RULIFYING FAIR USE

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Fair use is a statutory legal standard that authorizes courts to determine whether a particular use of a copyrighted work is permissible without a license. The open-ended nature of fair use enables copyright law to remain flexible and adaptable to changing circumstances. At the same time, however, flexibility creates a high level of uncertainty regarding permissible uses, which may lead to a detrimental chilling effect. Consequently, while courts, scholars, and practitioners strive for more certainty in fair-use analysis, they are also concerned about losing the flexibility that comes with it.

Does fair use mandate case-specific decision-making, or does it also allow some elaboration into rules and guidelines? A recent Eleventh Circuit decision brought this issue to the forefront of legal discourse. In Cambridge University Press v. Patton*, the court repudiated the attempt made by the lower court to offer a rule-like elaboration of fair use for educational purposes. This Article argues that the court's rigid approach in* Cambridge University Press *reflects a misconception of the rule/standard distinction. The Article challenges the court's binary approach to rules and standards, arguing that they should not be treated as mutually exclusive. While legal scholarship has generally focused on standardization of rules—i.e., elevating concrete rules to a higher level of abstraction—the opposite process of rulifying standards has been understudied. This Article proposes to fill this gap by offering a normative framework for rulifying fair use.*

This Article argues that the open-ended nature of fair use should not be viewed as preventing courts from specifying the abstract standard into rules. Rather, the objective of copyright law mandates that courts elaborate the fair-use standard into rules for particular creative contexts through common-law adjudication.

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We thank Michael Birnhack, Oren Bracha, Danny Benoliel, Jane Ginsburg, Dotan Oliar, Gideon Parchamovsky, Justin Pila, Matthew Sag, Pamela Samuelson, and the participants of IP Scholars (DePaul Center for Intellectual Property Law & Information Technology 2015), the Annual Meeting of the Israeli IP Scholars (Bar Ilan University 2015), and the IP Scholars Roundtable (Tel-Aviv University 2015) for insightful comments on earlier drafts.

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INTRODUCTION

Fair use is considered by many to be the crown jewel of U.S. copyright law. Enacted as a statutory standard in § 107 of the 1976 Copyright Act,[1] fair use authorizes courts to consider and weigh four factors when determining whether certain use of a copyrighted work is permissible without a license.

Most advocates of fair use prefer a flexible standard rather than bright-line rules for determining exceptions and limitations to copyrights.[2] Fair use offers flexibility, which is particularly important with regard to copyright laws, because they must be constantly adjusted to face the changing needs of rapidly developing technology.[3] Flexibility, advocates argue, is necessary for achieving the goals of copyright laws in such a dynamic environment, and for securing breathing space for creators.[4]

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1. *See* 17 U.S.C. § 107 (1976).
2. *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990); Pamela Samuelson, *Justifications for Copyright Limitations & Exceptions, in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth Okediji ed., forthcoming 2017); P. Bernt Hugenholtz & Martin R.F. Senftleben, Fair Use in Europe: In Search of Flexibilities 6 (Nov. 4, 2011) (unpublished manuscript) (available at http://www.ivir.nl/publicaties/download/912).
3. *See* Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1835 (2009).
4. *See, e.g.*, Gwen Hinze et al., The Fair Use Doctrine in the United States—A Response to the Kernochan Report 4 (July 26, 2013) (unpublished manuscript) (available at

Flexibility, however, may come at a cost. Applying the four factors of fair use involves complex analysis, which may lead to unpredictable outcomes, thus failing to offer sufficient guidance to users on whether a particular use is permissible.[5] Some users, especially risk-averse users such as libraries or schools, may choose to avoid certain uses which are otherwise desirable and could promote copyright goals simply due to uncertainty regarding the legal consequences.[6] This uncertainty about permissible uses may impair the purpose for which fair use was enacted in the first place. Copyright exceptions drafted as rules would indeed offer more certainty; however, this certainty comes at the cost of rigidity that may fail to address the needs of users in a dynamic environment.

For many years, these tradeoffs in copyright policy were presented as a binary choice between rules and standards.[7] The rule/standard distinction, however, overlooks the dynamic nature of adjudication, which is shaping the nature of legal norms. As recently recognized by legal theorists, the rule/standard distinction reflects a continuum, rather than a sharp binary division.[8] Judges soften rules through interpretation and, in a similar fashion, rulify standards by elaborating discrete categories and developing contextual guidelines.[9]

Can fair use be rulified in this manner? A recent Eleventh Circuit decision brought this issue to the forefront of legal discourse. In *Cambridge University Press v. Patton,* the court repudiated the attempt made by the lower court to offer a rule-like elaboration of fair use in the context of an educational e-reserve system.[10]

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http://ssrn.com/abstract=2298833) (arguing in favor of the Fair Use Doctrine's flexibility and relative predictability).

5. *See, e.g.*, WILLIAM W. FISHER III & WILLIAM MCGEVERAN, THE DIGITAL LEARNING CHALLENGE: OBSTACLES TO EDUCATIONAL USES OF COPYRIGHTED MATERIAL IN THE DIGITAL AGE 54–56 (Berkman Center for Internet & Society, Research Publication No. 2006-09, 2006), https://cyber.harvard.edu/sites/cyber.harvard.edu/files/BerkmanWhitePaper_08-10-2006.pdf (concluding that copyright law hampers the educational uses of copyrighted material); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) (proposing to fix the ambiguities of copyright law through an advisory opinion mechanism); Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC'Y U.S.A. 337, 338–39 (2009) (examining the strengths and weaknesses of "Statements of Best Practices" as a solution to the unpredictability of copyright law).

6. *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1694 (1988) (discussing the effects of the uncertainties of fair use); Emily Meyers, Note, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 229–30 (2007) (discussing the negative effects of the uncertainties surrounding copyright law and the fair use doctrine); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 396, 420 (1989) (critiquing the idea/expression dichotomy in the First Amendment analysis of copyright).

7. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976); Pierre J. Schlag, *Rules and Standards*, 22 UCLA L. REV. 379, 380 (1985).

8. *See infra* notes 25–26 and accompanying text.

9. "Rulification" refers to turning a standard into a rule.

10. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1260 (11th Cir. 2014).

