go to jail for breaking and entering? Can I sue her for copyright infringement? Again, we need to distinguish use and access. Section 107 of the Copyright Act addresses fair use and all it does is pull certain uses out of the general infringement regime created by copyright law, meaning that if you engage in one of those uses, you can't be held liable for copyright infringement. By itself, section 107 doesn't create an independent right of access to works and doesn't limit the ability of a copyright holder to condition access to the work. Limits on those conditions will have to be found elsewhere, if anywhere.

I can readily imagine three possibilities as to how use and access should interact:

1. *Full Separation.* Use and access are separate questions. Your right to use the material doesn't turn on how you obtained access. It is what it is independent

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19. There is a large literature and almost an infinite number of works could be cited, though I remain unsurprisingly partial to my own contributions. See, e.g., RANDAL C. PICKER, *Copyright and the DMCA: Market Locks and Technological Contracts*, in ANTITRUST, PATENTS AND COPYRIGHT: EU AND US PERSPECTIVES 180 (François Lévêque and Howard Shelanski, eds., (Edward Elgar 2005); Randal C. Picker, *Mistrust-Based Digital Rights Management*, 5 J. TELECOMMS. & HIGH TECH. L. 47 (2006).

of how you gained access. If a book review of a book borrowed from the library would be fair use, so would a review of a review of the same book obtained via a burglary of the library. But, more independence, your immunity to use the material if you have access also doesn't change your right to gain access to the material. If stealing the book is a crime, you don't get off the hook by saying that the use that you made of the book was a fair use. So the state would pursue a criminal action for burglary, but the burglary wouldn't create an action for copyright infringement where one wouldn't otherwise exist.

2. *Fair Use Penalties*. I could imagine a regime of fair use penalties, meaning that we would take into account how access was obtained and limit usual fair use because of the way in which access was obtained. A use that would usually be fair—a book review—would lose that status if the book were stolen. The state gets to put the burglar in jail for the theft and the author can sue for copyright infringement.

3. *Fair Use Trumps*. The flipside of fair use penalties would be fair use trumps: we use the fact that the use would not be copyright infringement because it would be fair to trump the punishment that could attach to the method used to acquire access. The book review would insulate the burglar from prosecution because the book review was fair use.

I am quite skeptical about the role for regime 3. Once it was announced, burglars would go into blogging in a big way: steal stuff, be sure to take a book as well, and then blog a review of the book. Presumably a fair-use trumps regime would apply only to stolen copyrighted works; but even there, I am hard-pressed to understand why we should twist fair use to vindicate theft. I could go either way on 1 or 2, but regime 3 effectively converts a particular copyright privilege into something much, much broader. I suspect that the caselaw puts us in cases 1 or 2; I doubt that we are even close to regime 3.<sup>20</sup>

What cases might fall within my third situation? The library burglary obviously, but that is the most extreme version. Consider two other situations: (1) contractual access limits and (2) digital rights management technologies. I give you access to the manuscript of my poem but I make you promise not to post a review on your blog. You breach the promise. Do I have an action in contract? Copyright infringement? What is the interaction between the two?

The case against enforcing the contract would focus on the third-party benefits of fair use. Fair use benefits not merely the person making the use, but also those who are exposed to the use. The book review isn't so much about the reviewer as the potential audience for the book. A recipient of the manuscript who agrees to contractual limits on use might not take into account fully the third-party benefits associated with not being subject to the limits. If you thought that the author would grant access even without the contractual limit, we would be better off barring the enforcement of the contractual term.

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20. See William Patry, *Fair Use: The Source Copy* (Dec 20, 2005), available at <http://williampatry.blogspot.com/2005/12/fair-use-source-copy.html> (last visited Apr. 2, 2008) (laying out some of the relevant case law).

Of course, the key premise there is that the author would give access to the work even without the contract limiting use. The Supreme Court was certainly skeptical about that in *Cohen*. It saw promises to sources as a key way for reporters to get stories in the first place and understood that the press as a whole would be worse off if it couldn't make meaningful upfront promises to sources. And even putting to one side the empirical judgments required, I am skeptical that section 107 itself, read fairly, says anything about contracts limiting uses. As suggested before, section 107 just excludes certain uses from copyright's rules regarding infringement.

