FAIR USE AND ACADEMIC EXPRESSION: RHETORIC, REALITY, AND RESTRICTION ON ACADEMIC FREEDOM†

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INTRODUCTION

At first glance, copyright policy seems an unlikely subject of concern to defenders of academic freedom. After all, both doctrines are firmly rooted in the goal of advancing knowledge. The courts, however, have begun to express a neoclassical economic view of copyright that has troubling implications for the academy. The conspicuous adoption of this view in recent fair use doctrine, if applied to academic use, would be contradictory to principles of academic freedom. Although academic uses of academic expression—academic journal articles of scholarship and research—have not yet been challenged directly, such uses are highly likely to precipitate the next fair use controversy.

This article addresses the contours of copyright policy in the academic context by juxtaposing principles of academic freedom against the implications of importing neoclassical economic principles into how we judge the value of academic contributions to knowledge. The article argues that judging the value of scholarship and research on the basis of market preferences will reinforce the subordination and exclusion of outsider perspectives in the academy. Thus, importing such a system into the university context will chill academic freedom by undermining the principles of unfettered inquiry and inclusion upon which the university is premised.

Copyright bestows property rights onto the authors of creative expression as a means for advancing knowledge. These property rights are justified by an incentive rationale—as necessary to stimulate the maximum production of creative works. The social costs related to the monopolistic protection that copyright affords to authors have prompted a need to balance the copyright incentives against the limitation on public access to creative works. Thus, the courts and Congress have fashioned the fair use doctrine to avoid the rigid application of copyright restric-

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† This article was the recipient of an Honorable Mention Award, Association of American Law Schools' 1999 Scholarly Paper Competition.

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tions in situations where the social costs of copyright restrictions outweigh the benefits.

While the courts rhetorically embrace this incentive theory, they decline to substantively rely upon this rationale as a basis for deciding fair use cases.[1] In recent years, with the emerging discipline of Law and Economics, [2] neoclassical economic theory has emerged as the primary justification for copyright[3] and the courts have imported this trend into significant fair use decisions.[4] Pursuant to this theory, copyright serves to advance *worthy* knowledge by creating a market for creative works that allocates those works to their highest valued use. The social value of the creative works is then defined by the price the works can command in the market. This theory requires that creative expression be given broad copyright protection to facilitate its distribution in the market. Thus, whereas incentive theorists argue that copyright protection should extend only as far as necessary to induce the creation of new works, the neoclassical economic justification for copyright requires broad restrictions on access to such works regardless of the impacts on creativity.

This article argues that a neoclassical economic justification for copyright is inappropriate in the university context.[5] Part I examines the goals and application of the differing theoretical justifications for award-

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1 *See infra* Part I.B.

2 Law and Economics primarily involves analyzing legal doctrines by translating principles and assumptions of economic analysis into principles and assumptions of law. These presumptions and assumptions are used to explain, critique, and make predictions regarding the law. *See* Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1038 (1992). Law and Economics relies on a number of neoclassical microeconomic principles and assumptions. The most basic principle underlying neoclassical economic theory is that resources are limited and human wants are unlimited. This leads to the second principle—we need a mechanism for allocating scarce resources with optimal efficiency. Efficiency in allocating scarce resources is said to exist when the gains of the gainers compensate the losses of the losers. The third principle asserts that the market is the best mechanism for achieving efficiency. The basic assumption underlying neoclassical economic theory is that groups of individuals pursue their self-interest rationally after weighing the costs and benefits of any particular action, and that an economic market model can be used to predict the behavior of a group of individuals in maximizing their self-interest. Based on these assumptions and principles, Law and Economics claims that neoclassical economic theory is a scientific method that describes what *is*, without importing into the equation any value judgment to decide what *should be*. This positive/normative distinction has been the source of much of the debate surrounding Law and Economics.

3 Major contributors to copyright scholarship are attracted to the economic justification as a framework for deciding fair use cases. The primary exemplar is Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

4 *See, e.g.*, Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992) (citing and drawing reasoning from several economically-oriented articles on copyright protection for software).

5 The focus of this article is on the university context, rather than on primary and secondary educational environment.

ing property rights in creative works. Part II discusses the possibility that a neoclassical economic justification for copyright may soon apply to the academic use of academic expression. Part III considers whether academic use of academic expression is sufficiently different from other uses of creative works to warrant special treatment in copyright doctrine. In doing so, the article explores the differing viewpoints of the appropriate mission of the university. The article also reviews the correlative policy of academic freedom to identify both the academic values implicit in that policy, and how the policy advances the mission of the university. Against this background, Part IV explores how the neoclassical economic view of copyright can impact academic freedom in particular and the mission of the university in general. The article argues that importing this view into value judgments made in the university context will impoverish the diversity of viewpoints essential to the university's mission of advancing knowledge. In conclusion, the article suggests that the more limited incentive justification of copyright best furthers academic values in the university context, since a policy of inclusion and access defines the university's mission.

I. THE JUSTIFICATION FOR COPYRIGHT: RHETORIC VERSUS REALITY.

A. COPYRIGHT RHETORIC: AN INCENTIVE JUSTIFICATION.

Copyright rhetoric justifies applying property principles to creative expression through an incentive rationale that is theoretically founded in the Constitution.[6] Article I of the United States Constitution gives Congress the exclusive 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."[7] The Framers' eighteenth century use of the word "science" referred to knowledge or learning, rather than the study that today we call "science."[8] Thus, the constitutional goal of copyright is to advance learning and knowledge.[9]

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[6] *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1204 (1996).

[7] U.S. CONST. Art. I, § 8, cl. 8.

[8] *See* Pierre N. Leval, Essay, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. Rev. 1449, 1450 n.3 (1997) [hereinafter Leval, *Nimmer Lecture*]; Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 7 (1995).

[9] The Statute of Anne, England's early version of copyright, stated that copyright legislation was needed "for the Encouragement of Learned Men to Compose and write useful Books." Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.). This rational remained the impetus of the first Copyright Act enacted by Congress, which carried the title, "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." *See* 1 Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831).

The copyright policy envisioned in the Constitution is rooted in democratic values. The Framers who enacted the Copyright Clause thought it essential to the establishment of a democratic government that society be provided with new ideas and knowledge.[10] They viewed scientific inquiry—the search for truth without prejudice—as a prime means by which new ideas are generated.[11] Given the Framers' predilection for open inquiry and the high value they placed on innovation in ideas and technology, it makes sense that the Framers' focus in enacting the Copyright Clause was encouraging maximum production and dissemination of new works.

Pursuant to its Constitutional mandate, Congress enacted the Copyright Act,[12] which entitles authors to property rights in certain creative works.[13] According to copyright rhetoric, these property rights are not a matter of divine right.[14] Rather, property interests in creative expression have a limited functional role in society. Copyright rhetoric asserts that the purpose of copyright is to advance learning and knowledge by stimulating creativity that results in the widest possible production and dissemination of creative works.[15] This approach views any reward to authors as secondary to learning and knowledge.[16] From this rhetoric emerges the theme that justification for copyright "rests solely on a utilitarian foundation."[17] According to this theme, copyright doctrine is animated by the notion that copyright's support for the creation and dissemination

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10 *See* Richard Delgado & David R. Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 355 (1978).

11 *See id.*

12 Copyright Act of 1976, 17 U.S.C. §§ 101- 1008 (1994 & Supp. 1996).

13 Copyright is a matter of positive law. Generally, there is no common law property right to creative expression. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1108 (1990) [hereinafter Leval, *Fair Use Standard*].

14 *See id.*

15 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (property rights afforded by copyright "are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward. . . .").

16 *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration . . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.").

17 *See* Sterk, *supra* note 7, at 1203.

of knowledge for the benefit the public[18]is the regime's paramount utilitarian purpose.[19]

Pursuant to incentive theory, copyright uses the economic rewards of the market to stimulate the production and dissemination of new works.[20] Incentive theory assumes that creative expression will likely be squelched and constricted if authors are not afforded some copyright protection to ensure a financial return on the costs of creating and disseminating their original works.[21] This assumption rests entirely on the theory that authors will not create works and make them available to the public unless they can prevent "free riders"[22] from copying those works and siphoning some of the value of the copied work by selling the copies to the public at a lower cost.[23] Faced with such competition, the original author cannot sell copies of her work at a price that would enable her to recover the costs of creating the original work.[24] If she cannot recover

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18 *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works."); *Twentieth Century Music Corp.*, 422 U.S. at 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

19 *See* Leval, *Fair Use Standard*, *supra* note 14, at 1108.

20 *See* Kreiss, *supra* note 9, at 4.

21 *See* Sterk, *supra* note 7, at 1207; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283, 285, 292 (1996). Copyright case law typically characterizes copyright as ensuring authors a "fair return" on their work. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1984) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."); *Sony*, 464 U.S. at 432; *Twentieth Century Music Corp.*, 422 U.S. at 156 (stating that the goal of copyright law is to secure a fair return for the author's labor); *Mazer*, 347 U.S. at 219. The case law, however, does not reflect any clear sense of what constitutes a "fair return." In economic terms, a fair return is a return of fixed costs plus a competitive rate of return on the investment. *See* DAVID R. HENDERSON, THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 400 (1993). Thus, it appears *return to costs* should be the defining quantifier. However, copyright creates a regime whereby an author is awarded a fair return based on the value of her work rather than the cost-based return associated with competition. This return can amount to a monopoly rent potentially reaching far beyond fixed costs.

22 Such competitors are called "free riders" because they use another's work, sometimes for profit, while the author or publisher pays all the creation, production and marketing costs. *See* Netanel, *supra* note 22, at 292 n.26.

23 *See* Sterk, *supra* note 7, at 1197; Netanel, *supra* note 22, at 308. Because such works are extremely easy to copy, a competitor can copy the original work and thereby avoid many of the creation costs incurred by the original author. The competitor can then market a competing version of the work at a lower price than would be profitable for the original author. *See* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 581 (1996).

24 *See* Lunney, *supra* note 24, at 581; Netanel, *supra* note 22, at 292 ("This free rider problem ... would greatly impair author and publisher ability to recover their fixed production

the costs of her original work, the author may forego authorship in favor of some other line of work, thus depriving society of additional creative works.[25] Thus, this theory suggests that only those authors whose desire to create is independent of financial return will continue to produce creative works.[26]

To counteract this problem, the Copyright Act grants authors certain exclusive rights with regard to their works.[27] This copyright protection increases the cost of, and thus decreases the incentive for, copying by allowing an author to legally prohibit a competitor from copying an original work.[28] Because an author can prevent free riders from copying and distributing an author's work without paying copyright royalties,[29] copyright protection creates an artificial scarcity[30] in the means of accessing a

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costs."); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) (arguing that when the market value of a creative work is reduced to the marginal cost of copying that work, the author and publisher will not be able to recover their costs of creating the work); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1700 (1988).

25 *See* Lunney, *supra* note 24, at 492-93, 581.

26 *See* Netanel, *supra* note 22, at 292-93.

27 A number of acts are reserved exclusively to the copyright owner by the Copyright Act of 1976, under 17 U.S.C. § 106, subject to the limitations and exceptions found in §§ 107-120. In its entirety, § 106 reads as follows:

> § 106. Exclusive rights in copyrighted works. Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (Supp. 1996).

28 *See* Lunney, *supra* note 24, at 600.

29 *Id.* at 493-94.

30 Enforcing copyright protection is essentially an effort to mimic scarcity where there is none. Most goods and services are resources that must be divided among a limited number of users due to scarcity—once they are used, they are consumed. Thus, one of the purposes of assigning a property right to such goods and services is to create a system for allocating such scarce resources. Creative expression, however, is not a scarce resource that must necessarily be allocated. Once created, such expression is capable of enjoyment by millions without incurring significant extra creation costs. Thus, creative expression is a classic example of a "public good." An unlimited number of people can enjoy the product without the product being consumed. This means that once a work is produced and disseminated to the public, no one can be excluded from using the work on the basis of consumption. This also means, however, that once a work is produced, the marginal cost of disseminating it to the public approaches zero. *See* Netanel, *supra* note 22, at 292. Marginal cost is a per unit cost that

creative work and gives the copyright owner a monopoly[31] in the resulting market for such access. This monopoly right enables copyright owners to charge substantially more than the costs of creation for access to such creative works.[32] Thus, by giving authors an enforceable property right in their works, copyright provides authors an economic incentive to produce creative works.

While some copyright protection may be necessary to prevent an underproduction of creative works, the monopoly property right attendant to that protection carries serious social costs. For copyright to serve its goal of promoting learning and knowledge, the copyright induced works must be accessible to the public. However, copyright protection decreases access to existing copyrighted works by enabling an author to charge a higher price for such accesses.[33]

Thus, the artificial scarcity created by copyright ultimately can lead to a deadweight social loss[34] stemming from a copyright holder's monopoly on access to existing works.[35] Those seeking access will have to pay more for the work than they would have had to pay in a naturally competitive market. Those members of the public who may have been willing to purchase access to the creative work at a competitive cost may be unwilling or unable to purchase access to the work at its monopolistic

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represents the increase in cost necessary to produce one additional unit of output. *See* MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS (1996).

31 The notion that affording an author a property right in her creative works gives that author a monopoly in that work depends upon the assumption that no creative work can serve as a complete substitute for another. *See* Sterk, *supra* note 7, at 1205 n. 45. If one creative work could serve as a complete substitute for another, the market would be characterized by competition, not by monopoly. *Id.*

32 *See* Lunney, *supra* note 24, at 494-95.

33 Professor Lunney stated:

> As copyright provides an author with an increasing degree of market power, it increases the extent to which the author can profitably raise her price above a perfectly competitive level, and simultaneously increases both the rent the author receives for her work and the deadweight loss associated with protection of her work.

Id. at 557.

34 Professor Netanel stated:

> Defined in terms of traditional welfare economics, deadweight loss consists of two components: (1) the extent of the lost satisfaction experienced by each consumer who is unable to purchase the product because of its monopolistic price; and (2) the number of consumers who experience such loss.

Netanel, *supra* note 22, at 293 n.32.

35 Monopoly:

> reduces aggregate economic welfare (as opposed to simply making some people worse off and others better off by an equal amount). When the monopolist raises prices above the competitive level in order to reap his monopoly profits, customers buy less of the product, less is produced, and society as a whole is worse off. In short, monopoly reduces society's income.