There, major academic publishers sued Georgia State University ("GSU") claiming that copies stored in its electronic-course reserve system violated their copyrights. GSU asserted that making these copies was within the boundaries of fair use. In deciding fair use, courts are required to consider the four factors enumerated in § 107:

> The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.[11]

The lower court applied the four fair-use factors to conduct an extremely fact-intensive analysis of the 75 instances claimed by the plaintiffs to be copyright infringements. The court explained that the four factors should be weighed as a whole.[12] At the same time, however, the court's position was that because the defendant is a nonprofit educational institution using the copies for nonprofit educational use, copying up to 10% or one chapter of a book, would constitute fair use. On appeal, the Eleventh Circuit confirmed some of the lower court's conclusions, yet it held that the lower court "erred in setting a 10 percent-or-one-chapter benchmark" because no fixed benchmark should be set at all.[13] Instead, the court explicitly endorsed a rigid case-by-case (work-by-work) approach to fair use.[14] The case was remanded to revisit the fair-use analysis for the remaining 48 infringement claims.[15] The district court applied the standard set by the court of appeals.[16] Once again, in a long and extensive decision, the district court examined every allegedly infringing excerpt, applying to each an in-depth analysis of the

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11. *See* 17 U.S.C. § 107 (1992). In its introductory clause, § 107 also provides a list of several types of uses that can qualify as fair use, including criticism, comment, news reporting, teaching (including making multiple copies for classroom use), scholarship, and research. *Id.* Importantly, this list is non-exclusive. *Id.*

12. Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190, 1210–11 (N.D. Ga. 2012) ("It is hornbook law that there is no across the board rule for what weight should be given to each factor or how the factors should be applied.").

13. *Patton*, 769 F.3d at 1283.

14. The court explained:

> We understand "case-by-case" and "work-by-work" to be synonymous in cases where a copyright proprietor alleges numerous instances of copyright infringement and a secondary user claims that his or her use was fair. Courts must apply the fair use factors to each work at issue. Otherwise, courts would have no principled method of determining whether a nebulous cloud of alleged infringements purportedly caused by a secondary user should be excused by the defense of fair use.

Id. at 1258 n.20.

15. *Id.* at 1284.

16. Cambridge Univ. Press v. Becker, No. 1:08-CV-01425-ODE, 2016 WL 3098397, at *6–8 (N.D. Ga. Mar. 31, 2016).

four factors. The lower court subsequently concluded that 41 cases out of the remaining 48 infringement claims were fair use.[17]

The Eleventh Circuit's holding reflects a strong disagreement over not only the details of fair-use analysis in a particular case, but also the fair-use methodology. It underscored the manner in which courts are allowed to perform their analysis when applying fair use.

This case also raises a question that has yet to be explicitly addressed in fair-use adjudication or in copyright scholarship: Does fair use mandate case-specific decision-making, or does it also allow some elaboration into rules? This question is often confused with another, different dilemma over whether exceptions and limitations to copyrights should be defined by open-ended standards such as fair use, or strictly specified by bright-line rules.[18] Choosing to substitute fair-use standards with a set of specific rules goes to the heart of the fair-use doctrine and challenges the very concept of defining permissible uses based on a flexible norm. This dilemma on how best to define exceptions and limitations resembles the classic debate on rules versus standards.

However, the question raised by the Eleventh Circuit decision is a completely different one. Fair use is a statutory standard, defined as such by the 1976 Copyright Act. The issue addressed here is whether courts are allowed to craft rules under the fair-use standard through adjudication. Can they elaborate the standard using judge-made rules without revoking their decisional freedom to deviate from such guidelines in future cases where application of the underlying principles weighs differently? Indeed, while many scholars have highlighted the importance of preserving courts' discretion in applying fair use,[19] until recently, very little attention has been paid to the existence and desirability of judge-made rules in fair-use jurisprudence.

This Article argues that Congress' articulation of fair use as a standard in the 1976 Copyright Act was deliberately meant to preserve the rulemaking power of the judiciary.[20] Rulification of fair use, this Article asserts, has always been exercised by courts in common-law adjudication, as courts constructed the scope of permissible uses of copyright material. Congress designed the fair-use standard to ensure that courts could adjust the law to accommodate future developments

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17. *Id.* at *90.

18. *See, e.g.*, Hugenholtz & Senftleben, *supra* note 2, at 6 (discussing the different approaches to copyright law through an evaluation of copyright law within the European Union).

19. *See, e.g.*, Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 998–99 (2002) (arguing that the Supreme Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), "opens the door" to a flexible balancing approach to fair use cases); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 85 (2012) (concluding, through an intensive study, that "a flexible fair-use doctrine" likely does not cause the "unpredictability" and "doctrinal incoherence" alleged by its critics); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2542–43 (2007) (advocating for the coherence and predictability of fair-use cases through the identification of common patterns, or "policy-relevant clusters," within fair-use case law).

20. *See infra* Section III.A.

that may be unpredictable for the legislature.[21] It is not accompanied, however, by any "rule against rulification," and both Congress and the Supreme Court have endorsed some elaboration of this standard into specific guidelines through adjudication.[22] Indeed, courts have developed rule-like elaboration of the fair-use standard, and such rules have become an integral part of fair-use adjudication.[23]

This Article proceeds to argue that the court's rigid approach in *Cambridge University Press v. Patton* is based on the misconception that the rule/standard distinction is a *binary* one rather than a *continuum*, and therefore overlooks the rulification process that takes place whenever a court applies legal standards in general and for fair use in particular.[24] Acknowledging the existence of a rulification process and gaining a better understanding of the role of courts in rulifying standards may help understand the actual choices that courts make while applying fair use—i.e., determining the appropriate scope of rulification and identifying the considerations that should guide courts when rulifying fair use.

Advocates of strictly open standards share two common assumptions: first, that rules and standards are mutually exclusive and, second, that it is impossible to turn standards into rules without losing the open-ended nature of the standard. While this Article recognizes the importance of flexibility for achieving copyright goals and supports formation of fair use as an open standard, it nevertheless challenges these assumptions, arguing that articulating rules within a standard does not necessarily disqualify the standard as such. Therefore, turning standards into judge-made rules in particular cases will not detract from the open-ended nature of the norm. Rulification could promote certainty, while at the same time preserving courts' flexible discretion.

At a normative level, this Article argues that courts should encourage the development of explicit rules within the framework of the fair-use standard in order to facilitate fair use by the general public. While the virtues of the fair-use standard (flexibility and adjustability) are indispensable, high levels of uncertainty may inhibit desirable uses. Allowing some rules and guidelines in fair-use adjudication may enhance predictability, thereby promoting the objectives of fair use and advancing the goals of copyright law.

This Article begins in Part I by introducing the classic rule/standard dichotomy and recent challenges to it in legal theory. In Part II, the Article argues that rulification of standards should be understood within the common-law tradition of adjudication. Part III asserts that the view of fair use as a permissive standard, for which rulification is allowed, is supported both by the legislative history of fair use and by the courts' interpretations. Part IV argues that

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21. *See infra* notes 71–74 and accompanying text.