The leading case law discussion of the DRM question is *Universal City Studios, Inc. v. Corley*.<sup>21</sup> *Corley* contended that the DMCA—in particular, section 1201(c)(1)—meant that DRM schemes could be circumvented if that would allow fair use of the materials. The Second Circuit rejected that reasoning, but also concluded that the fact that fair use resulted from a breach of the DMCA didn't somehow render that use unfair.<sup>22</sup> This is to embrace the full independence view.

I'm not sure that I agree with the Second Circuit that section 1201(c)(1) adopts full independence. The section says that 1201 itself isn't intended to change the usual rules regarding copyright infringement, including the fair use rule. As I have suggested above, fair use addresses use, not access. The fair use penalty idea is within the fair use doctrine, a fair use version of clean hands, where fair use is forfeited if access is obtained illegitimately. I wouldn't understand section 1201(c)(1) to limit a judge from applying this version of the clean hands doctrine to what would otherwise be a fair use.

#### IV. BUILDING ON COPYRIGHTED WORKS

At its core, the fair use question is about the circumstances under which a subsequent individual can use the prior work of a second author. This is often part of the general case in which a first work is used to create a second work. Take a simple case: I write a novel in English and the question is whether to translate the novel into Mandarin. As the author, I can make this decision before or after the novel is first published. We should think of this as case of incremental investment. I spend some amount to create the novel in English and then face a separate second and discrete investment question.

In setting up our copyright system in the face of this sort of sequenced investment, we should take into account the way that new information should influence that investment decision. Put simply, we don't want bad English novels translated into Mandarin, and we can run a market test to figure out which novels should and shouldn't be translated: publish the book in its original English and see how the public reacts. If they love it, translate it into Mandarin, but if everyone hates the novel, don't bother spending money to create the Mandarin version. Take advantage of the information that we know will be forthcoming to make the

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21. 273 F.3d 429 (2d Cir. 2001).

22. *Id.* at 443 ("Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the 'fair use' of information just because that information was obtained in a manner made illegal by the DMCA").

second-stage investment decision.

How do the rules of copyright influence this? If as author I don't hold a translation right—if anyone with access to the English work can legally translate the work—I won't get any value in the second round of value that arises from my original work. That might mean that I don't create the work in the first place if I need access to some chunk of both pots of money created by the work—the original English sales and the subsequent Mandarin sales—but the more standard incentives-to-create issue isn't my focus right now. Instead, focus on my incentive to translate the novel into Mandarin *before* it is published in English. Being first to market with the Mandarin version may be the way in which I grab some of the second stream of value that results from the work. Note also that doing this means that I will almost certainly delay the release of the original English work while I take time to do the Mandarin translation. That delay is a social cost too.

We can now say something sharp about the incentives of first authors to make these second-stage investments. Absent a property right over translations, authors will overinvest—compared to what we as a society want—in these second-stage investments. As a society, we should wait for the English sale results before investing in Mandarin, but, absent a translation property right, the first author won't get any value from the Mandarin version if she waits for results. Instead, she will take advantage of her initial monopoly over access to the book to try to turn that into a first-mover advantage in the Mandarin market. Note how copyright can influence this. If she holds a translation right, then she can wait for the market returns. She doesn't fear that giving up her initial unique access to the work will turn into a market disadvantage in the subsequent Mandarin competition. With a translation property right in hand, the author will now share the social incentive in using the market-value information efficiently.

Now focus on the social trade-off in deciding whether to give the first author a property right over translations. Giving the author a monopoly means that we suffer the deadweight loss of monopoly for the work in the Mandarin market. The price of the Mandarin edition is higher than it would be absent the property right, and some consumers never buy the work, though they otherwise would if the work were sold in free competition. The size of that effect depends of course on how the Mandarin work competes with all other Mandarin texts, so the monopoly power costs could be large or small. Against those costs we have to weigh the wasted investments that authors will make in translating bad books so as to take advantage of their initial monopoly over access to the text. And, to come back to the more conventional incentive story of copyright, we must consider the possible loss of original works if author wouldn't create the work at all without access to both markets.