Henderson, *supra* note 22, at 400.

price.[36] In addition, those users who do purchase the work at its higher, monopolistic price must transfer "monies that would otherwise would have remained in their collective pocket as consumer surplus[37] to the author in the form of a monopoly profit or rent."[38] At some point, copyright protection reduces the supply of new works because the number of authors deterred from creating by the high cost of accessing source material exceeds the number encouraged to create by the economic incentives stemming from copyright protection.[39] Ultimately, copyright's monopoly protection can strangle the creative process.[40]

Recognizing the social costs of copyright, an incentive justification for copyright requires that authors be protected no more than necessary to induce the creation of new works.[41] Thus, under incentive theory, the tension in copyright law lies in determining when "exclusive rights should end and unrestrained public access should begin."[42] Copyright's proper scope pursuant to incentive rhetoric is "a matter of balancing the benefits of broader protection, in the form of increased incentive to produce such works, against its costs, in the form of lost access to such works."[43] Copyright protection must be broad enough to provide authors

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[36] *See* Netanel, *supra* note 22, at 293.

[37] Consumer surplus is the excess value a consumer places on a good over the price of the good. *See* Seidenfeld, *supra* note 31, at 16. "'Surplus' refers to the resources left over after a consumer purchases those items she considers more essential." Lunney, *supra* note 24, at 574 n.338. At the same time it reduces publishers' production costs, new computer technology will enable the copyright owner to extract all profit from a work through price discrimination based on consumer ability to pay. Such price discrimination will bring copyright owners a maximum share of consumer surplus since they can charge each customer the full amount she would be willing to pay for access to the work. *See* Netanel, *supra* note 22, at 293 n.31.

[38] Lunney, *supra* note 24, at 497.

[39] *See* Sterk, *supra* note 7, at 1207 n.46; Lunney, *supra* note 24, at 485, 495.

At some point, as copyright broadens its scope of protection, the market power such protection creates will become excessive, enabling the author to charge such a high price for access to copies of her work that it imposes an undue deadweight loss, and unduly limits access to, or dissemination of, the work.

Id. at 520.

[40] *See* Leval, *Fair Use Standard*, *supra* note 14, at 1109-10. *See also* Landes & Posner, *supra* note 25, at 342-43 (as the number of copyrighted works increases, the amount of material in the public domain falls, making it more expensive for authors to acquire the raw material necessary for creating new works).

[41] *See* Sterk, *supra* note 7, at 1209; Landes & Posner, *supra* note 25, at 343-44.

[42] Netanel, *supra* note 22, at 285. *See also* Kreiss, *supra* note 9, at 4 ("To function properly, copyright law must strike a balance between the rights given to copyright authors and the access given to copyright users.").

[43] Lunney, supra note 24, at 485; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (the task of defining the scope of the limited monopoly that should be granted to authors "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand. . . ."); H.R. Rep. No. 94-147 at 134 (1976) (discussing the incentives-access balance in determining copyright's appropriate term); Wildlife Express Corp. v. Carol Wright Sales, Inc.,

adequate incentives to produce and disseminate creative works, but not so broad that an author's ability to extract monopoly rents for access chills the production and dissemination of, and access to, creative works.[44]

1. *Fair Use Rhetoric.*

Tailoring a system of copyright protection to the minimum necessary to induce creative activity would impose onerous administrative costs. One should not expect a perfect fit. Therefore, the courts and Congress have created traditional limiting doctrines that, when taken at face value, seek to address the balancing problem that copyright monopoly creates. One of these doctrines, the *fair use* doctrine, purportedly serves as a mechanism for striking a balance between copyright's costs and benefits.[45] The doctrine provides that some unauthorized uses of existing copyrighted works will not constitute an infringement on the copyright of those works.[46]

Copyright rhetoric asserts that the fair use doctrine reflects a theoretical desire among Congress and the courts to limit copyright protection in situations where such protection will not generate incentives sufficient to warrant the social costs associated with monopoly power

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18 F.3d 502, 507 (7th Cir. 1994) (balancing the author's rights to their original expression with the need to allow others to build freely upon the ideas conveyed by a work).

[44] In *Computer Associates Int'l., Inc.*, the court stated:

> Thus, the copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation. In applying the federal act to new types of cases, courts must always keep this symmetry in mind.

Computer Assoc. Int'l, Inc., v. Altai, Inc., 982 F.2d 693, 696 (2d Cir. 1992).

[45] *See* Sterk, *supra* note 7, at 1205-06; Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977) ("The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry.").

[46] The fair use doctrine is codified at 17 U.S.C. § 107 (1994). The full text of the provision reads as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1994).

(or, in fact, might be counterproductive to such incentives).[47] Thus, at first glance, this limitation on copyright protection appears to be consistent with an incentive justification for copyright. In applying the fair use doctrine, however, the courts have found distinguishing fair uses from unfair ones problematic. Courts and commentators frequently caution that such difficult fair use decisions should be made in light of copyright's purposes and objectives.[48] The problem then becomes discerning copyright's true goals by differentiating copyright rhetoric from copyright reality.

B. COPYRIGHT REALITY: A NEOCLASSICAL ECONOMIC JUSTIFICATION.

While the incentive theme pervades the superficial rhetoric of the courts' fair use decisions, it does not appear to animate the courts' fair use jurisprudence. A brief review of recent fair use cases illustrates that the courts, despite their rhetorical flourishes, appear to be defining the fair use doctrine exclusively in neoclassical economic terms—terms that have their basis in a broad, rather than limited, property right.

1. *Derivative Rights.*

Copyright's expansion into a broad proprietary right began with the extension of protection to derivative works based on original expression. In the nineteenth century, an author's legally protected copyright interest consisted only of the exclusive right to make copies of her work in its *original* form.[49] Thus, a secondary use of an author's expression would interfere with the author's copyright interest only if that use would directly compete with the author's original work in its original form.[50]

The Copyright Act now extends an author's rights beyond competitive displacement of the demand for the author's original work by prohibiting most unauthorized derivative uses of a copyrighted work. Derivative works are defined broadly to include "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 adapted."[51] Most of these derivative uses will not displace the demand for the origi-

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47 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (The fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

48 *See id. See also* Leval, *Fair Use Standard*, *supra* note 14, at 1110-11 (The four statutory fair use factors direct courts to "examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of copyright.").

49 *See* Lunney, *supra* note 24, at 534.

50 *See id.* at 542; Netanel, *supra* note 24, at 301-02.

51 17 U.S.C. § 101 (1998). *See also* 17 U.S.C. § 106(2), (4), (5) (Supp. 1996).

nal work in its original form, and thus are not the type of competitive uses copyright protection was previously limited to.[52] Thus, the exclusive right to prepare derivative works based upon the copyrighted work extends the author's monopoly over not only the work in its original form, but also over noncompeting works as well.[53]

Because copyright now protects derivative works that do not displace the demand for the original, the courts now hold that unauthorized uses can amount to infringement based on lost potential licensing revenue.[54] As a result, the Copyright Act enables the author to control every valuable use of her work.[55] Under an incentive rationale, affording such rights to authors is justified only when the return on derivative works is necessary at the outset to provide incentives for the author to create the original work.[56] This would be true only in those limited cases where:

(1) the projected returns from the original work are too small to justify the costs of production, and (2) the projected returns from the derivative work are so large relative to the cost of producing the derivative work that the difference will more than make up the projected deficit on the original work alone.[57]

Extending derivative rights beyond such limited cases expands copyright protection beyond the reach of the incentive rationale and into the domain of neoclassical economic justification. Current fair use doctrine has thoroughly embraced this expansion.[58]

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[52] *See* Lunney, *supra* note 24, at 628-29. Note that the user will have already have paid the market price to obtain a copy of the work and, thus, these rights require an additional licensing fee over and above the market price for a copy.

[53] *See id.* at 542. For example, the creator of a cartoon is afforded the exclusive right to create toys or other objects based on the cartoon's characters. The author of a book has the exclusive right to prepare a movie version of the book.

[54] *See* Princeton University Press v. Michigan Document Services, 99 F.3d 1381, 1386-87 (6th Cir. 1996); American Geophysical Union v. Texaco, Inc., 37 F.3d 881 (2d Cir. 1994), *aff'g* 802 F. Supp. 1 (S.D.N.Y. 1992), *modified*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S.Ct. 592 (1995).

[55] *See id.* at 545-46; *see also* Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 79, 85 (1992) ("Congress has given copyright owners rights to every market in which consumers derive value from their works.").

[56] *See* Sterk, *supra* note 7, at 1215.

[57] *Id.* at 1215-16.

[58] *See* Lunney, *supra* note 24, at 533-34; *see also Texaco*, 60 F.3d at 922 (stating that any copying of another's work that allows one to earn a profit weighs against a finding of fair use); Twin Peaks Prods., Inc. v. Publications Int'l., Ltd., 996 F.2d 1366, 1371-73 (2d Cir. 1993) (finding that a book about a television series infringed the copyrights in the audio-visual works that constituted the television series); Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (making a fine art statute using a cheap, kitschy postcard as a model constituted infringement); Morgan v. MacMillan, 789 F.2d 157, 162-63 (2d Cir. 1980) (suggesting that a book about ballet could infringe a copyright in the ballet's choreography); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1535 (S.D.N.Y. 1991) (finding infringement where the defendant was making a profit repackaging the plaintiff's copyrighted works).

2. *Fair Use Reality.*

The United States Supreme Court inaugurated the judicial embrace of a neoclassical economic justification for copyright through its very few fair use cases interpreting Congress's 1976 codification of the fair use doctrine.[59] The Court inadvertently[60] ventured into an economic analysis of fair use in its first case interpreting the 1976 fair use codification. In *Sony Corp. of America v. Universal City Studios, Inc.*,[61] the Court employed the economic justification of fair use analysis to justify a finding that private, noncommercial home videotaping was fair use. The *Sony* Court stated that "every commercial use of copyrighted material is presumptively . . . unfair."[62] The Court then determined that the home videotaping at issue was a fair use because it was noncommercial and it thus yielded social benefits while presenting no commercial detriment to the copyright holders.[63] The Court reasoned that "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."[64] In determining that all commercial uses are presumptively unfair and by focusing on a use's harm to all potential markets, the Court laid the groundwork for a subsequent fair use interpretation that has severely limited a traditionally expansive doctrine.[65]

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[66] the case in which the Court most clearly revealed its incorporation of market theory into the fair use arena, the Court further limited the fair use doctrine along neoclassical economic lines. In *Harper & Row*, editors of *The Nation* magazine excerpted and published key portions of the unpublished manuscript of Gerald Ford's autobiography relating to the Nixon pardon. *Time* magazine, which had secured the exclusive right to print

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59 *See* Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J 305, 305 (1993).

60 Judge Pierre Leval, a noted copyright jurist and scholar, contends that the court unnecessarily focused on a relationship between commercial objectives and fair use to justify finding fair use in the case of home videotaping. *See* Leval, *Nimmer Lecture*, *supra* note 9, at 1455-56.

61 464 U.S. 417 (1984).

62 *Id.* at 451.

63 *Id.* at 454-55.

64 *Id.* at 450.

65 Pierre Leval stated:

> Most undertakings in which we expect to find well-justified instances of fair use are commercial. These include, of course, journalism, commentary, criticism, parody, biography, and history; even the publication of scholarly analysis is often commercial. If all of these are presumptively unfair, then fair use is to be found only in sermons and classroom lectures. This would not be a very useful doctrine.

Leval, *Nimmer Lecture*, *supra* note 9, at 1456.

66 471 U.S. 539 (1985).

prepublication excerpts from the manuscript, then refused to pay for such rights.

In the absence of a clear mandate in existing case law as to how to apply the statutory fair use factors, the *Harper & Row* Court turned to the writings of Professor Wendy Gordon, a leading theorist for the neoclassical economic view of copyright. In an early article, Professor Gordon had advocated that fair use be restricted to cases where the defendant proves that market failure is insurmountable, that transferring control over the use would serve the public interest, and that the copyright owner's incentives would not be substantially impaired.[67] Thus, according to Professor Gordon, the narrow role of fair use is to correct market failure or protect socially desirable uses that do not impact the value of the copyright.

In *Harper & Row*, the Court relied heavily on Professor Gordon's application of neoclassical economic analysis to fair use questions. After invoking the obligatory incentive language,[68]the Court, without relying on any precedent, characterized the effect of a challenged use on the market for the original creative work as "undoubtedly the single most important element of fair use."[69] Thus, impact on potential licensing revenues immediately became determinative of fair use questions. Implementing Gordon's market model of fair use, as well as the restrictive conditions that flow from that model, the Court held that fair use should be available only in isolated cases of market failure and in the absence of any adverse effect on the potential market for the copyrighted work not only from the use in question, but from others like it.[70] Thus, the Court construed copyright to give an author a property right defined by the prerogative to extract all actual and potential economic value from a creative work not limited to that which is necessary to stimulate production. This reasoning provided the court the justification for stating that *The Nation*'s use of the excerpts was not a fair use.

The Court next touched on fair use analysis in *Stewart v. Abend.*[71] In *Stewart,* the Court held that a filmmaker's unauthorized use of a short story as a basis for a derivative motion picture was not a fair use because

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67 Professor Wendy Gordon presented this neoclassicist approach to fair use analysis in Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982) (discussing fair use where transactions costs or other impediments interfere with free market transactions between copyright owners and users).

68 The Court explained that copyright serves "to motivate the creative activity of authors . . . by the provision of a special reward." *Harper & Row*, 471 U.S. at 546 (citing Twentieth Century Music Corp v. Aiken, 422 U.S. 151, 156 (1975)).

69 *Harper & Row*, 471 U.S. at 566.

70 *See id.* at 549-50.