22. For a description of Congress' and the Supreme Court's basic perception of the fair-use doctrine as a standard that should be further elaborated by courts, see *infra* Section III.A.

23. For a thorough description of both Supreme Court and lower court adjudications in which fair use was reduced to more concrete rules, see *infra* Sections III.B–C.

24. *See infra* Part II.

implementing fair use as a permissive standard is an appropriate legal policy as it serves to advance the goals of copyright law and to promote the rule of law.

I. UNPACKING THE RULE/STANDARD DICHOTOMY

A. Rules and Standards

The distinction between rules and standards dates back to the legal realists and has gained renewed attention by scholars of law and economics over the past two decades.[25] Generally speaking, rules and standards reflect two different forms of drafting legal directives. Bright-line rules define legal consequences that result from easily ascertainable facts; for example, "a person driving above the 50 mph speed limit is subject to a fine." Once the judge determines the facts—i.e., the driving speed exceeded 50 mph—the legal consequences will follow.

By contrast, an open-ended standard allows the judge to define preconditions for the legal consequences when applying the norm.[26] The judge must not only determine whether certain preconditions exist in the case at hand but also exercise judicial discretion to define which factors are relevant for determining that the norm applies. Consider, for example, "a person who engages in careless driving is subject to a fine." The judge will be responsible for determining what constitutes careless driving by applying the norm in particular circumstances.

Literature on the rule/standard dichotomy notes several differences between these approaches towards drafting legal norms.[27] One important difference is the level of precision. Rules define behavior and outcomes with sufficient accuracy, while standards simply define the considerations to be made and how to weigh different variables based on a single overarching principle—e.g., reasonableness—or on a set of factors—e.g., fair-use analysis.[28]

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25. The classic writings on rules and standards include the following: Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

26. *See* Korobkin, *supra* note 25, at 23 (citing Sullivan, *supra* note 25, at 58) ("[Standards] require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion.").

27. *See* cases cited *supra* note 19.

28. *See supra* notes 18–20 and accompanying text.

Another difference is the rulemaking authority. Rules and standards reflect a division of labor between the legislative and the judicial branches.[29] When setting rules, the legislature defines the legal circumstances that lead to a legal outcome, leaving courts with relatively limited discretion to determine if and how the rule should be applied in particular circumstances. Standards, by contrast, delegate rulemaking power to the courts, entrusting them with the authority to determine the content of the norm and to define the particular scope of permissible behavior.[30]

Rules and standards also differ from one another in the sequence in which the norm is set: rules precede the incident (*ex ante*), while when setting standards the judge formulates the norm upon its application, namely, after the incident has taken place (*ex post*).[31] This entails yet another distinction between rules and standards, reflecting a tradeoff between certainty and flexibility. While rules offer a higher level of certainty and predictability *ex ante*, standards give the court a broad range of discretion to define the content of the norm *ex post*. This presumably makes standards less predictable, since they provide relatively little guidance for prospective users, *ex ante*.

In summary, standards reflect a particular strategy for crafting norms where the norm is abstract and requires the application of principles (as opposed to concrete rules). The norm entrusts rulemaking power to the court (not the legislature) and is determined retrospectively when applied by the adjudicating judges (*ex post* instead of *ex ante*).[32]

B. The Rule/Standard Dichotomy Revisited

Over the past decade, a growing body of literature has sought to loosen the rule/standard dichotomy.[33] Rather than viewing rules and standards as two distinct categories, scholars have suggested that there is a wide spectrum of norms, reflecting specificities that range from bright-line rules to open-ended standards.[34]

Moreover, commentators have also recognized that the nature of legal norms is neither inherent nor intrinsic. Instead, the attributes of rules and standards

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29. *Id.*

30. *Id.*

31. *See* Kaplow, *supra* note 25, at 560 ("[T]he only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act.").

32. As summarized by Michael Coenen: "With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity inflexibility and arbitrary-seeming outcomes. With standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs." Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014).

33. *See* Korobkin, *supra* note 25, at 26 (re-characterizing the rule/standard dichotomy as a "spectrum"). More recently, Parchomovsky and Stein challenged the rule/standard dichotomy by proposing a new form of legal norms: a catalog. Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 168 (2015).

34. In *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, for instance, Russell B. Korobkin has argued that the legal forms are a wide spectrum with rules at one end and standards at the other. Korobkin, *supra* note 25, at 26.

are dynamic and can be shaped during the adjudicating process. Judges often soften rules and insert more discretionary judgment at the moment of application by introducing exceptions or applying broad interpretations that extend beyond the literal meaning of the rule.[35]

For instance, the Copyright Act defines the scope of copyright as a set of exclusive rights defined by rules. Though the law provides that a copyright owner has the exclusive right "to *reproduce* the copyrighted work in copies or phonorecords,"[36] courts must determine which actions are considered reproductions for the purpose of copyright liability. Consequently, even this relatively straightforward, rigid rule is often interpreted in ways that expand courts' discretion, giving judges more flexibility when applying the rule, while at the same time enhancing uncertainty regarding its scope. The Second Circuit, for instance, interpreted *reproduction* by imposing two requirements: it must be embodied in a medium, and it must remain embodied "for a period of more than transitory duration." Accordingly, the court concluded that reproduction in an online buffer for a brief period of 1.2 seconds did not meet the duration requirement, and the statutory meaning of "reproduction" therefore did not apply in *Cartoon Network LP v. CSC Holdings, Inc*.[37] The minimum duration that is "more than transitory" and therefore sufficiently "fixed" to constitute a reproduction remains to be decided by the courts. In other words, the very basic rule that vests exclusive rights to copyright owners for all *reproduction* of their original work of authorship has been "standardized" by courts.

Standards can merge with rules as well. Over time, courts may introduce various judicial tests, develop discrete categories, and elaborate open-ended standards by defining more precise and contextual guidelines; namely, rules.[38]

For instance, the Copyright Act states that material is eligible for copyright protection only if it is an "original work of authorship," yet the term *originality* sets a standard that is not defined by law.[39] Consequently, the threshold for copyright eligibility is set by an open-ended standard, leaving the courts to determine the criteria of eligibility for copyright protection. The question of what constitutes an original work of authorship is one of the most fundamental inquiries in copyright law.[40] In the seminal decision of *Feist Publications, Inc. v. Rural*

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35. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 222–28 (1991) (discussing the complexities of rule-based decision making in law and in society at-large).

36. 17 U.S.C. § 106(1) (2012) (emphasis added).

37. 536 F.3d 121, 130, 134 (2d Cir. 2008).