There has been a suggestion that we should frame fair use simply as any use that creates additional value for the work.<sup>23</sup> I am not clear on how that notion would

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23. See Tim Wu, *Bits Debate: Mixing It Up Over Remixes and Fair Use*, N.Y. TIMES BITS BLOG (Jan. 16, 2008), available at <http://bits.blogs.nytimes.com/2008/01/16/830/> (“... [W]ork that adds to the value of the original, as opposed to substituting for the original, is fair use”).

apply to my translation example. In some basic way, a translation of a work doesn't compete with the original work. Mandarin-only readers aren't going to buy the English version of the novel, and so the Mandarin translation isn't a meaningful substitute for the English version; it complements it. There will only be a handful of readers who will decline to buy the English version sold under the control of the copyright holder and will instead buy the Mandarin version sold at a competitive price free of copyright restraints.

So we might say that the Mandarin version adds value and hence the translation qualifies as fair use. That misses the key point that the author could do the translation herself and, through her control over original access to the work, controls the timing of that translation and holds that control with or without a copyright over the translated work. We should care about her decision about whether to make the second-stage investment and that has little—maybe nothing—to do with whether the second work is a complement or substitute for the first work.

The translation example is a natural starting point, as this is where U.S. copyright law started its march towards adding control over derivative works to the rights held by the copyright holder. The 1870 Copyright Act authorized authors to reserve the rights to dramatize or translate their own works.<sup>24</sup> The familiar “all rights reserved” legend became a standard way for authors to hang onto the rights available to them under the statute. We might say that translation is just fancy copying. Indeed, it isn't hard to imagine a Xerox 2020 copier offering “language shifting” as one its key selling points—“Now with improved Mandarin!”—and that would seem just like old-fashioned copying. But the incremental investment point is broader and the real question is how much of the derivative works right now in section 106(2) should be brought within that framework.

## V. FAIR USE AS INEFFICIENT BUNDLING

Finally, consider the way that fair use may operate as an inefficient bundle of rights. The following example is instructive. We have a book published on paper. All consumers value the paper copy of the book at \$8. Some consumers are happy as clams with just paper. Other consumers would love to have a digital, searchable copy of the book to go along with the paper copy. Those consumers would value bundle of a paper copy and a digital copy at \$12. If the copyright owner didn't fear copying—either of the physical book or a digital copy—what would she do?

The answer is straightforward: sell physical copies of the book for \$8 and digital copies for \$4 (or for the proverbial epsilon less than that if you like). Old-school consumers would just buy the physical copies, while “newbies” would buy both. We would sell to all consumers, and the copyright holder would capture all of the value associated with the work. We would also not leave any social value sitting on the table. No transactions that we would like to see take place will have been

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24. 16 Stat. 212 (1870). The current version of the derivative work right is codified at 17 U.S.C. § 106(2) (2000).

missed.

Now consider a possible fair use doctrine. Suppose that we announced a doctrine that said that any consumer was entitled to the work in any medium, once the work was purchased in some medium.<sup>25</sup> A digital copy is produced—perhaps through an online open source-type process where individuals contribute chunks of typed text. Consumers who wanted the digital copy would no longer need to pay \$4 to get it. Where would this put our copyright holder?

Before, the copyright holder could sell different products to different consumers. The sensible approach was to sell just paper copies to traditional consumers and sell paper and digital copies to the younger consumers. Now the rights regime makes it such that the copyright holder can sell only one product, but some of those consumers will value the product at \$8, while other consumers will value the product at \$12 (knowing that once they have the paper product, they can get a digital product they will value at \$4 for free).