71 495 U.S. 207 (1990).

it impinged on the ability to market new versions of the story.[72] In its brief analysis of the fair use factors, the Court restated that the effect on the potential market was the most important factor to consider.[73]

In its most recent foray into fair use analysis, *Campbell v. Acuff-Rose Music, Inc.*,[74] the Court employed market failure analysis to uphold a parody as fair use. In this case, the music group *2 Live Crew* released a rap version of Roy Orbison's 1964 pop hit "Oh, Pretty Woman." Acuff-Rose, a music publisher holding the copyright to the song, sued the group for copyright infringement. The Court held that *2 Live Crew*'s version of the song, even though commercial,[75] was a parody of the original Orbison composition, and hence was a fair use because it would not replace the original in the market. According to the Court, the market for potential derivative uses includes only those uses that creators of original works would in general develop or license others to develop.[76] For example, criticism would not constitute a cognizable derivative market because few, if any, copyright owners will license critical reviews of their works.[77] Similarly, a copyright holder is unlikely to authorize a secondary user to parodize an original work. Thus, parodies such as *2 Live Crew*'s constitute the type of market failure that supports a finding of fair use. The Court made clear, however, that fair use analysis must recognize the copyright holder's rights to exploit cognizable markets for derivative works and that any use that occupies a derivative market within the copyright owner's entitlements is not going to be a fair use.[78]

The Court's importation of neoclassical economic analysis into fair use analysis has rendered fair use cases much less complicated than they had been before. Instead of operating as an "equitable rule of reason,"[79] lower courts can now decide fair use cases on the basis of market harm alone. After all, the Court has declared, and lower courts have repeated,

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72 *Id.* at 238.

73 *Id.*

74 510 U.S. 569 (1994).

75 In *Campbell*, the Court announced that commercial use should not be determinative because "[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph ofs§ 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'" *Id.* at 584 (no single factor should be treated as dispositive in the fair use analysis). The Court also conspicuously failed to refer to harm to potential market as the supreme consideration in fair use cases.

76 *Id.* at 592.

77 *Id.*

78 *Id.* at 590-94.

79 Committee reports described fair use as an "equitable rule of reason." *See* H.R. Rep. No. 94-1476, at 65 (1976). The *Sony* court called fair use an equitable rule of reason that required "a sensitive balancing of interests." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984).

that "[c]ommercial uses are presumptively unfair"[80] and that effect on the market is undoubtedly the single most important element of fair use.[81] If a use can be construed as a commercial use having an impact on any potential licensing revenues, that use is not going to be a fair use.

3. *The Role of Copyright Pursuant to Economic Theory.*

As the Court's fair use cases indicate, neoclassical economic theory, as opposed to incentive theory, has emerged as the principal theoretical justification for awarding expansive copyright protection for creative works. Neoclassical economic theory does not dispute that copyright provides an incentive for authors to create and disseminate works. Neoclassical economic analysis provides a conceptually distinct approach to copyright from incentive rationale. According to neoclassical economic theory, "[t]he basic purpose of a property system, from an economic perspective, is to ensure that resources are allocated to their highest valued use."[82] Because broad copyright protection enables the development of a market for existing creative works, it serves as a vehicle for directing investment in, and thus signaling the value of, such works. From the perspective of economic theory, copyright provides the appropriate degree of protection for a creative work when the market can channel that creative work to its most "highly valued use."[83] Thus, while incentive rationale for copyright focuses on the precarious balance between access and incentive, the neoclassical economic approach strives to create and perfect "markets for all potential uses of creative works for which there may be willing buyers."[84]

When viewed through this lens, copyright has vastly different goals. Creative works are commodities whose value is best determined by the market. As with other commodities, the price prospective users are willing to pay for the use of a creative work reflects the value such users attach to that commodity.[85] Collectively, consumer demand defines the social value of a work.[86] Ultimately, the social utility and value of these

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[80] *Sony*, 464 U.S. at 451.

[81] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

[82] Lunney, *supra* note 24, at 579.

[83] *Id.* at 489.

[84] Netanel, *supra* note 22, at 309. *See also* Wendy J. Gordon, *Assertive Modesty: An Economics of Intangibles*, 94 COLUM. L. REV. 2579, 2579 n.1 (1994) (stating that intellectual property law is fundamentally "a mode of converting mental labor into a 'vendible commodity'ê'); Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 118 (1990) (maintaining that "[e]xcept in the rarest case, we should treat intellectual property and physical property identically in the law").

[85] *See* Lunney, *supra* note 24, at 490.

[86] *Id.* at 592 n.379.

works is measured by the price they can command in the market.[87] The goal of copyright pursuant to a neoclassical economic justification is to advance and allocate learning and knowledge according to this market—assigned value.

Economic theory views a system of clearly defined property rights as a prerequisite for market efficiency because the economic model through which the allocative goals of copyright doctrine are theoretically realized requires broad, fully exchangeable property rights.[88] Therefore, under a neoclassical economic justification for copyright, authors of creative expression must be afforded broad proprietary rights that extend to every conceivable valuable use.[89] Thus, while "the incentive approach tends to look critically at copyright's expansion, questioning whether greater protection is necessary to provide economic incentive for the production of creative works," the neoclassic economic approach "has pushed economic analysis in the opposite direction. It supports expanded intellectual property rights and a diminished public domain."[90]

The fair use doctrine detracts from a copyright owner's full property rights. Pursuant to a neoclassical economic justification, the courts must employ the doctrine sparingly to avoid disrupting the pricing mechanism of the market through which customers signal what works are socially valuable.[91] Thus, the neoclassical economic theory shaping current fair use decisions has drastically limited applications of fair use while at the same time expanding authors' proprietary rights to creative works.[92] As a result, the courts have converted fair use from a standard that allowed for considerable copying as part of the process of creating a new work to a standard that permits such a use only in anomalistic cases.[93]

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87 *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 12 (1994).

88 *See* Netanel, *supra* note 22, at 312. *Cf.* Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 38 (1989) ("Markets work only after property rights have been established and enforced, and our question is what sorts of property rights an inventor, writer, or manager should have. . . .").

89 *See* Netanel, *supra* note 22, at 286.

90 *Id.* at 308.

91 *See id.* at 307 n.97.

92 *See* Lunney, *supra* note 24, at 547-48; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) "every [uauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright"); American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 922 (2d Cir. 1994) (noting that any copying of another's work that allows one to earn a profit weighs heavily against a finding of fair use); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1535 (S.D.N.Y. 1991) (finding infringement where the defendant was making a profit repackaging the plaintiff's copyrighted works).

93 *See* Netanel, *supra* note 22, at 290; *see also* Lunney, *supra* note 24, at 552:

> By defining the fair use doctrine as a means to address compelling needs for access, otherwise unaddressed, that may arise in particular cases, the Court has converted the fair use doctrine from the primary standard by which courts are to resolve the

On the surface, neoclassical economic analysis is powerfully alluring in an area such as copyright that is characterized by the tensions of competing interests. It provides a seemingly neutral framework for mechanically resolving the tensions at issue in fair use cases.[94] However, in advancing neoclassical economic theory, proponents of a broad copyright have successfully persuaded courts in fair use cases to broaden copyright protection without considering whether such an expansion is appropriate.[95] A rigorous systematic understanding of how a neoclassical economic justification for copyright inhibits creative authorship is wholly absent from the courts' analysis in fair use decisions. Consequently, the courts are extending copyright protection to authors without determining whether such protection is likely to induce or inhibit creative activity. Although the courts and Congress consistently invoke the rhetorical justifications for copyright in shaping fair use analysis, "copyright doctrine now extends well beyond the contours of the instrumental justification."[96]

II. FAIR USE AND ACADEMIC EXPRESSION

Recently, in *American Geophysical Union v. Texaco, Inc.*,[97] the Second Circuit, which is very influential in shaping copyright policy, employed the neoclassical economic justification for copyright to hold that photocopying of academic expression by Texaco researchers was not a fair use of the copyrighted works. This case comes at a propitious time in the development of fair use doctrine because photocopying is a form of derivative use that is receiving increasing scrutiny lately—especially in the university context.[98]

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issue of infringement into a secondary standard to be applied only in exceptional cases.

94 *See* Netanel, *supra* note 22, at 311.

95 *See* Lunney, *supra* note 24, at 602 n.399.

96 Sterk, *supra* note 7, at 1197.

97 37 F.3d 881 (2d Cir. 1994), *aff'g* 802 F. Supp. 1 (S.D.N.Y. 1992), *modified*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

98 *See, e.g.*, Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991); Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996). In the *Kinko's* case, eight large New York publishers sued Kinko's for copyright infringement based on Kinko's practice of copying materials selected by professors to use as coursepacks. Kinko's sold the coursepacks to students at the same rate as any copying project—about four cents per page. After finding that a majority of the fair use factors weighed against Kinko's, the court held that Kinko's was not entitled to a fair use privilege and was liable for copyright infringement. *Kinko's*, 758 F. Supp. at 1547. On the first factor, the court relied on the fact that Kinko's made a profit. *See id.* at 1531. Kinko's argued that the professors' use of the photocopied material served nonprofit educational purposes and that when teaching and education are involved, the scope of the fair use doctrine must be wider. *Id.* at 1530-31. Kinko's argued that denying educators the fair use exception would destroy the policy of broadly disseminating information that underlies the copyright laws. *Id.* at 1534. The court reasoned that commercial concerns and educational concerns were not however, mutu-

Copyright owners frequently complain that photocopy technology has led to consumer copying that undermines publisher markets just as much as infringing on the original work would.[99] Some may think, however, that fair use photocopying issues are obsolete because the current state of computer technology bypasses the temporal and physical limitations of hard copy borrowing, allowing many more people access to crea-

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ally exclusive. *See id.* at 1532. The court suggested that if the professors had made their photocopies at a not-for-profit shop, the copying may have been permissible. *See id.* at 1536 n.13. On the fourth factor, the court cited *Harper & Row*, in stating that the fourth factor was "undoubtedly the single most important element of fair use." *Id.* at 1534 (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1984)). The Kinko's court reasoned that the plaintiffs lost royalty income when *Kinko's* copied the materials without first paying them a permission fee and that this loss weighed against fair use. *See id.* at 1534.

In *Michigan Document Services*, publishers of copyrighted works brought a copyright infringement action against a commercial copying service that prepared and sold unauthorized coursepacks to university students without paying royalties or permission fees. 99 F.3d at 1381. The Sixth Circuit began with the obligatory rhetoric, stating that "[t]he fair use doctrine, which creates an exception to the copyright monopoly, 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law was designed to foster.'" 99 F.3d at 1385 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)). The Sixth Circuit then held that the copying was not fair use even though students used the coursepack for educational purposes. According to the court, "[t]he four statutory factors may not have been created equal. In determining whether a use is 'fair,' the Supreme Court has said that the most important factor is . . .'the potential market for or value of the copyrighted work.'" 99 F.3d at 1385 (citing *Harper & Row*, 471 U.S. at 566). The court, relying heavily on *American Geophysical Union v. Texaco, Inc.*, and *Harper & Row*, found that because the copying resulted in a diminution of the publishers' potential licensing revenue, the use was presumptively unfair, regardless of the fact that the ultimate use was educational rather than commercial. 99 F.3d at 1386-87. Whereas the *Texaco* court attempted to distinguish academic use, the Sixth Circuit circumvented the issue, but stated, "[a]s to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt." *Id.* at 1390. Michigan Document Services had put forth the assertions of numerous academic authors that they do not write primarily for money and that they want their published writings to be freely copyable and suggested that such copying will stimulate artistic creativity for the general public good. *See id.* at 1391. The court found that "[t]he fact that a liberal photocopying policy may be favored by many academics who are not themselves in the publishing business has little relevance in this connection." *Id.* The court quoted Judge Pierre Leval's district court opinion in *Texaco*:

> It is not surprising that authors favor liberal photocopying; generally such authors have a far greater interest in the wide dissemination of their work than in royalties—all the more so when they have assigned their royalties to the publisher. . . .Once an author has assigned her copyright, her approval or disapproval of photocopying is of no further relevance.

Id. (quoting *Texaco*, 820 F. Supp. at 27).

[99] *See* Netanel, *supra* note 22, at 299-300; Sterk, *supra* note 7, at 1201-02. During hearings for the 1976 Act, a representative of a publishing group warned that if an exemption for educational photocopying were enacted, "the end result, in the aggregate, would be the erosion of entire markets for certain books and periodicals and in many instances to make the publishing of a work simply uneconomical." Copyright Law Revision: Hearings Before the Subcomm. On Patents, Trademarks, and Copyrights of the House Comm. On the Judiciary, 93d Cong., 1st Sess. (1973) (statement of Ambassador Kenneth B. Keating, representing Harcourt Brace Jovanovich, Inc. and MacMillan, Inc.).

tive works without purchasing them. This naive view assumes that such technology will reduce copyright restrictions.

On the one hand, new technology does provide significant advantages in terms of time and expense saved in accessing and producing a copy of a work. Computer technology in the world of libraries has resulted in considerable improvement in the amount and type of information that can be made quickly available to the library user. The implications of electronic libraries on teaching and research in the university context are enormous. Libraries, bulging with inexorably expanding shelves of materials, may well express a preference for publications that reside electronically in cyberspace.[100] Readers also might press for such a system, since it would provide even the most remote library with all the information now found in only a handful of metropolitan centers. For the vast majority of scholars today, unable to travel to the world's finest libraries or to reside near them long enough to exploit their resources, electronic access through online systems could be a "great equalizer" in access to the scholarly resources necessary for research and instruction. As a result of such easy access to electronic libraries, many people will not need to have their own paper copy of many types of works.[101]

On the other hand, accessing works via computer technology is a form of copying, and thus presents the same fair use issues as photocopying does.[102] Furthermore, such technology is likely to enable new barriers to access and thus exacerbate the potential inequities inherent in restricting access. Computer technology allows a creator to control access to works much more effectively than when photocopying provided the main access to such works. For example, on-line access can be restricted through licenses that may bar various uses.[103] Unlike the tradi-

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100 For example, at the American Association of Law Schools' Executive Committee Summer Retreat and Meeting held July 29 and 30, 1997, one of the highlights of the meeting was a discussion regarding a "common enterprise" project on reducing library journal expenditures. The project involves an "aggressive, cooperative use of technology to reduce the present levels of law library expenditures for law school based journals," which could include publishing some journals in electronic form only. American Association of Law Schools August 22, 1997, Report on Executive Committee Summer Retreat, 2-3.

101 *See* Netanel, *supra* note 22, at 300.

102 President Clinton's White Paper on Intellectual Property and the National Information Infrastructure takes the position that simply viewing material on a computer screen, without even downloading that material, constitutes copying. *See* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 66 (Sept. 1995).

103 Such licensing restrictions could go beyond the restrictions offered by copyright law. Whether the use of such license restrictions would or should be preempted by § 301 of the Copyright Act is an issue beyond the scope of this article. *See generally* David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering,* 53 U. PITT. L. REV. 543 (1992) (discussing preemption of contractual restrictions against disassembly of computer programs). Clinton's White Paper

tional photocopying situation, technology provides opportunities to extract payment for downloaded copies.