38. *See* Justin Hughes, *Fair Use and its Politics – At Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF EXCEPTIONS AND LIMITATIONS, *supra* note 2 (arguing that precise rules can be generated off standards as fact patterns become standardized).

39. *See* 17 U.S.C. § 102(a) (1990).

40. *See, e.g.*, Daniel J. Gervais, Feist *Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949, 973–75 (2002) (comparing definitions of originality in copyright law across common and civil law systems); Elizabeth F. Judge & Daniel Gervais, *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, 27 CARDOZO ARTS & ENT. L.J. 375, 377 (2009); *see also* ELEONORA ROSATI, ORIGINALITY IN EU COPYRIGHT: FULL HARMONISATION

Telephone Service Co., the Supreme Court held that the standard of originality should be interpreted as a "modicum of creativity." Consequently, the mere investment of effort ("sweat of the brow") in the production of a work does not qualify it for copyright protection per se.[41] The Court thus rulified the standard of originality to a certain extent, offering guidance on what would not qualify as originality.

Frederick Schauer argues that "the rulification of standards is as common a phenomenon as is the standardization of rules."[42] In fact, Schauer uses insights from social psychology to explain that judges are inclined to rulify open-ended norms. Psychological resistance to excessive choice explains this phenomenon of self-limitation on unconstrained decision-making power in open-ended standards.[43] Consequently, he argues, some level of rulification of standards might be inevitable.[44]

Michael Coenen recently added another layer of analysis to the rules and standards jurisprudence that focuses on the process of applying standards and, more precisely, on courts' approach to rulification.[45] Coenen explains that classifying a norm as a *standard* is only the first step towards understanding its nature. In order to understand the nature of the norm, he argues, it is crucial to consider the manner in which the courts are permitted to apply the standard.[46] He distinguishes first-order choices, in which the court decides to apply either rules or standards, from related second-order choices in which the court opts to fortify the standard with "rules against rulification."[47] While a *permissive standard* allows the court to develop ancillary rules to assist it in applying the standard, a *mandatory standard* prohibits any future doctrinal development of rules, mandating persistent content-specific discretion. If a standard is accompanied by rules against rulification—i.e., a *mandatory standard*—then lower courts may not develop specific rules for applying this standard in future cases. In that case, courts will be

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THROUGH CASE LAW 3 (2013) (discussing the policy implications in copyright law of adopting one understanding of originality over another).

41. 499 U.S. 340, 356–57 (1991).

42. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 806 (2005).

43. *Id.* at 805–06. As aptly described by Schauer: "Rather than embracing standards as a logical corollary to resisting rules, interpreters and enforcers have systematically resisted standards almost as much as they have resisted rules, sharpening the soft edges of standards just as they have rounded off the crisp corners of rules." *Id.* at 805.

44. Schauer explains that one reason courts limit the choices available to them in future cases by making a standard more precise is "indirectly to impose those constraints on their less able and less trustworthy successors." *Id.* at 810. Moreover, courts, like other decision-makers, seek to limit their choices by converting standards into rules, since they "believe that they can decide better and with less anguish if they have fewer options and fewer factors to take into account." *Id.* at 813. Therefore, Schauer concludes: "To the extent that this belief guides the way in which they shape their own decision-making environments and their own decision-making algorithms, decision-makers are likely to look for ways to focus their decisions in ways that standards do not and rules do." *Id.*

45. Coenen, *supra* note 32.

46. *Id.* at 653–54.

47. *Id.* at 658, 681.

required to apply a case-by-case inquiry and consider the particular circumstances without using any checklists or relying on any ancillary rules. If the standard is not accompanied by a rule against rulification—i.e., a *permissive standard*—then lower courts will have discretion to choose whether or not to rulify the standard.[48]

Coenen's theoretical framework may shed light on the choices available to courts when applying fair use. Indeed, Coenen's analysis focuses on the decisions made by the Supreme Court regarding rulification of a standard once the Court has opted to apply a standard as opposed to a rule.[49] Fair use, however, is a statutory standard, although historically it evolved as a standard in courts before it was codified in the 1976 Copyright Act.[50] Statutory interpretation may be subordinated to explicit congressional intent,[51] but overall courts are presented with similar choices when deciding whether a standard is mandatory or permissive. Therefore, Coenen's theoretical framework can be equally applied to fair use.

Focusing on the manner in which the court conducts fair-use analysis may enable courts and commentators to move beyond the rule/standard dichotomy in copyright law and refine the nature of the fair-use standard. How should courts exercise their discretion when applying fair use? Should they perform a case-by-case inquiry, strictly avoiding any rules, or may they rely on rules and guidelines when determining the outcome? Reliance on rules, checklists, and guidelines in fair-use analyses may not only guide legal analysis conducted by the court, but may also enhance judicial transparency and promote the clarity of fair use as applied by the court. This, in turn, would also enhance the guidance that the norm can provide for prospective users and increase predictability of permissible uses. Yet opponents of rulifying fair use are concerned that permitting rule-like elaboration of the standard may unnecessarily restrain judicial discretion and inhibit the flexibility that enables adapting copyright law to new challenges.[52]

Is fair use a mandatory standard that bans any elaboration of supplementary rules, or a permissive standard that allows some degree of rulification in applying an open-ended norm? Before we discuss the nature of fair use and whether it is a mandatory or permissive standard, the next Section takes a closer look at rulification in the context of common-law adjudication.

C. Common-Law Adjudication: Rulification is the Default

Rulification of standards is inherent in all common-law adjudication, as long as the relevant standard is considered permissive.[53] Common-law case law is

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48. *Id.* at 680.

49. *Id.* at 646.

50. *See infra* Section III.A.

51. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 59–60 (1988).

52. *See infra* Section III.B.

53. As aptly described by Coenen:

> In a precedential system, the initial pronouncement of a legal norm marks only the beginning of its development. As cases begin to arise under a non-specific standard, courts must decide whether a particular set of facts satisfies the standard's triggering criteria. By rendering such

generated through an incremental string of court decisions, successively implementing or specifying a certain legal norm and ultimately crystallizing an inductive logical pattern for judicial decision-making.[54] The outcome of this process is a judge-made rule. Rules against rulification interfere with this process by severing the string: decisions would inevitably be handed down by courts, but courts would not be authorized to use the common-law technique of setting specifications that would enable successive courts to develop an inductive logical pattern for judicial decision-making. The opposite applies as well—i.e., a permissive standard does not interfere with the natural process of generating strings of adjudications.