What will the copyright holder do? She can sell the paper copy for \$8 or the paper copy for \$12, but she can no longer sell any digital copies for a positive price. What she will do depends on the numbers (and to simplify matters, treat the costs of making physical and digital copies as being 0). If the copyright holder sets a price of \$8 for the physical book, she receives revenues of  $8*(O + N)$ , where  $O$  is the number of old-school consumers and  $N$  is the number of digerati. If instead she sets a price of 12, her revenues are  $12*N$ .

Try an example. Set  $N = 10$  and  $O = 4$ . Total revenues from selling at \$8 are then \$112, from selling at \$12, \$120. In the face of free digital copies—whether from the open-source text collective or from a service like Google Book Search—the copyright holder will jack up the price of the physical book. She can no longer treat the two customer types differently. Note that the copyright holder is much worse off than before. Without the free digital copies, on these numbers, the copyright holder sold to everyone and took in revenues of \$152. But, and this is the important point, society is much worse off too. All consumers were served before. Now the increased price for the physical book—caused by the inability to charge separately for the physical book and the digital book—has priced some consumers out of the market.

Fair use is a form of bundling: one right necessarily comes with some other right. Not all consumers will want the “extra” bundled rights. Copyright holders will take into account in their initial pricing decisions for a work the full uses being conveyed, including those conveyed as a result of fair use. With that idea in mind, step back to consider two quick points. First, I think that this is exactly the dynamic at stake for the record legends in *Whiteman*. If a sold record automatically came with a broadcast right, we run the risk of inefficient bundling. I take it that we think history suggests that there was more money to be made in selling many records at low prices rather than just a few at high prices to the broadcasters, but it could have worked out otherwise. Second, if we ask where that might have

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25. See, e.g., DigitalConsumer.org Bill of Rights, <http://digitalconsumer.org/bill.html> (last visited Apr. 2, 2008).

happened, we might want to consider the emergence of the public performance right in 1856.<sup>26</sup> This again is a use bundling question: if I sell you a copy of the play, do I also sell you right to perform the play? Reading the play and performing it are two quite different uses that might arise from the same physical instantiation of the work. The 1856 act facilitated separation of these markets.

## VI. CONCLUSION

Use of a copyrighted work and access to it are different animals. U.S. copyright law focuses almost exclusively on use rights and doesn't create general positive access rights. Of course, use rights will nonetheless be effective if authors choose to give access to works through wide distribution of those works through publication. But even with publication, authors want to exercise control at a distance over the work, to publish the work and yet retain control over it. In the past authors have attempted to do so using legends and contracts; now authors seek control at a distance through digital rights technology. While effective legends, contracts and DRM could limit the way in which fair use operates, these limiting tools do no more than implement the author's fundamental right to control access to the work, a right that fair use just doesn't address.

If we turn to functional accounts for nonconsensual use of copyrighted works—uses such as fair use and uses outside the scope of the derivative works right—we need to take into account how copyright influences incremental investments in works and how fair use can inefficiently bundle together too many uses. The author's initial control over access to a new work means that the author could enter many markets for the work simultaneously, so the author could produce both an English version of a work and a Mandarin version at the same time. An author might have incentive to do this if, for example, anyone could produce the Mandarin version once the English version was published. We don't want authors to do this. As a society, we want to continue to invest in the copyrighted work only after we received market feedback on the English version. Otherwise we throw away the information that should guide our incremental investments in the work. Copyright designs that limit nonconsensual follow-on uses do a better job of aligning incremental investment incentives.

Finally, fair use can operate as a bundling of rights. If we were to conclude that the sale of a text copy of a play came with, as fair use, the right to perform the play, playwrights would not be able to separate the reading and performing markets. Instead of selling at different prices to both markets, playwrights might choose to drop one market—probably the reading market—to instead sell at high prices to the performing market. Consumers would be worse off a result. Of course, the 1856 amendments to our copyright statutes made exactly this separation possible, but the way in which fair use might prevent this type of rights separation in other markets is perfectly general.

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26. 11 Stat. 138 (1856). The current version of the public performance right (except for the corresponding public performance right for sound recordings) is codified at 17 U.S.C. § 106(4) (2000).