Although keenly aware of the ethical problems raised by charging patrons for sources of information, many academic libraries will be unable to make such technology, and the information provided by such technology, available to all without recourse to fees. The economics of the situation will take their toll, and though the complex debate over the ethical issues will, and indeed should, continue, many institutions will require patrons to pay part or all of the costs of information. Thus, computer technology is likely to exacerbate rather than alleviate fair use dilemmas.

A. AMERICAN GEOPHYSICAL UNION, INC. v. TEXACO.

The Second Circuit's opinion in *Texaco*[104] extends the possibility that the rift between copyright rhetoric and copyright reality exhibited in fair use doctrine will soon reach the university context. Although this case involved the use of academic expression by researchers employed in a for-profit company, the court decided the case on a basis strikingly applicable to traditional academic use of academic expression.

In *Texaco*, American Geophysical Union and eighty-two other publishers (including academic presses) of scientific and technical journals claimed in a class action lawsuit that Texaco's practice of photocopying articles published in the journals constituted an infringement of the publishers' copyright interest in those articles. Texaco claimed that its copying was a fair use unders§ 107 of the Copyright Act.s[105]

At the time of the class action, Texaco employed between 400 and 500 researchers to conduct scientific research impacting the petroleum industry. To support the scientists' research activities, Texaco's library included multiple subscriptions of many scientific and technical journals including the *Journal of Catalysis* ("*Catalysis*"), a scholarly journal published by Academic Press, Inc., a major publisher of scholarly journals.[106] *Catalysis*' editors chose the articles published in the journal from unsolicited submissions by various academic authors. Academic Press did not pay the authors whose work the journal published, but required the authors to transfer their individual copyright interest in the articles to the publisher as a condition of publication.[107] The lawsuit

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"strongly suggests that technological means of tracking transactions and licensing should lead to reduced application and scope of the fair use doctrine." Netanel, *supra* note 22, at 301 n.65.

104 37 F.3d 881 (2d Cir. 1994), *aff'g* 802 F. Supp. 1 (S.D.N.Y. 1992), *modified*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S.Ct. 592 (1995).

105 *See id.* at 914-15.

106 *See id.* at 915.

107 *See id.* Each journal issue states that no part of the publication may be reproduced without permission of the copyright owner.

concerned the alleged infringement of such copyrights in certain individual journal articles published in *Catalysis*.

To keep current in his field, Chickering, one of Texaco's scientists, viewed by the parties as representative, reviewed articles related to his areas of research published in the various journals.[108] Texaco's library circulated issues of relevant journals to this scientist.[109] This scientist photocopied eight articles from *Catalysis* because he felt the information in the articles would "facilitate his current or future professional research."[110] The scientist filed the articles for later reference, rather than using them immediately in his research.[111]

The Second Circuit, through a series of amended opinions, framed the issue as whether Texaco's "institutional, systematic copying increases the number of copies available to scientists while avoiding the necessity of paying for license fees or for additional subscriptions."[112] The court then invoked the rhetoric that has become so familiar in fair use decisions. Quoting *Sony*, the Second Circuit stated that copyright law seeks "to motivate the creative activity of authors. . . by the provision of a special reward" by granting certain exclusive rights in original works to authors.[113] The bulk of the court's analysis centered on the first and fourth factors of the fair use statute. In determining that both factors resulted in a finding of infringement, the court's analysis left little room for distinguishing Texaco's copying of journal articles from the copying of journal articles that takes place every day at universities across the country.

In analyzing the first factor—*the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes*—the court determined that although Texaco did not use the photocopied articles for a "commercial" purpose, the articles were not used for a preferred "research" purpose either. The court first found that while Texaco itself was a commercial entity, Texaco was not profiting directly from the photocopying of the articles and thus "the link between Texaco's commercial gain and its copying is somewhat attenuated."[114] The court briefly distinguished the type of profit received through photocopying in *Basic Books, Inc. v. Kinko's Graphic Corp.*, where the revenues of a photocopying business stemmed directly from selling unauthorized photocopies of copyrighted works to university stu-

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108 *See id.*
109 *See id.*
110 *See id.*
111 *See id.*
112 *See id.* at 916.
113 *Id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
114 *See Texaco*, 60 F.3d at 922.

dents.[115] The court determined that the commercial/nonprofit consideration asks the court to consider the value obtained by the secondary user from the use of the copyright material rather than simply focus on the nature of the user.[116] The court refused to conclude that Texaco's copying amounted to commercial exploitation of the copied material in light of the fact that the intermediate goal of Texaco's copying was to facilitate Chickering's research in the sciences, an objective that might well serve a broader public purpose.[117] Thus, the court's *Texaco* analysis cannot be distinguished in the university context on the basis of the university's nonprofit nature.

The court then refused to view Texaco's use as a "research" use, which is expressly listed in the preamble of the fair use statute and thus is theoretically a preferred use for the purposes of fair use analysis.[118] The court determined instead that Texaco's use was an "intermediate step that might abet . . . research" and thus, not a preferred research use.[119] According to the court, after the scientist discovered the journal articles through Texaco's circulation process, he then had them photocopied, at least initially, for the same basic purpose that one would normally seek to obtain the original—to have it available on his shelf for ready reference if and when he needed to look at it.[120] This was not the "spontaneous copying of a critical page that he was reading on the way to his lab,"[121] or "spontaneous" copying that would enable the scientist, "if the need should arise, to go into the lab with pieces of paper that (a) were not as bulky as the entire issue or a bound volume of a year's issues, and (b) presented no risk of damaging the original by exposure to chemicals."[122] Rather, "the predominant purpose and character of the use was to estab-

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115 *See id.* at 921 (distinguishing Basic Books, Inc. v. Kinko's Graphics Corp., 768 F.Supp 1522 (S.D.N.Y. 1991)).

116 *See Texaco*, 60 F.3d at 921.

117 *See id.*

118 *See id.* at 920.

119 *See id.* at 920 n.7.

120 *See id.* at 918.

121 *See id.* at 919. The court stressed again, in a footnote:

> the primary objective in making these single copies was to provide Chickering with his own, *additional*, readily accessible copy of the original article. As the District Court noted, '[I]f Chickering were the subscriber and sole user of the subscription to *Catalysis*, and he made an extra copy of article for use in the lab or for marking with scratch notes, the argument [for a transformative fair use] might have considerable force.' 802 F. Supp. at 14 (emphasis supplied).

Id. at 919-20 n.6.

122 *Id.* at 918-19. According to the court, if the scientist had asked Texaco to buy him a copy of the pertinent issue and "had placed it on his shelf, and one day while reading it had noticed a chart, formula, or other material that he wanted to take right into the lab, it might be a fair use for him to make a photocopy, and use that copy in the lab (especially if he did not retain it and build up a mini-library of photocopied articles)." *Id.* at 919.

lish a personal library of pertinent articles for Chickering,"[123] without Texaco's having to purchase another original journal.[124]

In its second amended opinion, the court added the following:

We do not mean to suggest that no instance of archival copying would be fair use, but the first factor tilts against Texaco in this case because the making of copies to be placed on the shelf in Chickering's office is part of a systematic process of encouraging employee researchers to copy articles so as to multiply available copies while avoiding payment.[125]

Texaco's copying practices and purposes appear almost identical to the copying done in most universities to bring scholars meaningful access to academic expression. Thus, the court's *Texaco* analysis cannot be distinguished on the basis of notion that the copying done in the university context involves a preferred research or scholarship use.

In discussing the fourth factor—*the effect of the use upon the potential market for or value of the copyrighted work*—the court distinguished the "traditional market for, and hence a clearly defined value of, *journal issues and volumes*" from that of individual journal articles for which "there is neither a traditional market for, nor a clearly defined value

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123 *See id.* at 926.

124 *See id.* at 919.

125 *Id.* at 920. Texaco argued that "photocopying the article separated it from a bulky journal, made it more amenable to markings, and provided a document that could be readily replaced if damaged in a laboratory, all of which 'transformed' the original article into a form that better served Chickering's research needs." *Id.* The court made a blanket judgment, however, that if the use is an untransformed duplication:

> the value generated by the secondary use is little or nothing more than the value generated that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use.

Id. at 923. The court cited *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989), *cert. denied*, 493 U.S. 883 (1989) (explaining that a use merely for the same "intrinsic purpose" as original "moves the balance of the calibration on the first factor against" secondary user and "seriously weakens a claimed fair use"). The court also cited *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (emphasizing that a "finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use.") The court barely nodded toward the benefits of the photocopying stating, "we should not overlook the significant independent value that can stem from conversion of original journal articles into a format different from their normal appearance." *Texaco*, 60 F.3d at 923. The court acknowledged that Texaco's copying transformed the articles into a more serviceable format and noted that, prior to the advent of photocopying, the scientist might have done such transformation by taking handwritten notes. *See id.* at 923. Then the court made clear in a footnote that it was not implying that handwritten notes would necessarily have been a fair use of the material "[d]espite the 1973 dictum in *Williams & Wilkins* asserting that 'it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use.'" *Id.* at 924 n.10 (referring to William & Wilkins v. U.S., 487 F.2d 1345, 1...0

of."[126] The court then characterized how journal articles are marketed to consumers. According to the court, the publishers have traditionally sought to exploit their monopolistic privileges only by compiling the individual articles into journal format and selling subscriptions to the journals.[127] There has been no traditional market for selling individual articles.[128] Thus, according to the court, the effect of the photocopying on the traditional subscription market is of "somewhat limited significance in determining and evaluating the effect of Texaco's photocopying upon the potential market for or value of' the individual articles."[129]

The court chose to focus instead on the potential market for a licensing arrangement for photocopying individual articles and on how Texaco's photocopying could affect the value of the publishers' copyrights in such a market.[130] The Second Circuit approved the district court's finding that "if Texaco's unauthorized photocopying was not permitted as fair use, the publishers' revenues would increase significantly" because Texaco would have to use some method to pay for the right to photocopy the articles.[131] Texaco had faulted this reasoning, arguing that the very question at issue was whether the publishers had a right to demand such a fee and thus it was inappropriate to assume at the outset that the publishers were entitled to the right in order to assume value of, and effect on, the right.[132] The Second Circuit answered Texaco's argument with a conclusory statement: "[i]t is undisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work. . .and that the impact of potential licensing revenues is a proper subject for consideration in assessing the fourth factor."[133]

The court then determined that while the publishers had not developed a conventional market for copies for individual articles, they had created a workable market through the Copyright Clearance Center

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126 *See Texaco*, 60 F.3d at 927 (emphasis added).

127 *See id.*

128 *See id.*

129 *See id.* at 927-28. Ultimately, the court determined that "the loss of a few journal subscriptions tips the fourth factor only slightly toward the publishers because evidence of such loss is weak evidence that the copied articles themselves have lost any value." *Id.* at 929. The court noted further that, without photocopying, Texaco would not increase its subscriptions enormously; Texaco would possibly increase its subscriptions "somewhat." *See id.* at 928.

130 *See id.* at 927-28.

131 *See id.* at 929.

132 *See id.*

133 *See id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569,s591 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548-9 (1985); Twin Peaks Prods., Inc. v. Publications Intl., Ltd., 996 F.2d 1366, 1377 (2nd Cir. 1993); DC comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982); United Telephone Co. of Missouri v. Johnson Publishing Co., Inc., 855 F.2d 604, 610 (8th Cir. 1988)).

("CCC")[134] for obtaining photocopy licenses that authorize users to pay for the right to make their own copies of individual articles.[135] Because this system exists, according to the court, it is appropriate to consider the effect of Texaco's photocopying on this licensing market.[136]

Recognizing that "the publishers' revenues would grow significantly"[137] if Texaco obtained permission to copy through the CCC, the Second Circuit determined that the publishers had shown "'substantial harm to the value of their copyrights' as a consequence of Texaco's copying."[138] The court summed up by stating:

[i]f Texaco wants to continue the precise copying we hold not to be a fair use, it can either use the licensing schemes now existing or some variant of them, or, if all fails, purchase one more subscription for each of its researchers who wish to keep issues of *Catalysis* on the office shelf.[139]

Photocopying done in the university context will have exactly the same effect on potential licensing income as that described in *Texaco*. Thus, the court's *Texaco* analysis cannot be distinguished in the university context on the basis of impacts on a potential licensing market.

B. ACADEMIC USE AS FAIR USE.

The *Texaco* court's analysis, in refusing to find Texaco's copying of academic expression a fair use, casts legitimate doubt on whether a court would find similar copying of academic expression by professors and researchers on university campuses a fair use. Although the Second Circuit attempted in its amended opinion to reassure the academic community through lip service purportedly distinguishing what the court characterized as systematic copying by Texaco scientists from a situation where a "professor or an independent scientist engaged in copying and creating files for independent research,"[140] the court's analysis in *Texaco* actually leaves little room for distinguishing copying of academic scholarship and research in a university context.

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134 The CCC is a central clearing-house established in 1977 primarily by publishers to license photocopying. The CCC offers a variety of licensing schemes; fees can be paid on a per copy basis or through blanket license arrangements.

135 *See Texaco*, 60 F.3d at 930.

136 *See id.*

137 *See id.* at 926 (quoting the federal district court's opinion in American Geophysical Union, Inc. v. Texaco, Inc., 802 F. Supp. 1, 19 (1992)).

138 *See Texaco*, 60 F.3d at 926.

139 *See id.* at 932. On May 15, 1995, after Texaco filed a petition for certiorari to the Supreme Court, the parties announced a settlement in which Texaco agreed to pay a large dollar award and a retroactive licensing fee to the CCC. *See* Settlement Reached in Photocopying Suit, N.Y.L.J., May 16, 1995, at 4.

140 *See Texaco*, 60 F.3d at 916.

Prior to *Texaco*, commentators assumed that an intermediate copy of an academic journal article made to aid in the production of a final work was a preferred research use under fair use analysis.[141] Thus, they asserted that it was a fair use for an author/scholar to make copies of journal articles as part of scholarship and research activities.[142] Furthermore, they assumed that because such copies were not created in a commercial setting, they would not be viewed as causing any cognizable market impact on the value of the copyrights. Thus, copies of such articles for access purposes would be presumptively fair use. However, by interpreting research use incredibly narrowly,[143] and by looking to all potential licensing markets to find market impact despite the fact that the user is determined to be noncommercial, *Texaco* shoots down both of these bases upon which a court could support a finding of fair use in the university context.