The rulification process in common-law tradition might offer guidance for other courts and future litigants, but the level of guidance may vary. There are many factors that can affect the guiding force of judge-made rules, such as the passage of time since the decision and changing circumstances during that period of time.[55] Aside from external factors such as these, the degree of guidance is also affected by the emerging inductive logical pattern; namely the level of concretization of the "rule."[56] A judge-made rule may reflect a quite accurate formula with high chances of predictability, or alternatively, it may provide a vaguer formula.[57] Judicial discretion is applied with respect to the appropriate structural formation of the judge-made rule and the level of guidance that it should convey for future litigants, and not only with regard to its concrete consequences for the parties in the case.[58] Additionally, common-law judicial discretion should also address instances in which earlier judge-made rules—i.e., precedents—are not

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> decisions—which carry precedential force—courts will begin to elaborate on the content of the norm itself.

Coenen, *supra* note 32, at 653.

54. Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1181–82 (1990).

55. *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 263 (1976) ("Changes in social and economic conditions, in legislation, in judicial personnel, and in other parameters of legal action reduce the value of precedents as a source of legal doctrine.").

56. *Id.* at 250–51.

57. *Id.*

58. Benjamin N. Cardozo opened his masterpiece, *The Nature of the Judicial Process*, with a sincere confession concerning the challenges any common-law judge faces. These challenges include a series of determinations concerning the following questions:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it?

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

applicable to the case at hand, and therefore should not be followed or at least followed *mutatis mutandis* only.[59]

Further, from the perspective of assessing the level of guidance generated by case law, there is a wide range of possibilities for crafting a judge-made rule. For instance, "safe harbor" denotes a concrete rule, a norm that guarantees legal immunity when applied.[60] The explicit consequences of a legal safe harbor include its adoption with a higher degree of precision, similar to a strict rule. Therefore, a common way of anchoring safe harbors is through legislation.[61] Nevertheless, safe harbors may be generated through adjudication as well.[62] Indeed, codified safe harbors differ from judge-made ones in that they offer more explicit guidance.[63] Accordingly, both may serve the final end of providing guidance.

Understanding the nature of judicial decision-making in a common-law system leads to the conclusion that standards are inevitably rulified by courts to some extent unless there is an explicit overriding command against rulification. Rulification, in other words, is a natural byproduct of common-law adjudication. Therefore, a stance against rulification should be viewed as an exception, which is contrary to the basic trajectory of a common-law court, and which should be well underpinned.

There are various reasons that courts may opt for a rule against rulification.[64] One set of reasons reflects structural concerns related to allocation of power between the legislature vis-á-vis the court, and between the U.S. Supreme Court, the courts of appeals, and the lower courts. Another reason to adopt a rule against rulification is a specific need to encourage judicial experimentation. This addresses the concern that rulification would generate excess legal uniformity or diminish the likelihood of the U.S. Supreme Court discussing the matter thoroughly and generating a (better) guiding precedent.[65] An analysis of the reasons for adopting a rule against rulification is beyond the scope of this Article. However, viewing fair use within the theoretical framework of common-law adjudication suggests that rulification of rules is the default, while rules against rulification are the exception.

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59. *Id.*; *see also* Landes & Posner, *supra* note 55, at 249 ("The rules produced by the process of adjudication are distinctive in being implicit rather than explicit rules.").

60. *See, e.g.*, Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1511–18 (2007) (proposing the use of "safe harbors" in fair use jurisprudence).

61. In the fair-use context, it was proposed to legislate safe-harbors relating to minimal uses, such as permission to copy up to ten seconds from a sound recording or thirty seconds from audiovisual works. *See id.*

62. Kennedy, *supra* note 7, at 1690; *see also* Andrew Stumpff Morrison, *Case Law, Systematic Law, and a Very Modest Suggestion*, 35 STATUTE L. REV. 159, 170 (2014) ("[The Judge], will typically attempt to identify the relevant objective guidelines that can be used to *classify* any fact pattern that might arise. The rule-writer will try to create some "system.").

63. Landes & Posner, *supra* note 55, at 249 ("The rules produced by the process of adjudication are distinctive in being implicit rather than explicit rules.").

64. *See* Coenen, *supra* note 32, at 681–94.

65. *Id.* at 683–87, 690.

The remaining sections of this Article build on this theoretical framework to argue that fair use is a permissive standard, both on the descriptive and normative levels. This conclusion is based on the basic understanding of the common-law framework as a legal system, which favors rulification of standards. In the absence of explicitly justified rules against rulification, the default general policy would be to allow the natural and inevitable process of rulification to take place. Part II argues that fair use was intended to be a permissive standard and that courts have indeed developed a rule-like elaboration of the fair-use standard. Also, on a normative level, courts should allow some degree of rules and guidelines in fair-use adjudication.

II. FAIR USE AS A PERMISSIVE STANDARD

The fair-use doctrine in copyright law is undoubtedly a statutory standard.[66] The question is whether fair use was perceived by the legislature and the Supreme Court as a *mandatory standard*, forbidding any rulification by lower courts, or as a *permissive standard*, allowing some form of rulification. This Part argues *descriptively* that Congress initially designed fair use as a permissive standard. Part III then argues that as a matter of sound policy fair use *should* be designed and interpreted as a permissive standard.

A. Legislative History

The legislative history of the fair-use doctrine offers some initial insights into the legislative purpose of enacting a fair-use standard. The evolution of the fair-use doctrine since its early days embraces a dialectic tension between its discretionary nature for purposes of achieving fair and reasonable results, and the need to formulate certain guiding factors. The fair-use doctrine emerged as a judicial discretionary-equity legal framework in the early-eighteenth-century English courts.[67] It was not crafted as a fully formed doctrine at its inception, but has developed extensively over the years.[68] Nevertheless, the basic rationale of the fair-use doctrine was established early on, to ensure that later authors and the public could build upon the work of earlier authors.[69] Nineteenth-century American courts adopted the doctrine as well, while the most significant milestone in the early history of American fair use is Justice Story's 1841 decision, *Folsom v. Marsh*.[70] Justice Story developed one of the basic purposes of fair use, namely

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66. 17 U.S.C. § 107 (2012).

67. WILLIAM P. PATRY, PATRY ON FAIR USE § 1:5 (2015) (explaining that the Statute of Queen Anne 1710, 8 Ann. c. 21, did not give any guidance to courts with respect to many significant questions, and therefore courts looked to the purpose of the Act—"An Act for the Encouragement of Learning"—and crafted permits to use copyrighted work accordingly).

68. *Id.*

69. BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911, at 12–15 (1999).

70. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

"fair and reasonable criticism,"[71] but also formulated the doctrinal framework of the factors that should be considered:

> In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[72]

The *Folsom* decision served as a guide for subsequent courts, in the absence of statutory pointers, when defining the scope of permissible use. This decision was also the basis for codification of the fair-use doctrine, including the four-factor framework codified in the 1976 Copyright Act.[73]

The 1909 Copyright Act refrained from codifying the fair-use doctrine; therefore, courts continued to develop the doctrine in the common-law framework.[74] During the 1950s and early 1960s, a few studies and reports were prepared, resulting in the first preliminary copyright bill of 1963 prepared by the Copyright Office, which included the first draft of the fair-use codification. The 1963 draft bill proposed this codification of the fair-use doctrine:

> All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work.[75]

Thus, fair use was described as a *privilege*, and some guiding factors based on the *Folsom* decision were provided. Various draft bills were thereafter presented, each reflecting the negotiations between the various stakeholders. The opening definition of fair use and the precise wording of the four factors were carefully scrutinized. In later versions of the bill, the definition of fair use as a privilege was omitted and an exemplary list of uses was added. The clear purpose of this addition was to clarify the doctrine.

Between 1973 and 1976, Congress intensively discussed and reviewed the draft bills of the Copyright Act. Hearings were held and the draft bill was revised

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71. *Id.* at 344–45 ("[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.").

72. *Id.* at 348.

73. On the legislative history of the codification of fair use, see JESSICA LITMAN, DIGITAL COPYRIGHT 68–69 (2001).

74. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

75. PATRY, *supra* note 67, § 9.6.

several times as a result of the various debates.[76] The Senate and House reports agreed on several elements of the fair-use doctrine, as explained in the House report:

> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.[77]

Did Congress purport fair use to be a *mandatory standard*—namely, a standard which bans any rulification? Or did it opt for a *permissive standard*, to be further rulified by courts? Indeed, the House report stresses that "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[78] However, a careful reading of this report suggests that when codifying fair use, the division of labor between the legislature and the courts had to be ensured. The House report explicitly asserts that codifying the judge-made fair use standard is in no way intended to detract from courts' authority, beyond providing a very broad statutory explanation of what fair use is and some of the criteria applicable to it. The courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[79]

Moreover, "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."[80] On the contrary, Congress intended to preserve the courts' judicial rulemaking power, allowing judges to adapt the doctrine to changing circumstances. The report explains that the standard should evolve by means of the courts themselves, and not by a legislative set of rules that would deny the courts any discretion in applying the law. In other words, the legislature conferred discretion to the courts to decide on a case-by-case basis because it recognized its limited ability to codify rules for every possible case.

The overall picture that arises from the legislative history suggests that the legislature designed the fair-use doctrine as an open-ended norm to be further concretized by courts, with no explicit "rule against rulification." The legislative

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76. H.R. REP. NO. 94-1476, at 48–50 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5661–63; *see also* Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 875–77 (1987) (summarizing the House Hearings on Fair Use).

77. H.R. REP. NO. 94-1476, at 66; *see also* S. REP. NO. 94-473, § 106 (1975).

78. H.R. REP. NO. 94-1476, at 66.

79. *Id.*

80. *Id.*

history does not suggest any prohibition on further development of the general standard into concrete rules, as long as the courts maintain their ability to adapt the doctrine to new, specific circumstances. Moreover, the House report avers that the codified fair-use doctrine reflects the existing judicial doctrine at the time, making no attempt to change it.[81] As explained above, the codified doctrine was constructed from its inception as an evolving common-law standard, which, by nature, can be freely converted into clearer rules[82] and which, in turn, may be followed or differentiated by subsequent court decisions.

B. Fair-Use Adjudication: No Rule Against Rulification

Mandatory standards may also be defined by the Supreme Court. How was the nature of a fair-use standard interpreted by the Supreme Court, and what does it signal to lower courts? Surprisingly, the Supreme Court has directly addressed the issue of fair use in only three cases: *Sony Corp. of America v. Universal City Studios*, *Harper & Row v. Nation Enterprises*, and *Campbell v. Acuff-Rose Music, Inc*.

In *Sony Corp. of America v. Universal City Studios*, a 1984 decision,[83] the Supreme Court discussed whether home users of the Video Tape Recorder ("VTR") device who record broadcasted content for time-shifting purposes were infringing copyright. If so, secondary liability could potentially be imposed upon Sony, which manufactured the VTRs. The Court ruled that home-use taping for time-shifting purposes was fair use. At the outset, the Court explained that the doctrine "identifies various factors that enable a court to apply an 'equitable rule of reason' analysis to particular claims of infringement."[84] The Court did not explicitly address the rule against rulification. However, in a footnote that referred to the House report, the Court quoted that "no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[85] The Court further cited the above-mentioned paragraph from the House report that declared the intention not to "freeze" the law and the need to apply the fair-use doctrine on a case-by-case basis.[86]

At the same time, however, the Court did generate rules in the opinion itself. For instance, it upheld the presumption that every commercial use should be deemed presumptively unfair: "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . ."[87] Moreover, after a detailed analysis of the four

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81. *Id.*
82. *See, e.g.*, Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (formulating a series of factors that should be considered when deciding copyright cases under the common law fair-use doctrine).
83. 464 U.S. 417 (1984).
84. *Id.* at 448.
85. *Id.* at 448 n.31.
86. *Id.*; *see also supra* note 77 and accompanying text.
87. *Sony*, 464 U.S. at 451. Justice Stevens explained: "If the Betamax were used to make copies for a commercial or profit-making purpose . . . such use would presumptively be unfair." *Id.* at 449.

factors and their application to the case at hand,[88] the Court concluded that "[w]hen these factors are all weighed in the 'equitable rule of reason' balance we must conclude that this record amply supports the [d]istrict [c]ourt's conclusion that home time-shifting is fair use."[89] The *Sony* decision was widely understood to mean that consumers do not violate the law when they "tape television programs off the air" and that private non-commercial copying is fair use.[90]

Consequently, the *Sony* Court crafted concrete rules concerning non-commercial use and fair use of home recordings for time-shifting purposes. In doing so, the Court defined a rule that reflected the view that some private copying might be permissible.[91] The Court's actual analysis thus laid another brick in the process of concretizing the fair-use standard by applying rules.[92]

Only one year later, the Supreme Court decided *Harper & Row v. Nation Enterprises*,[93] marking another milestone in the interpretation of the fair-use doctrine. In that case, the petitioners acquired the copyright for the then-unpublished memoirs of former President Gerald Ford. Shortly before the scheduled release of the memoirs, an unauthorized source provided *The Nation* magazine with the unpublished Ford manuscript. Working directly from this manuscript, an editor of *The Nation* produced a 2,250-word article, of which at least 300 to 400 words were verbatim quotes of copyrighted expressions taken from the manuscript. Harper & Row claimed copyright infringement, and the Court, after considering the four fair-use factors, rejected the fair-use defense largely because *The Nation* had copied the heart of the story.[94]

Here, the Court again did not explicitly address the mandatory nature of the fair-use standard, nor did it announce a rule against rulification. The Court yet again followed the House report literally, explaining that the "statutory formulation of the defense of fair use in the Copyright Act reflects the intent of

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88. *Id.* at 448–55.