The courts' incentive rhetoric, coupled with the Copyright Act's supposed preference for "teaching, scholarship, and research" as fair uses, may have lulled academia into a false sense of fair use security. A close examination of *Texaco* indicates that academic use of academic expression is far from the assumed safe harbor. Instead of limiting the impact of copyright restrictions upon scholarship and research, the court has significantly enlarged the scope of such restrictions to possibly swallow these preferred academic uses listed in the preamble paragraph of § 107 of the Copyright Act. In fact, it is difficult to see how the court's *Texaco* analysis leaves any room for the supposed preferences listed in the statute. The court's decision in *Texaco* may serve a useful purpose in shaking academia from its complacency. Unless a critical distinction can be made regarding academic use of academic scholarship and research in the university setting, we must prepare ourselves for the possibility that

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141 *See, e.g.*, Kreiss, *supra note 9, at 60 n.221.*

142 *See, e.g.*, John T. Soma et al., *Software Interoperability and Reverse Engineering*, 20 RUTGERS COMPUTER & TECH. L.J. 189, 210 (1994); Michael G. Anderson and Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L. J. 143, 168 (1993) ("Had the course packets not contained excepts from textbooks but rather excerpts from a law review [article], . . . a court could find fair use since the professor's secondary use of the article would not serve as a market substitute for the original work.").

143 In finding the work non-transformative, the court was incredibly insensitive to the research process. Although beyond the scope of this article, the insights of current literary thought, in which the reader "transforms" text simply by reading it, could provide the court a more sensitive framework in which to determine the transformative nature of a secondary use. *See generally* Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993) (discussing contemporary literary criticism in the context of copyright analysis).

copyright restrictions on such academic expression may invade academia.[144]

C. COPYRIGHT RESTRICTIONS ON ACADEMIC EXPRESSION: RHETORIC OR REALITY?

To identify the ramifications of copyright policy in the university context, we must examine whether the application of broad copyright restrictions to academic use of academic expression reflects an incentive justification or a neoclassical economic justification for copyright. Recall that the incentive justification for copyright protection bestows upon authors limited property rights in their creative expression for the purpose of encouraging authors to create and disseminate information and knowledge. Theoretically, an incentive justification would mandate that copyright protection be limited to cases where extending this right to authors would induce an author to produce an original work that the author would not otherwise produce. Rarely would this be the case with respect to academic expression.

The *Texaco* court itself acknowledged that academics do not create academic expression in reliance on a market return from that expression.[145] While publication of academic expression is a critical part of the profession by which a scholar makes a monetary living, and may lead to an increased salary often linked with promotion and tenure, this financial incentive is not tied to the market return on a journal article.[146] Thus, the

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144 Some may surmise that the publishers of an academic journal would never or could never enforce their copyrights. Copyright owners in many arenas have become vigilant in preventing piracy when royalties are at stake, however. They have often formed associations to assist them. These include American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music Incorporated ("BMI") and the CCC. Computer companies have emulated these other copyright owners by creating the Software Publishers Association and the Business Software Alliance to help prevent unauthorized copyright of software.

145 *See Texaco*, 60 F.3d at 927. According to the court:

> [i]n the distinctive realm of academic and scientific articles, however, the only form of royalty paid by a publisher is often just the reward of being published, publication being a key to professional advancement and prestige for the author, *see Weissmann*, 868 F.2d at 1324 (noting that 'in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure.'). . . .Ultimately, the monopoly privileges conferred by copyright protection and the potential financial rewards therefrom are not directly serving to motivate authors to write individual articles; rather, they serve to motivate publishers to produce journals, which provide the conventional and often exclusive means for disseminating these individual articles.

Id.

146 Note that I do not include authors of academic books in this thesis. Financial gain is often a motivation, sometime a significant one, for authors and publishers of academic books. Thus, one might expect that the financial return secured by copyright protection *might* generate more creativity and publication in this area. Thus, if copyright truly is limited to providing necessary incentives to create, there is greater justification for extending copyright protection to authors of academic books than to authors of academic articles.

academy is the quintessential example of a class of authors whose incentives to create are market transcendent.[147] Because academics do not rely on the economic aspects of copyright protection to create, academics will produce scholarship without regard to the availability of copyright protection.[148] Thus, some commentators might argue pursuant to incentive rationale, that the justification for copyright protection in this context is slim, if not absent.[149]

Moreover, academics would likely find that monopoly rights in academic expression actually inhibit incentives to create academic expression. If academic expression enjoys full copyright protection in the context of academic use, the publishers of that expression will be able to extract monopoly rent from the primary audience of academic expres-

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147 Retention, promotion and tenure, as well as acknowledgment in ones field, are the but a few of the market-transcendent incentives that induce an academic to produce academic journal articles. However, many returns on publication are nonmonetary. *See* Howard P. Tuckman and Jack Leahey, *What is an Article Worth?*, 83 J. POL. ECON. 951, 952 (1975) ("Ideally, publications enable faculty to share insights, demonstrate creative scholarship, gain recognition for creative thinking, and develop a reputation for expertise in a specialty area."). In attempting to calculate the monetary value of an article with respect to returns on publication to a scholar, the authors discussed only market-transcendent benefits: direct salary increments, promotion-related salary increments, and career-related option effects. *Id.* at 951-55.

148 *See* Netanel, *supra* note 22, at 292-93 ("In a world without copyright, only authors unconcerned with monetary remuneration would produce creative expression and only publishers with no need for financial return would invest in selecting, packaging, marketing, and making such expression available to the public.").

149 *See, e.g.,* Lunney, *supra* note 24, at 488 n.10 (Authors who "work to satisfy their nonpecuniary desires, the availability of such a nonpecuniary return on authorship suggests that we could reduce the pecuniary return on authorship, and hence the scope of copyright protection, proportionally, and yet still ensure the optimal production of copyrighted works."); John S. Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 152-54 (1991); Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675, 679 (1993):

> From an economic viewpoint, the exclusive control entailed by copyright is justified to the extent that one views copyright as protecting the economic incentive to market intellectual property according to the creator's intent. This rationale applies less will, if at all, to uses that do not compete with those uses for which the creator intended to derive compensation. Hence, these uses lie outside the context of the classic copyright policy trade-off in which copyright grants a putative monopoly so to give a creator an incentive to create. . . .Consequently, one might argue that copyright protection ought not be granted to these noncompeting uses and that copyright holders have no right to suppress in those settings.

Professor Brennan has also stated:

> The 'uneasy case' for copyright is that such control is permissible only to the extent that it provides an incentive to spend one's time, energy, and money to produce copyable work of value. This *ex ante* perspective implies that the effect of the bargain on the potential creator extends only as far as reasonably foreseeable gains. Consequently, it might be argued, we ought not extend copyright beyond the uses from which the creator intended to earn rewards, as perceived at the time the creator made her commitments to devote effort and resources to creating.

Id. at 702-03.

sion—academic consumers.[150] Such an expansion of copyright will impose an ever more burdensome access tax on academic consumers and, thus, the academic expression will be less available and more costly to these consumers.

Original works of academic expression are published in an economic context that renders the original work relatively inaccessible to many users at one time. Access to such original works is limited to those users who are able to obtain one of only a few copies purchased by a library. A scholar who wishes to access the academic expression through a copy made by photocopy or computer technology may have to pay an extra tax for each copy. To the extent that copyright protection in a scholar's potential source and reference material requires payment for each copy of that source material, some scholarship will never be used and, in fact, less scholarship may be created.

Given that copyright protection is largely irrelevant as an incentive for the creation of academic expression and may actually inhibit such creation, extending restrictions to academic use of academic expression in the university setting would be inconsistent with the incentive justification for copyright. However, the *Texaco* court belied the fair use doctrine's rhetorical allegiance to the incentive justification for copyright, and indicated that copyright doctrine condones monopoly in a situation where market incentives are unnecessary to encourage creation of academic expression. Imposing such copyright restrictions on the academy cannot be justified through incentive theory. Rather, it can only be attributed to a neoclassical economic justification for copyright—using copyright doctrine to create the broad proprietary rights that enable a market mechanism to determine the value of particular academic expression.

III. IS ACADEMIC USE OF ACADEMIC EXPRESSION *DIFFERENT*?

Should the broad property rights in knowledge resulting from neoclassical economic theory prevail in the university context, or can an

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150 The size of this potential monopoly surcharge will be a function of the extent to which other works might substitute for the work in question and the extent to which the copyright owner can engage in price discrimination. *See* Lunney, *supra* note 24, at 520-21; Sterk, *supra* note 7, at 1205. This tax will be especially burdensome to academic users because the percentage of the total retail cost that is attributable to copyright protection is huge. Academic consumers will be paying not only for the original work (the journal publication), but will be paying monopoly rent for a use (photocopy) that copyright owners (publishers) do not have to contribute any cost to. Academic consumers supply their own search material, paper and labor in making copies of articles. "The costs of publication are usually incurred during the period when an article is conceptualized, researched, and polished." Tuckman and Leahey, *supra* note 148, at 952.

argument be made that fair use should have special vitality in this arena? In other words, in determining the appropriate scope of copyright, can and should we distinguish the academic use of academic expression from general uses of other creative works? The answer to whether copyright restrictions should apply with full force in a university setting inevitably turns both on how society views the purpose of copyright and on how society conceives the purpose of the university. I have already discussed the differing interpretations of the justification for copyright. I now turn to a discussion of the history and of the differing viewpoints regarding the proper mission of the university.

A. THE MISSION OF THE UNIVERSITY.

Over the last two centuries, the idea of the American university has changed in accordance with a change in how we view *truth*. Until the middle of the nineteenth century, an orthodox understanding of truth infused higher education in America.[151] Although colleges existed to bestow knowledge, the test of knowledge was whether it conformed to the revealed truths of religious doctrines and traditions.[152] Thus, the advancement of knowledge was restricted to testing the work of teachers and scholars against the truths of religion.[153]

Consequently, prior to the Civil War, most American institutions of higher education were denominational colleges concerned with inculcating dogmatic religious truths rather than with searching for new truths.[154] Because the key role of the university was as a center of orthodoxy designed to impose particular views on other members of society, these were institutions of great intellectual conformity.[155] The general acceptance of a core of religious doctrine very much restricted any notion of free inquiry in this setting. Thus, the perceived role of the university did not require or allow for the intellectual freedom of members of the university community.

Following the Civil War, an "educational revolution"[156] resulted in a commitment to the critical inquiry central to the modern justification for the American university.[157] A growing body of American educators

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151 *See* Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 LAW & CONTEMP. PROBS. 303, 307 (1990).

152 *See id.* at 306-07.

153 *Id.*

154 *See* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 237 (1990).

155 *See* Reports, *On Periodic Evaluation of Tenured Faculty, A Discussion at Wingspread: August 24-26, 1983*, 69 ACADEME 1a, 5a (Nov.-Dec. 1983).

156 Richard Motstadter & Walter P. Metzger, *Preface* to WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY i, v (1961).

157 *See* Rabban, *supra* note 155, at 237.

became attracted by the questioning spirit of the nineteenth century German university.[158] The modern American university was born in a conscious attempt to free scholarly investigation from the strictures of the conservative understanding of the advancement of knowledge. Under this modern view, colleges and universities existed to advance the frontiers of knowledge rather than merely bestow existing knowledge.[159] The test of knowledge became its ability to withstand *critical inquiry*—the rigors of debate and disputation.[160] Quite suddenly, the university was designated the guardian of critical inquiry. It is this scientific search for truth without prejudice that was adopted as the essential method of acquiring and advancing new knowledge and understanding.

1. *Advancing Value-free Knowledge.*

Under this secular philosophy of the university, something intrinsic to the nature of knowledge and understanding itself served as the justification for the university.[161] The underlying theory was the notion that "new knowledge was valuable for its own sake, irrespective of its contribution to everyday life."[162] Thus, the original mission of the modern university was deeply grounded in the production of new knowledge, whatever its potential application might be.

The modern university required a scholar to be committed to the creation of objective, "value-free" knowledge.[163] This "value-free" philosophy of the advancement of knowledge animated the requirement that a university's faculty continuously produce new knowledge and publish the results.[164] Thus, the definitive mission of the American university became the production and publication of new knowledge.[165] This publication requirement prompted the creation of a number of academic journals to publish the research and scholarship coming out of the American universities. Consequently, most American academic journals trace their

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158 *See* Audain, *supra* note 3, at 1062; William W. VanAlstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW AND CONTEMP. PROBS. 79, 87 (1990); Matthew W. Finken, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 822 (1983).

159 *See* McConnell, *supra* note 152, at 306-07.

160 *See id.*

161 *See* Audain, *supra* note 3, at 1063; John S. Brubacher, ON THE PHILOSOPHY OF HIGHER EDUCATION, 12-13 (1982).

162 Audain, *supra* note 3, at 1062.

163 *See id.* at 1063

164 *See id.* at 1062.

165 While Harvard College was the first American institution of higher education, Johns Hopkins is recognized as the first American university because Johns Hopkins was the first to espouse the "German Model" of higher education. *See id.* at 1062 (citing PAUL WESTERMEYER, A HISTORY OF AMERICAN HIGHER EDUCATION 8-10, 90 (1985); MICHAEL D. STEPHENS & GORDON W. RODERICK, POST-SCHOOL EDUCATION 190-91 (1984)).

origins to the publication requirement implemented at the modern universities adopting the "value-free" philosophy of knowledge.[166]

2. *Advancing Valuable Knowledge.*

Toward the end of the nineteenth century, another perception of the mission of the university surfaced in conjunction with the development of the public universities. State governments began to exercise control over academic decisions in public universities by requiring those institutions to educate large numbers of students and by pressuring the institutions to lend their services and expertise to stimulating economic development. Eventually, even private universities were increasingly viewed as public resources and called upon to contribute to the solution of social problems.[167] While the emphasis remained on the advancement of knowledge, the purpose of the university was not so much on creating knowledge for its own sake, but on the uses to which knowledge could be put-on creating knowledge that had "value". This philosophy posits that knowledge is necessary to understand and solve problems.[168] Unless the knowledge has some demonstrable pay-off, it is not worthy of pursuit.[169] Thus, whereas the intrinsic philosophy is animated by the notion of value-free knowledge, the instrumental philosophy values knowledge only if it can be directed toward some useful end.[170]

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166 *See* Audain, *supra* note 3, at 1062 (citing WESTERMEYER, *supra* note 166, at 96). In fact, the AALS Executive Committee appointed a committee to produce a model author-journal agreement that would serve as a template against which law professors could judge the agreements they received from law journals. One of the concerns the committee determined it should address was that the material be made widely available as the "overall function of student-edited law journals is to provide education for both the student editors and the readers. The law schools that house and commonly subsidize such journals have the purpose of uncovering and disseminating knowledge." Marci A. Hamilton, *Why a Model Author/Journal Agreement?*, Attachment to AALS Memorandum 98-24 at 4 (May 18, 1998) (visited Feb. 4, 1999) <http://www.aals.org/98-24.html>. The draft agreement suggests that authors require that "the issue of the Journal in which the Work appears shall include a notice stating that the Work may be reproduced and distributed, in whole or in part, by nonprofit institutions for education purposes including distribution to students, provided that the copies are distributed at or below cost." AALS Special Committee, *Model Author/Journal Agreement*, Attachment to AALS Memorandum 98-24 at 3 (May 18, 1998) (visited Feb. 4, 1999) <http://www.aals.org/98-24.html>.