89. *Id.* at 454–55.

90. For a discussion of the aftermath of the *Sony* decision, see Jessica Litman, *The* Sony *Paradox,* 55 CASE W. RES. L. REV. 917, 947–60 (2005).

91. *See id.* at 947–48 ("The *Sony* decision was reported widely and approvingly in the popular press as holding that consumers do not violate the law when they tape television programs off the air."); Stacey L. Dogan, Comment, Sony*, Fair Use, and File Sharing*, 55 CASE W. RES. L. REV. 971, 972 (2005) ("Scholars commonly remember *Sony* for its presumption of fair use for noncommercial copying."); Jessica Litman, Campbell *at 21/*Sony *at 31*, 90 WASH. L. REV. 651, 655 (2015) ("In *Sony*, the Court reshaped fair use in order to limit contributory liability and shelter personal uses."); Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1850 (2006) ("The most obvious and most commercially significant legacy of Sony is the safe harbor it established for technologies having or capable of having substantial non-infringing uses.").

92. *See* Hughes, *supra* note 38, at 25 (arguing that the Supreme Court in *Sony v. Universal City Studios* "established a 'rule' that there is no copyright liability for private copying for later consumption/enjoyment when no copy is retained and the copyright owner made the work available").

93. 471 U.S. 539 (1985).

94. *Id.* at 546, 549.

Congress to codify the common-law doctrine,"[95] and that § 107 "requires a case-by-case determination . . . [and] this approach was 'intended to restate the [preexisting] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.'"[96] As in *Sony*, the Court did not elaborate on a "no rulification" policy and instead focused on reaching the "correct" conclusion, using traditional common-law reasoning, such as precedents, logicality, and broad copyright policy considerations.[97] But in its substantive analysis of the four factors, the Court crafted two important rules. First, it endorsed *Sony*'s presumption against commercial use, holding that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[98] Second, the decision applied a detailed analysis of use of an unpublished work, holding that the scope of fair use is narrower for unpublished than for published works.[99]

The next milestone in interpreting the fair-use doctrine came a decade later in 1994, in *Campbell v. Acuff-Rose Music, Inc.*[100] In that case, the publisher of Roy Orbison's hit song "Oh, Pretty Woman," filed a lawsuit against members of a rap music group, 2 Live Crew, and their record company, claiming that one of their hits infringed on the copyright of Orbison's classic. 2 Live Crew and the record company argued that the rap song constituted fair use, as it was a parody. In contrast to the two earlier fair-use cases decided by the U.S. Supreme Court, in this case, the decision did more than simply address the purpose of the fair-use doctrine as formulated by Congress.[101] The Court offered more guidance as to the appropriate application of fair use. It retracted prioritization of commercial use and the commercial-harm factor, ruling that when applying fair use "all factors are to be explored, and the results weighed together, in light of the purpose of copyright."[102] Indeed, the Court stressed that fair use "permits [and requires] 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."[103] Citing previous precedents, the Court observed that "[t]he task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case by

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95. *Id.* at 549.

96. *Id.*

97. *Id.* at 549–56.

98. *Id.* at 562.

99. *Id.* at 564. This rule was further elaborated by the Second Circuit in *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987) (holding that unpublished works "normally enjoy complete protection against copying"), and in *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990) (holding that fair-use doctrine bars virtually all use of unpublished sources). The outcome was the creation of an almost categorical rule against fair use of unpublished works. *See* PATRY, *supra* note 67, § 4:2. Consequently, Congress amended the Copyright Act in 1992. *See* Act of June 19, 1992, Pub. L. No. 102-492, 106 Stat. 3145.

100. 510 U.S. 569 (1994).

101. *Id.* at 576.

102. *Id.* at 578.

103. *Id.* at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

case analysis . . . . [*Harper & Row, Sony,* and the House Report] which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses."[104]

The Court emphasized that the fair-use standard should not be substituted with bright-line rules. It did not, however, retract the authority of the courts to develop guidelines on applying fair use. As in *Sony* and *Harper & Row*, the Court elaborated more specific rules on applying fair use. The Court engaged in a detailed analysis of parodies, emphasizing that their transformative nature should outweigh other considerations taken into account in the four-factor analysis. The Court further elaborated extensively on the relationship between the various factors, explaining that a commercial use and some degree of economic harm do not automatically rebut the fair-use defense. The Court held that the transformativeness of the work lay "at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."[105] Following *Campbell,* lower courts have placed stronger consideration on whether the original work was used in a "transformative" way.[106]

The *Campbell* Court, therefore, wrote a guiding decision, which was adopted by lower courts upon implementing the four-factor analysis. It preserved the dialectic approach of an "open norm" on the one hand and the need for guidance on the other, while providing some very concrete instructions as to the implementation of the four factors. In other words, the *Campbell* decision itself can be classified as a move toward some rulification of the standard, and therefore should not be interpreted as a signal given by the Court to avoid any concretization of fair use.

In conclusion, it seems that in addition to not explicitly deciding against rulification of fair use, the Supreme Court in fact endorsed a permissive approach that allows concretization of the fair-use open standard. Indeed, the Court endorsed a case-by-case approach to fair use, and emphasized the need to avoid rigid application of rules and to exercise discretion when shaping the norm. At the same time, however, all three Court decisions concerning fair use conducted an analysis that generated rules: a rule that shelters home-taping users, a rule against fair use of unpublished works, and a rule that stresses the supremacy of the transformativeness factor. This dialectic policy explains the Court's adherence to the House report. Congress propounded the doctrine in a way that left room for dynamism and flexibility, and at the same time allowed formation of guidelines. The Court's clear policy is to maintain this delicate balance; the preservation of broad judicial discretion in fair use certainly does not reject its concretization in the traditional common-law style.

Rulification of fair use by lower courts is therefore unavoidable, and the Supreme Court does not shy away from offering guidance to lower courts by

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104. *Id.* at 577–78 (first citing *Harper & Row*, 471 U.S. at 560; then citing *Sony*, 464 U.S. at 448 & n.31; then citing H.R. REP. NO. 94-1476, at 64–66 (1976); and then citing S. REP. NO. 94-473, at 62 (1975)).