167 *See generally* Walter P. Metzger, *Academic Freedom in Delocalized Academic Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1 (1969) (arguing that the American conception of academic freedom, with its emphasis on protecting faculty members within the university, has become outmoded in light of increasing power exercised by decision makers outside universities).

168 *See* Audain, *supra* note 3, at 1063-64.

169 *See* CORNEL M. HAMM, PHILOSOPHICAL ISSUES IN EDUCATION, 52-53 (1989).

170 *See* Audain, *supra* note 3, at 1064. Among the arguments opponents of the intrinsic philosophy put forth is the argument that "it is a delusion to think of knowledge as being value-free since knowledge is the currency of power today and as such, value-laden." *Id.* at 1066.

B. ACADEMIC FREEDOM.

Considering the special purposes of the university, may the academy claim a special freedom to access copyrighted works of academic expression? Although some might find little reason to grant academics more latitude than any other user, the academy has been afforded more latitude in other areas in recognition of the special purpose of the university. This extra latitude is a product of the principles of academic freedom, which are viewed as essential to the successful mission of the university—whether that mission involves advancing value-free or valuable knowledge.[171] While the notion of academic freedom has achieved nearly universal institutional acceptance in this century, the claim that such freedom is extraordinary continues. The phrase "academic freedom" often invokes protests that policies and rules binding on the rest of society do not apply to the university.[172] Should an academic claim of copyright exemption be yet another extension of this special freedom?

The term "academic freedom" refers to the "freedom of the individual scholar to teach and research without interference (except for the requirement of adherence to professional norms, which is judged by fellow scholars in the discipline)."[173] A comprehensive theory of academic freedom first emerged in the United States at the time that the modern university came to dominate American higher education.[174] Once critical inquiry rather than dogma became the defining characteristic of universities, the university community required freedom to engage in the search for knowledge central to the mission of the university. Notions of academic freedom arose from the need to promote and protect the critical inquiry viewed as essential to the advancement of knowledge, and thus essential to the purpose of the university. This new conception of the

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171 A 1915 declaration justifies academic freedom in terms of three purposes of universities: to promote inquiry and advance knowledge, to teach students, and to develop experts for public service. *See* AAUP, *General Report of the Committee on Academic Freedom and Academic Tenure (1915)*, 1 AAUP Bull. 17 (1915), *reprinted in*, Symposium, *Freedom and Tenure in the Academy: The Fifth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 393 app. (1990) [hereinafter *1915 Declaration*]. Three distinct faces of academic freedom have been identified: personal autonomy of individual scholars, limits on government restrictions on expression within schools, and autonomy of academic institutions. *See generally* Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 834, 848, 851 (1987) (this article primarily is concerned with restrictions on research and dissemination.).

172 *See* Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 LAW & CONTEMP. PROBS. 195, 216 (1990).

173 McConnell, *supra* note 152, at 305. Academic freedom also has an institutional concept—the freedom of the academic institution from outside control. *See id.* at 305. For the most part, references to "academic freedom" in this article are to individual academic freedom.

174 *See* Rabban, *supra* note 155, at 237 (citing Richard Hofstadter & Walter P. Metzger, *Preface* to WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY (Columbia, 1961)).

advancement of knowledge required that the work of teachers and scholars be free from all constraints other than those of the academic discipline.[175] Academic freedom, as understood in the modern university, "is predicated on the view that knowledge is advanced only through the unfettered exercise of individual human reason in a posture of analytical skepticism and criticism."[176] This freedom supports the university's commitment to critical objectivity by "permitting scholars to challenge received wisdom and insulating them from pressure to adhere to a prescribed orthodoxy."[177]

The first official statement of academic freedom was produced in 1915 by a committee of eminent professors for the first annual meeting of the American Association of University Professors ("AAUP").[178] At this meeting, the AAUP declared that a university "should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world."[179] The *1915 Declaration* viewed the basic role of professors in this endeavor as sharing the results of their independent and expert scholarly investigations with students and the general public.[180]

This understanding of academic freedom assumed its canonical form in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly issued by the AAUP and the Association of American Colleges ("AAC").[181] The AAUP's 1940 Statement stated: "[i]nstitutions of higher education are conducted for the common good [which] depends upon the free search for truth and its free exposition."[182] The statement defines as one of the three aspects of academic freedom the "full freedom in research and in the publication of the results."[183]

The last several decades have seen increased judicial reliance on AAUP policy in reaching legal decisions in important cases raising significant academic freedom questions.[184] Furthermore, while the 1940

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175 *See* McConnell, *supra* note 152, at 306-07.

176 *Id.* at 303-04.

177 Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1367 (1988).

178 *See 1915 Declaration*, *supra* note 172.

179 *Id.* at 400.

180 *See id.* at 396.

181 *See* AAUP, *Academic Freedom and Tenure*, 72 ACADEME 52, 52-54 app. A (1940 Statement of Principles and Interpretive Comments) (Jan.-Feb. 1986).

182 *See* Symposium, *Freedom and Tenure in the Academy: The Fifth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 407 app. B (1940 Statement of Principles on Academic Freedom and Tenure) (1990).

183 McConnell, *supra* note 152, at 307.

184 *See* Reports, *AAUP in the Courts, The Association's Representation of Faculty Members and Faculty Causes in Appellate Litigation*, 69 ACADEME 1a, 6a (Mar.-Apr. 1983).

Statement technically has no legal force in its own right, it has been adopted by most accrediting agencies, whose determinations *do* have legal effect. For example, the two agencies that are responsible for the accreditation of law schools—the American Bar Association ("ABA") and the Association of American Law Schools ("AALS")—both use the 1940 Statement as their standard for academic freedom.[185]

The United States Supreme Court also has recognized the importance of academic freedom in the university context, going so far as to identify academic freedom as a First Amendment right.[186] In doing so, the Court has indicated that government encroachment on this right will have to meet demanding standards. In these cases, the Court, like the *1915 Declaration*, has consistently maintained that "the search for truth, in universities, as well as in society generally, is never complete and requires free debate about competing ideas that precludes any imposition of ideological orthodoxy."[187]

The Court first recognized academic freedom as a constitutional right in the 1957 case of *Sweezy v. New Hampshire*,[188] where a plurality of the court struck down a legislative investigation that delved into the subject matter of a professor's past lectures. Chief Justice Warren, having written the decision reached by four concurring justices stated that "[t]he essentiality of freedom in the community of American universities is almost self-evident."[189] Later, in *Keyishian v. Board of Regents*,[190] the Court held that a New York statute which required faculty members to certify they had never been members of the Communist Party was inimical to academic freedom as protected by the First Amendment.[191] The *Keyishian* court found academic freedom to be a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[192] The Court in subsequent years has gener-

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185 *See* ABA Standard 405(d) that provides, "[t]he law school shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory." ABA, Standards for Approval of Law Schools, § 405(d) (1987). Annex I, in turn, follows the text of the 1940 Statement, including the limitations clause. *Id.* at Annex I.

Bylaw 6-8(d) of the AALS provides, "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors." AALS Association Handbook 24 (1990) (Bylaws of the Association of American Law Schools, Inc.).

186 *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

187 Rabban, *supra* note 155, at 240.

188 354 U.S. 234, 250 (1957) (plurality).

189 *Id.*

190 385 U.S. 589 (1967).

191 *Id.* at 603.

192 *Id.* (citations and quotation marks omitted).

ally afforded greato deference to the academy, recognizing that universities are places that require the "robust exchange of ideas"[193] in order to fulfill their function.

Both the Court and the AAUP have stressed the importance of an inclusive university community as a means of serving the broader public interest by furthering democratic values, and both institutions justify academic freedom as necessary to this goal. The AAUP's *1915 Declaration* stressed the social benefits of scholarly work in universities and emphasized that education and knowledge are essential to a civilized and democratic society.[194] Similarly, the Court, in both *Sweezy* and *Keyishian*, emphasized the social importance of critical inquiry to universities in promoting the knowledge that serves democratic values. Thus, academic freedom and copyright policy share the same utilitarian goal—contributing the milieu necessary for a pluralistic and democratic society.

C. INSTITUTIONAL CONTEXT AS A FAIR USE CONSIDERATION.

Copyright policy and academic freedom theoretically share the goal of serving democratic values by promoting learning and knowledge. However, copyright doctrine in the university context implicates academic freedom because it affects choices made by academics in the pursuit of inquiry. In fact, the same educational and scholarly choices made in the exercise of unfettered critical inquiry might violate copyright restrictions. Thus, just as the "justification of academic freedom must therefore be sought in the peculiar character and function of the university scholar,"[195] the unique academic environment must also define.

Copyright policy in the context of the university should be based on a justification that recognizes the distinctive mission of the university and incorporates correlative principles of academic freedom. The question then becomes whether a neoclassical economic justification for copyright is appropriate in the university context when considered in light of the purposes of the university and the principles of academic freedom; that is whether copyright serves the mission of the university if its purpose is to advance academic expression that has the highest market "value."

IV. IS AN ECONOMIC JUSTIFICATION FOR COPYRIGHT APPROPRIATE IN THE UNIVERSITY CONTEXT?

Initially, the question of whether a neoclassical economic justification for copyright furthers the mission of the university may depend on

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193 *Id.*

194 *See 1915 Declaration*, *supra* note 172, at 396, 397-99.

195 Glenn R. Morrow, *Academic Freedom, in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 4, 6 (DAVID L. SILLS, ed., 1968).

which viewpoint we accept regarding the proper mission of the university. As discussed above, the intrinsic philosophy of the university seeks to advance value-free knowledge—the pursuit of knowledge as an end in itself.[196] The instrumental philosophy, on the other hand, seeks to advance knowledge that has "value." If we assume, pursuant to intrinsic philosophy, that *all* knowledge is worth advancing, if only as a challenge to predominant ideology, a system that purports to identify and advance only those ideas and knowledge that have "value" is inconsistent with the mission of the university. If, on the other hand, we adopt the philosophy that the university's mission is to produce only "valuable" knowledge, we must ask whether determining value on the basis of market preferences serves this mission.

Those who advocate a neoclassical economic justification for copyright might read Congress's constitutional mandate "to promote the Progress of Science and the Useful Arts" as containing words of purpose requiring that only those works that *promote* the progress of science—works that have ascertainable *value* or *usefulness*—be encouraged and disseminated.[197] Thus, they might argue that the neoclassical economic purpose of copyright dovetails completely with the need to identify valuable knowledge in the university context. However, the task of identifying valuable works in any context would involve terribly difficult questions of judgment regarding the quality and utility of various works, however.[198] Is neoclassical economic theory an appropriate epistemological strategy for judging the value of particular academic contributions to knowledge in the university context?

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196 *See* BRUBACHER, *supra* note 162, at 12-13 (1982).

197 *See also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (monopoly granted by copyright has the intended purpose of "inducing the creation of new material of potential historical *value*.") (emphasis added). *Compare* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (noting that, while Congress could "require that each copyrighted work be shown to promote the useful arts (as it has with patents), it need not do so.").

198 *See* Kreiss, *supra* note 9, at 39. "The copyright system (particularly the courts) is not particularly well suited to evaluate whether individual works provide a public benefit and, hence, will not concern itself with such a determination at that microlevel." *Id.* at 40 (citing *Belcher v. Tarbox*, 486 F.2d 1087, 1088 (9th Cir. 1973), in which the court rejected a claim that allegedly fraudulent material should be denied copyright protection:

> There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific, that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it.

Id. at 1088.

Mainstream academic discourse operates from the premise that desirable knowledge is objective.[199] Within this rational/empirical mode of advancing knowledge, the knowledge produced by the academy must be a product of certain standards of "impartiality, objectivity, evidential confirmation, comprehensiveness or completeness, and explanatory power."[200] One of the essential requirements of the university according to this mode is the obligation to remain neutral—to place itself "on neither side of a disputed claim to truth."[201] Thus, even if knowledge must have value, a judgment of value in the university context must be "value-neutral."[202] It is tempting, therefore, to seize on any neutral principles or standards available to minimize the opportunity for biased decision-making within the university.

On the surface, therefore, a neoclassical economic model of decision-making seems attractive. Because determinations about whether a particular work does or does not advance knowledge are so subjective, some would argue that the question of the value of such works may be best left to the market to address through its "value-neutral" mechanisms of allocative efficiency. Economic theory purports to inject market-neutrality into the discussion about the relative value of a particular creative work based on the price it can command in the "objective" market. Perhaps the market is the best way to identify relevant knowledge and thus ferret out the truth—the new, improved model for truth—seeking in the university.

However, a close examination of supposedly neutral standards often reveals bias. Theoretically, neutral market preferences often reflect diverse forms of prejudice because such preferences are arguably a social construction.[203] They are likely influenced by criteria derived from the

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199 *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 39 (1994). Contrast this position with the post-structuralist view that objectivity is a false premise upon which to pursue knowledge because knowledge enjoys no universal foundations. This anti-foundationalist theory views knowledge as "perspectival, language-based, culturally constructed." *See id.* at 44 (*citing* Jane Tompkins, *Me and My Shadow*, in GENDER AND THEORY: DIALOGUES ON FEMINIST CRITICISM 125 (Linda Kauffman ed., 1989).

200 ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 354-55 (1983).

201 Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS. 155, 164 n.9 (1990).

202 The *1915 Declaration* describes a scholar's function as the obligation to deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and to import the results of their own and of their fellow-specialists' investigation and reflection, both to students and the general public, without fear or favor. The proper discharge of this function requires (among other things) that the university teacher shall be exempt from any pecuniary motive or inducement to hold, or to express, any conclusion which is not the genuine and uncolored product of his own study or that of fellow-specialists. *1915 Declaration*, *supra* note 172, at 396.

203 *See generally* Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Automony: A Normative Evaluation*, 24 RUTGERS L.J. 347, 435-40 (1993).

heavy ideological baggage of the dominant culture.[204] Thus, adopting a neoclassical economic justification for copyright in the university context compromises the critical objectivity of the academy in determining the value of knowledge. "Indeed, a broad expanded copyright may, in effect, stifle transformative uses in a way that parallels, but is far more systematic than the problem of private censorship."[205] Such is the case when we examine whether market value can really act as a proxy for merit when making value judgments of academic expression.

Value is already a loaded word in academia these days, even without the pressures of market influences. Strong disagreements currently exist in the academy as to the legitimacy of particular approaches to academic disciplines.[206] Theoretically, the individual scholar enjoys academic freedom to teach and research without interference, subject only to the requirement of adherence to professional norms judged by fellow scholars in their discipline. However, disciplinary norms themselves are now contested, as the current polemic regarding the relevance of many developing academic disciplines indicates.

Recent disputes over the value of scholarship emanating from the perspectives of racial minorities, feminism and radical legal theory have highlighted the subjectivity of these disciplinary norms. Some complain, for example, that certain disciplines have inappropriately modified their content and their standards to avoid charges of elitism, racism and sexism.[207] Such critics claim that in the humanities, established literary

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204 *See id.*

205 Netanel, *supra* note 24, at 295-96.

206 Consider the dispute over whether critical legal studies should be considered a legitimate mode of discourse in academic law. The AAUP felt compelled to issue two brief statements: one dealing with peer review and the second addressing the controversy over the "value" of "critical legal studies" in law schools inspired by Paul D. Carrington's essay, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), which contained the statement that "the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school." *Id.* at 227. AAUP, *Report of Committee A, 1985-86*, ACADEME 13a, 19a (Sept.-Oct. 1986); AAUP, *Some Observations on Ideology, Competence, and Faculty Selection*, 72 ACADEME 1a (Jan.-Feb. 1986). Correspondence provoked by Carrington's article is collected in *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985). More recently, Daniel Farber and Suzanna Sherry issued an indictment of radical legal theory in their book, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

207 *See* Doris Y.Wilkinson, *The American University and the Rhetoric of Neoconservatism*, 20 CONTEMP. SOC. 550 (1991) (reviewing ROGER KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990); CHARLES J. SYKES, PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION (1988). According to Wilkinson, Bloom blames "the more vulnerable disciplines, those where change is most apparent, such as the humanities and the social sciences as damaging to the integrity of the university." Wilkinson, *supra* note 208 at 551. According to Wilkinson, Bloom dismisses the unique experiences, insights, and intellectual paradigms of white women and the racially ethnically disempowered and, instead, decries as a crime the institutionalization of what he perceives to be "'the

standards are ignored as various interest groups demand more women's literature for feminists, black literature for blacks, gay literature for homosexuals, and so on.[208] Conversely, others charge that disciplinary norms are "mere screens for the dominant ideology"[209] and that institutions of higher education have become "homes of orthodoxy, reaction and conventionality."[210] Such critics argue that universities are "dominated by male-inspired conceptions of what constitutes good scholarly work."[211] Still others assert that "the philosophical canon these institutions place before their students is improperly restricted to the products of Western philosophy, totally ignoring the East."[212] A value system based on neoclassical economic analysis will only exacerbate these conflicts.

Once profit considerations are injected into the university context, the interests of academic authors and publishers diverge. Such considerations may lead academic publishers to choose works on the basis of profit-maximization. Publication choices may become business decisions based on whether the original work has further "merchandising value"—a function of which types of academic expression will appeal to the largest audience. Thus, publishers seeking the widest consumer base may favor projects that conform to prevailing views of the academic community and disfavor more unorthodox projects that challenge received wisdom.

Such publication decisions may then distort the substantive directions of research and scholarship by channeling the academy toward work that is commercially valuable, and thus more desirable, to the publishers. This can result in repression of participation through reluctance to promote a viewpoint challenging the status quo. Scholars may feel compelled to formulate academic expression with broad appeal that satisfies the market's collective desires rather than developing scholarly agendas on the basis of academic interest and intellectual significance.

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conferences and professional meetings.' He condemns these as being theoretically impotent and empty value-laden incursions on 'the canon.'s' *Id.* She characterizes one of Kimball's primary obsessions as the modification of traditional curriculum to include works by women, minorities, and persons of color writing, "[h]e depicts contemporary innovations in the humanities, as in the social sciences, as 'ideologically motivated assaults on the intellectual and moral substance of our culture's' *Id.*; *see also* Thomson, *supra* note 202, at 155-56 (some complain that "left-wing politics and commitments now dominate college and university faculties, and that institutions of higher education are behaving like homes of left-wing orthodoxy, so that conservatism cannot get a hearing on campus."); *see also* Ralph S. Brown and Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325,330 (1990).

208 *See id.* at 550-51.

209 McConnell, *supra* note 152, at 314-15.

210 Thomson, *supra* note 202, at 155-56.

211 *Id.*

212 *Id.*

Thus, a copyright policy that determines value on the basis of profitability cannot provide an unbiased standard from which to value scholarship involving black dialects, feminist literary theory, radical legal theory, or Marxist economic analysis. When you have dominant and subordinate ideologies competing in a "scholarship" market, the circular reinforcement of that market will favor the dominant ideology. Because adherents of a dominant ideology form a broader base from which to signal market value, these adherents ultimately have the power to decide which knowledge is currently worthy as well as the power to create the paradigms within with these judgments will be made in the future. Furthermore, some consumers' market choices,[213] and thus their voices in determining the relevance of particular scholarship, may be more constrained than others as a result of financial disparities.[214] Thus, such a system could enable a class of scholars from wealthier institutions to unwittingly attain and maintain the ascendancy of its own ideology.

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213 Mainline economists emphasize the role of choice in the economic market model. Value is determined "objectively" by the collective choices made by consumers. Critics of the market model have introduced a more realistic and less benign view of choice and of the process of choosing, however. They emphasize the institutional constraints on choice, the social customs, styles, and conventions that guide choices and the social sanctions that are apt to be visited on those who make unconventional choices.

214 This concern also raises serious questions about the potential distributional impacts of such a system. *See* Netanel, *supra* note 22, at 295. The economic model ignores the negative consequences of a system that will likely lead to information inequities by disproportionately reducing access to information of those consumers with more limited financial resources. *See* Netanel, *supra* note 22, at 295 n.40; *see* NII Copyright Protection Act of 1995: Hearings on H.R. 2441 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary, 104th Congress (1996) (statement of American Association of Law Libraries, etc. expressing concern that copyright owner ability to impose universal charges "will take us a very long way towards becoming a nation of information haves and information have-nots."); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 264-67 (1996) maintaining that digital distribution and discontinuation of libraries' provision of free access to information may exacerbate socioeconomic inequality); Diane Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403, 410 (discussing possible chilling effect on students, scholars and library users of having to pay for each use). Critics of neoclassical economic analysis strongly object to the application of market theory on the grounds that it fails to take into account the distributional effects of such a model. The economic justification for property leaves aside the question of how property rights should be distributed among the members of society. *See* Brennan, *supra* note 161, at 694. This is because economists generally see matters of distribution as having no appreciable effect on allocative efficiency. *See* Netanel, *supra* note 22, at 293; Fisher, *supra* note 25, at 1702. But who gets to charge, and who has to pay, is very much determined by the structure of property rights. Such a premise reposes ownership of knowledge with the wealthy and powerful. We may want to assign property rights to ensure that criteria of distributive justice are met or that wealth inequality is minimized. "Distributive justice combines philosophy, economics, and jurisprudence in an attempt to establish the fundamental theory by which wealth and resources are allocated among the members of a society." John J. Flynn and Piero Ruffinengo, *Distributive Justice: Some Institutional Implications of Rawls'* A THEORY OF JUSTICE, 1975 UTAH L. REV. 1, 123.

For example, some may argue that the objectivity of the market in the academic context may actually mask white male subjectivity. The mainstream legal academy, which is predominantly white and male, already stands accused of largely ignoring the work of feminist and critical race scholars.[215] Importing neoclassical economic principles into decisions regarding the value of scholarship may further suppress knowledge that is disquieting, disillusioning or unpopular. Ultimately, deriving relevance from market decision-making can inhibit the interplay of ideas and participation in the enterprise of those with other viewpoints by casting doubt on the legitimacy of those who are unable or unwilling to assimilate their views with the orthodoxy. Such distortion already occurs without the aid of market decision-making. As Paul Carrington has noted:

> Much academic expression disappears into the ether without a trace of recognition, much less response. This, alas, is what we often mean when we characterize an expression as "academic," namely, that it does not matter to anyone but the author. Some of what we say may be so inconsequential or redundant that it deserves no recognition or response, but all scholars of experience know that the relationship between recognition and worth is loose. Scholarship has its fashions, perhaps more truly in some disciplines than in others, and those who buck trends run the greatest risk of seeing their expressions disappear without a trace.[216]

An "objective" market can further suppress outsider perspectives in the university with the result that ideas of which the mainstream disapproves, stand little chance of being developed.

As a net result, copyright doctrine based on market theory could reinforce those tendencies and pressures to conform that are already part of the university and the larger community in which it exists. One of the most dangerous threats to academic freedom comes from internal pressures for intellectual conformity.[217] Too many academics already find little merit in disciplinary approaches that differ from their own.[218] A neoclassical economic approach to copyright in the university context

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215 *See* Chang, *supra* note 200, at 5. Richard Delgado has discussed the fact that the more radical feminist writers, such as Katherine MacKinnon or Susan Brownmill, seem to be cited less often that more mainstream feminist authors such as Kay, Weitzman, and Ginsberg because the more radical feminists proposed far-reaching changes in the ways in which society is constituted. Richard Delgado, Commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PENN. L. REV. 561, 576 n.71 (1984).

216 Paul D. Carrington, *Freedom and Community in the Academy*, 66 TEX. L. REV.1577, 1579 (1988).

217 *See* Kingston Brewster, Jr., *On Tenure*, 58 AAUP BULL. 381, 382 (1972).

218 *See* Rabban, *supra* note 155, at 291.

might further reinforce the self-perpetuation of like-minded colleagues and their continued dominance in the generation of ideas through market pressures for intellectual conformity. Such an effect would directly contradict the *1915 Declaration*, which states that the university makes a social contribution by checking both the hasty impulses of popular opinion and the tendency toward conformity in modern democracies.[219]

Some commentators have already discerned patterns of dominance and subordination in the context of the impact scholarship, even without the influence of market principles.[220] These patterns, which would only be reinforced and exacerbated through market considerations, have wider social and structural dimensions that just an individual scholar's recognition. These patterns can actually undermine democratic values. For example, commentators recognize that law schools are socially significant institutions[221] and that legal scholarship has been a component of important intellectual movements.[222] As Richard Delgado has noted, the potential bias of mainstream scholarship

is not harmless. Courts do cite law review articles; judges, even when they do not rely on an article expressly, may still read and be informed by it. What courts do clearly matters in our society. Moreover, what law professors say in their elegant articles contributes to a legal climate, a culture. Their ideas are read and discussed by legislators, political scientists, and their own students. They affect what goes on in courts, law classrooms, and legislative chambers.[223]

A system that encourages an eclectic scholarly output serves democratic values by addressing diverse political, social and economic interests. A valuing system that reinforces a dominant culture's ability to monopolize determinations regarding which knowledge is worthy of advancing places those outside that culture at a political disadvantage.

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219 *See 1915 Declaration*, *supra* note 172, at 400.

220 Richard Delgado has already noted "the absence of minority scholarship from the text and footnotes of leading law review articles about civil rights." Delgado, *supra* note 216, at 565. In a 1984 article, he discussed his impression that certain scholarship written by minority professors teaching at American law schools "seems to have been consigned to oblivion. Courts rarely cite it, and the legal scholars whose work *really* counts almost never do. The important work is published in eight or ten law reviews and is written by a small group of professors, who teach in the major law schools." *Id.* at 562-63.

221 *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

222 *See* Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981).

223 Delgado, *supra* note 216, at 562-63; *see also* Derrick Bell, *Bakke, Minority Admissions and the Usual Price for Racial Remedies*, 67 CAL. L. REV. 3, 4 n.2 (1979) (listing minority scholarship overlooked by the Supreme Court in *Regents of Univ. of California v. Bakke*, 438 U.S. 265). Bell points out that *Bakke* cites 10 law review articles by white male authors at *Bakke*, 438 U.S. at 288 n.25. Bell, *supra* note 224, at 4 n.2.

Given the ramifications of a neoclassical economic justification for copyright in the university context on the mission of the university in particular and society in general, we should not base decisions regarding the value of academic expression on neoclassical economic principles. Such principles cannot supply the inclusive critical inquiry contemplated by the mission of the university in determining what type of scholarship and research is worthy of pursuit. A doctrine that contributes to the establishment of "orthodoxy," and thereby detracts from the inclusive principles, upon which the university is premised contrasts starkly with the modern notion of the advancement of knowledge. The possibility of market-driven censorship resulting from such a doctrine compromises those academic values traditionally protected by academic freedom.

The core of academic freedom is the freedom of scholars to assess existing theories, established institutions, and widely held beliefs according to the canons of truth adopted by their academic disciplines, without fear of sanction by anyone if they arrive at unpopular conclusions. Academic freedom allows scholars to follow their autonomous judgment wherever it leads them, provided that they remain within the bounds of scholarly standards of inquiry.[224]

Thus, basing value judgments regarding scholarship on neoclassical economic principles would undermine the mission, and ultimately the credibility, of the university as a truth-seeking institution.[225]

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224 *See* AMY GUTMANN, DEMOCRATIC EDUCATION 175 (Princeton University Press 1987). *See also* Van Alstyne, *supra* note 159, at 87 ("A faculty, especially a research faculty, is employed professionally to test and propose revisions in the prevailing wisdom. . . .It's function is primarily one of critical review: to check conventional truth, to reexamine ('re-search') what may currently be thought sound but may be more or less unsound.").

225 The *1915 Declaration* states that:

> it is the first essential that the scholars who carry on the work of universities shall not be in a position of dependence upon the favor of any social class or group, that the disinterestedness and impartiality of their inquiries and their conclusions shall be, so far as is humanly possible, beyond the reach of suspicion.

1915 Declaration, *supra* note 172, at 399. Application of neoclassical economic analysis to determine the value of scholarship and research echoes concerns about the danger of university and external attempts to coerce faculty research into areas likely to attract corporate and government funding. *See* Stuart W. Leslie, *From Backwater to Powerhouse*, STANFORD (Mar. 1990) at 55 (Stanford University achieved preeminence in electrical engineering by attracting financial support and faculty from military contractors and by directing its research program and curriculum to military priorities); Eliot Marshall, *Harvard Tiptoes into the Market*, 241 SCIENCE 1595 (1988) (citing faculty criticism of proposed university funding for commercial development of professor's efficient method of making bacteria express human genes; concern that such projects would divert faculty from pure scholarship prompted new program to assure all funded projects are of "highest intellectual quality."); Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 Tex. L. Rev. 1363 (1988); AAUP, *Academic Freedom and Tenure: Corporate Funding of Academic Research*, 69 ACADEME 1a, 18a (Nov.-Dec. 1983); AAUP, *Government Censorship and Academic Freedom*, 69 ACADEME 1a, 15a (Nov.-Dec. 1983).

Instead, we must apply principles that serve to include, rather than exclude, outsider perspectives—principles that can find a scholar's efforts valuable "even if, and sometimes especially when, the external 'marketplace of ideas', in its slavish devotion to fashion, places low value on them."[226] We should judge the value of knowledge only after engaging in the critical inquiry so essential to the advancement of knowledge and the mission of the university—an inquiry founded on the notion that there are multiple methods for judging value and that different kinds of value cannot be reduced one to another. Only through such pluralistic critical inquiry can we make a determination of value that comports with the advancement of knowledge contemplated by the Framers

The appropriate testing of knowledge through critical inquiry requires the inclusion of many opposing intellectual perspectives within the same investigation. Market criteria of judgment ignore these crucial attributes of the advancement of knowledge. Copyright policy in the university context should encourage and allow a scholar to explore every tributary and rivulet of a disciplinary stream without the distorting interference of unwarranted market considerations. Judgments based on market criteria will diminish the advancement of knowledge through further isolation. Thus, we should reject institutional mechanisms that produce such judgments.

V. INCORPORATING ACADEMIC FREEDOM PRINCIPLES THROUGH AN INCENTIVE JUSTIFICATION

To adequately pursue its role as envisioned by the Court and the AAUP, the university must operate from the premise of inclusion of varied perspectives. At the same time, the university must eschew intrusions that further a policy of exclusion. The *American Geophysical Union, Inc. v. Texaco* court's fair use analysis reveals a remarkable lack of sensitivity to the importance of such an environment to the advancement of knowledge in the university context. The court's almost exclusive focus on the *market* for academic contributions to knowledge ignored the *institutional context* in which such works are produced and used. As a result, current fair use doctrine appears poised to expand copyright restrictions in the unique institutional setting of the university without thought to the ramifications that copyright's restrictions may have on that setting.

So how can we reconcile copyright with academic freedom? How do we fashion a copyright policy that meets incentive needs without compromising the academic freedom that is at the root of scholarship and research? As discussed above, the university's mission of the advance-

226 Carrington, *supra* note 217, at 1580

ment of knowledge, whether relevant or value-free, is best served by a policy that furthers critical inquiry rather than one that inordinately curbs the free flow of information. In essence, the advancement of knowledge in the university context is a shared project that should be based on a policy of inclusion rather than exclusion. Principles of academic freedom recognize that, for the university to achieve this goal, we must self-consciously design institutions affecting the university with these goals in mind. An incentive justification for copyright reflects the same public interest concerns that underlie the traditional justification for university-free scientific inquiry through the maximum production and dissemination of knowledge. Thus, the goals of copyright doctrine, as defined by incentive theory and the mission of the university, converge in the context of the academic use of academic expression. The same values that traditionally have justified academic freedom also justify recuperating an incentive justification for copyright in the university context.

An incentive justification for copyright is premised on the intertwined nature of access and creativity that also lies at the heart of advancing knowledge in the university context. Incentive theory "contemplates the creation and free flow of information; the unhindered flow of such information through, among other things, education in turn spawns the creation and free flow of new information."[227] Thus, such an inclusive theory of copyright doctrine better serves the mission of the university by providing scholars with market-transcendent incentives to create academic expression while, at the same time, maximizing the diversity, intellectual quality and social value of that expression.

A. PROMOTING INCLUSION IN THE ACADEMY'S CONTRIBUTION TO KNOWLEDGE.

Broad access is the engine that drives the production and dissemination of academic expression in the university and creates the opportunity for an inclusive scholarly environment. "Dialogue, and the willingness to engage in it with those of opposing viewpoints, comes to embody many of the qualities that morally legitimate the scholarly 'calling.' A willingness to tolerate a seeming cacophony of 'truths' becomes in many ways the *sine qua non* of our scholarly endeavor."[228] The "academic enterprise, more than other endeavors, generates and evaluates ideas."[229] Academics are part of a community with a shared goal and should engage in a cooperative process in trying to achieve that goal. "Inhibition

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227 Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1394 (6th Cir. 1996) (Chief Judge Martin dissenting).

228 Audain, *supra* note 3, at 1075-76.

229 Phoebe A. Haddon, *Academic Freedom and Governance: A Call for Increased Dialogue and Diversity*, 66 TEX. L. REV. 1561,1564-65 (1988).

of conversation or the exchange of ideas negates the academic community's purpose—attaining and transmitting knowledge."[230] Thus, broad intellectual collaboration and communication are critical to maintaining the diverse discourse necessary to academic creativity. Without such discourse, scholars from different perspectives may become entrenched in their own ideology, and thus, the advancement of knowledge will forgo the benefits to be achieved when scholars listen to one another.[231]

B. PROMOTING CREATIVITY IN THE ACADEMY'S CONTRIBUTION TO KNOWLEDGE.

Furthermore, because an incentive justification promotes the widest exchange of academic expression, a copyright policy based on such a justification will actually stimulate creativity in the academy. In fact, scholars studying the psychology of creativity have established a nexus between diverse dialogue and the existence of creativity.[232] Such research indicates that an increase in the exchange of ideas among scholars is more likely to lead to an increase of creativity.[233]

Scholars engaging in creativity research agree that two basic approaches to improving group creativity are brainstorming and brainwrit-

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230 *Id.* at 1565.

231 Robert Chang describes a situation in which physicists became locked in a stand-off about whether light was a wave or a particle. Imprisoned within their own ideologies, wave theorists could not see that light bears some characteristics of a particle and particle theorists were blind to the notion that light bears some characteristics of a wave. Thus, these two groups of physicists delayed the eventual revelation that light might be both a particle and a wave. Only through extended dialogue were physicists able to recognize a new model to explain the occurrence of these overlapping characteristics-wave mechanics. *See* Chang, *supra* note 200, at 32 (*citing* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 12-14 (2nd ed. 1970).

232 *See* Audain, *supra* note 3, at 1071.

233 *See id.* at 1075. Network analysis provides a useful theoretical framework for understanding the degree to which there is reciprocity in communication among scholars. In an ideal world, there would be complete symmetricality between and among scholars. Under network analysis, two of the best ways to characterize a communication relationship is according to its strength (frequency) and its symmetricality. *See id.* at 1057. A reasonable standard for judging the strength of communication between scholars is the extent of actual access to and dissemination of academic expression. In communication theory, a basic theoretical distinction is made between communication that is unidirectional and communication that is bidirectional or symmetrical. *See id.* at 1051. A unidirectional flow of information involves an outflow of information from a source with no inflow of information back to the source. A symmetrical flow of information involves a flow of information flowing into and out of a source. The chief benefits of highly symmetrical communication without restrictions are high organizational morale, to the extent the morale depends upon communication, flexibility and potentially high speed and accuracy of information. *See id.* at 1052. Thus a dialogic structure of communication among scholars in the form of scholarship benefits from maximum symmetricality. The best model of communication to occur among scholars is a symmetrical model where all scholars are able to communicate with other scholars through their publications.

ing.[234] Brainstorming refers to the oral generation of ideas within a group. In academia, such brainstorming might take place through informal discussion or through formal colloquia. Brainwriting involves ideas generated through communication by writing.[235] In interactive brainwriting, there is no oral group discussion of ideas.[236] Rather, "individuals are encouraged to improve upon their ideas once they have been exposed to the ideas of the other members of the group."[237] Among scholars, "the formal process of writing articles which are in turn read and discussed by other legal scholars appears to be a formalized version of the brainwriting technique of group creativity."[238] Such brainwriting is useful because new ideas, as well as the critique of submitted ideas, originate from many different sources.[239] A scholar's communication with peers may yield new insights or research programs not thought possible, or even imagined.

Thus, communication research shows that broad dialogue in the academy results in increased creativity. This increased creativity undergirds the ability of the university to fulfill its mission. Unwarranted copyright restrictions on academic expression, on the other hand, will reduce such dialogue and thus impair creativity among scholars.[240] An incentive justification would limit copyright restrictions to only those necessary to foster academic creativity.

C. PROMOTING DEMOCRATIC VALUES.

Creation of knowledge is not the only role the university plays in the advancement of knowledge. The duty and corresponding of academic freedom the university also includes the freedom to transmit the fruits of inquiry to the wider community.[241] In this role, the university serves as a political institution by giving voice to, and addressing the diverse concerns of, society. To an increasing extent, society in general, and government in particular, have come to rely upon academic scholars and researchers for acquiring the skills and knowledge that shape society.

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234 *See id.* at 1073 (discussing several creativity-training programs); CARLE M. MOORE, GROUP TECHNIQUES FOR IDEA BUILDING 9 (1987) (discussing "four techniques that can be utilized by groups of people to manage complexity; that is, to generate, develop, and select between ideas.").

235 *See* Audain, *supra* note 3, 1074.

236 *See id.*

237 *Id.*

238 *Id.*

239 *Id.* at 1075.

240 *See* Sterk, *supra* note 7, at 1210.

241 *See* Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV.1405, 1418 (1988) ("Dissemination of the products of scholarly inquiry in order to advance knowledge is a basic norm of academic freedom.") [hereinafter Rabban, *Faculty Autonomy*].

Unwarranted copyright restrictions abridge the traditional freedom of scholars to disseminate the products of their endeavor. An incentive justification for copyright enhances democratic participation by limiting such copyright restrictions and thus allowing the public broad access to academic expression.

Shaping a copyright policy particularly sensitive to the purposes and needs of the academic milieu requires a revival of an incentive justification for copyright. With any luck, such a justification will result in the recognition of a special academic status in fair use cases that reflects an emerging judicial sensitivity to the realities of the academic endeavor. However, if the courts are unwilling to incorporate academic freedom principles in fashioning an appropriate copyright policy for the university context, Congress should take the initiative by carving out a specific exemption for academic use of academic expression as it has done in the past for other specific uses when it has determined special attention was warranted.[242] Congress could easily justify such an exemption on the basis of incentive rationale after recognizing that the creation of academic expression in the university context does not depend on, and in fact may be diminished by, market considerations.

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242 For example, fair use claims have arisen in situations where scholars or biographers have wished to make use of private letters, diaries, or journals residing in library collections. Two decisions by the Second Circuit created great controversy by suggesting that the unpublished nature of the works might preclude a finding of fair use. *See* New Era Publications Int'l v. Henry Holt & Cl., 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *see* Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987). Scholars and publishers reacted strongly to these decisions and in 1992 Congress amended section 107 to reaffirm that the unpublished nature of a copyrighted work is not a bar to a finding of fair use. The amendment reads, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. §107 (1999).

Additionally, sections 108-120 of the Copyright Act identify activities that are non-infringing notwithstanding the provisions of section 106. For example, the first-sale doctrine embodied in section 109(a) of the Copyright Act permits the purchaser of a lawfully obtained copyrighted book to resell or lend that copy without infringing the copyright. This exception avoids the administrative nightmare that would result if every reseller or lender of a book were required to obtain copyright clearance. Through these sections, Congress has also prohibited copyright owners from bringing infringement action for noncommercial consumer recordings of music and the public display of a lawfully made copy of a work by the copy's owner. 17 U.S.C. §§ 113-114 (1999).

Congress has already created a clear safe harbor for classroom copying. The *Agreement on Classroom Guidelines* sets the *minimum* standards for educational fair use under section 107. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66, 66-68 (1976). Congress did not intend the guidelines:

> to limit the types of copyright permitted under the standards of fair use under judicial decision and which are stated in Section 107 . . . . There *may* be instances in which copying which does not fall within the guidelines stated below *may* nonetheless be permitted under the criteria of fair use.

Id.

CONCLUSION

Copyright creates property rights in expression where they would otherwise not have existed. This special grant "places the policy burden on the advocate for copyright"[243] in each particular situation. Advocates of the neoclassical economic justification cannot satisfy this burden in the university context because the neoclassical economic justification for copyright is inconsistent with the mission of the university. Copyright restrictions on academic use premised on a neoclassical theory of copyright directly impact academic values favoring critical inquiry, objectivity, access and dissemination. Such restrictions undermine the free exchange and criticism of ideas that lie at the core of academic freedom and upon which its public benefit depends.[244] Thus, they disempower the academy in its ability to judge knowledge on the basis of academic principles by replacing scholarly judgment with market judgment. Ultimately, such restrictions could undercut public confidence in the independence of scholarly judgments.[245] These implications argue for a heightened attention to the effects of copyright doctrine in the university context. Congress and the courts should therefore fashion copyright policy in the university context pursuant to an insightful and supportive endorsement of the mission of the university and its correlative academic freedom.

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243 Brennan, *supra* note 150, at 685.

244 *See* AAUP, *Academic Freedom and Tenure: Corporate Funding of Academic Research*, 68 ACADEME 18a, 18a-19a (Nov.-Dec. 1983); AAUP, *Government Censorship and Academic Freedom*, 68 ACADEME 15a, 16a (Nov.-Dec. 1983); AAUP, Statement on Preventing Conflicts of Interest in Government-Sponsored Research (1964), *reprinted in* ACADEMIC FREEDOM AND TENURE 82-84 (L. Joughin ed., 1969).

245 Rabban, *Faculty Autonomy*, *supra* note 252, at 1409.