105. *Id.* at 579.

106. *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 733 (2011).

creating certain presumptions or modifying them over time. In other words, the Court does not avoid developing guidelines for application of fair use, and does not assume that these guidelines would detract from the flexibility available to lower courts in accordance with fair-use standards as defined by copyright law. This approach to shaping the norm is consistent with common-law tradition, which is further explored in the following section.

C. Fair-Use Rulification in Action: Lower Court Cases

Neither Congress nor the Supreme Court has adopted a rule against rulification. The fair-use doctrine has been kept case-specific and the decisional freedom of courts endorsed. Lower courts have followed the Supreme Court's guidance and formulated certain rules while leaving significant space for individual discretion. In contrast to the small number of Supreme Court fair-use cases, a significant number of cases addressed the issue in lower courts. This broad corpus of case law further endorses the dialectic nature of the fair-use doctrine, as courts follow the directive to determine fair-use cases on a "case-by-case basis."[107] Nevertheless, courts understand that it is their responsibility to make concrete decisions, thereby providing specifications to be used by successive courts.[108] Aside from the desire to maintain complete dynamism and flexibility, courts hand down decisions that rulify the fair-use standard by their very nature.

In practice, fair-use adjudication exercises the traditional common-law mechanism for developing judge-made rules. Moreover, as discussed above,[109] courts tend to devise rules when exercising their discretion for applying legal standards, thus "sharpening the soft edges of standards just as they have rounded off the crisp corners of rules."[110] This tendency to craft a legal outcome that can be formulated as a rule is a typical common-law practice as well. As explained above, rules and standards denote the two ends of a spectrum of contingencies. As standards may differ in their level of generality, rules may differ based on their level of specification. The directive handed down Congress and the Supreme Court to maintain the case-specificity of the fair-use doctrine is therefore perceived as a rule against "over-rulification" of fair use through rigid and strict rules. Lower

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107. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) (citing Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 577–78 (1994)) ("[T]he determination of fair use is an open-ended and context-sensitive inquiry. In *Campbell*, the Supreme Court warned that the task 'is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.'"); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1279 (11th Cir. 2001) (Marcus, J., concurring) (citing *Campbell*, 510 U.S. at 577) ("Fair use adjudication requires case-by-case analysis and eschews bright-line rules."); Dr. Seuss Enters. v. Penguin Books USA, 109 F.3d 1394, 1400 n.6 (9th Cir. 1997) ("The Supreme Court has thus far eschewed bright line rules, favoring a case-by-case balancing."); Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1520 (9th Cir. 1992) (refusing to recognize a "per se right to disassemble object code" in light of the "case-by-case" and "equitable" nature of fair-use analysis).

108. *See* Netanel, *supra* note 106, at 733 ("Any attempt to 'make sense of fair use' is incomplete without taking into account how the doctrine actually operates across such multiple settings and impacts individual behavior and understandings in practice.").

109. *See supra* Part II.

110. Schauer, *supra* note 42, at 805.

courts would inevitably concretize the standard, but should beware of inappropriately reducing the level of generality of the fair-use standard. This is not a rule against rulification but rather a more complex version of a command to maintain full judicial discretion within the context of a legal system that must provide concrete legal outcomes for the parties petitioning to the courts. In common-law terms, the fair-use inductive logical pattern that has been generated maintains its "built-in" flexibility.

There are several noteworthy examples of rulification of fair use by lower courts. The first fair-use factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[111] This factor is often considered the heart of the four-factor inquiry.[112] Indeed, it yielded the transformative-use requirement stressed by the Supreme Court in *Campbell*.[113] The concept of transformative use proved to be highly correlated with the probability that the fair-use claim would be accepted.[114] Although transformative use is not exhaustive, being only one factor out of four,[115] its growing importance made it "susceptible of judicial manipulation to justify results that are actually reached on other bases."[116] Such manipulation may be achieved through the extensive interpretations given to the notion of transformative use, as originally defined by the *Campbell* Court in very broad terms.[117] As a result, the guidance granted by the Supreme Court for the first fair-use factor has served as an anchor for subsequent elaborations made by lower courts, and is not perceived as a command that forbids any initiatives to concretize instances that would be regarded as meeting the required threshold.

A good example of lower courts' willingness to elaborate upon the first fair-use factor is the decision by Judge Chin of the Second Circuit in *Authors Guild Inc. v. Google Inc.* on whether the Google Books project enjoys a fair-use defense.[118] Google made digital copies of books available to its library project partners to download. Therefore, according to the court, it had prima facie infringed on the copyright.[119] After reiterating the exposition concerning the case-sensitive nature of the fair-use doctrine, the court explored the four factors. As to the first factor, it ruled that:

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111. 17 U.S.C. § 107(1) (2012).

112. On Davis v. Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001).

113. Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 (1994). The Supreme Court adopted the proposition introduced by Leval in a law review article: Pierre. N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

114. Netanel, *supra* note 106, at 740 ("[T]hose recent decisions that unequivocally characterize the defendant's use as transformative almost universally find fair use.").

115. *Id.* at 741.

116. *Id.* at 742. For a similar insight, see David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 281, 287 (2003).

117. *Campbell*, 510 U.S. at 579 (defining "transformative use" as a use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

118. 954 F. Supp. 2d 282, 291–92 (S.D.N.Y. 2013).

119. *Id.* at 289.

> Google's use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books has become an important tool for libraries and librarians and cite-checkers as it helps to identify and find books. The use of book text to facilitate search through the display of snippets is transformative.[120]

Furthermore, "Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research."[121] These findings reflect a significant development in the *Campbell* transformative test because they focus on the shift in purpose of use, without requiring any alterations to the existing work or addition of original materials to it. This new interpretation of the transformative test delves into the purpose of copyright law to "promote the progress of science," to conclude that a use which creates a new purpose of a work satisfies the transformative threshold.[122] This decision demonstrates how broad judicial discretion is exercised, while still assuming the freedom to further develop and concretize the first fair-use factor, as well as the entire fair-use doctrine.[123] At the same time, this kind of elaboration does not limit the judicial discretion of subsequent courts. Thus, it demonstrates the policy that permits rulification but avoids "over-rulification" through rigid application and strict rules.

When applying the four-factor analysis of fair use, courts frequently resort to the case law.[124] Moreover, the various court decisions concerning the four fair-use factors can be sorted into clusters and categories according to the main type of use.[125] Such categories include, for instance: abstracting and indexing;[126]

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120. *Id.* at 291.

121. *Id.*

122. In this case, the court operated a purposive mode of interpretation, which sought to promote the goal of any piece of law through its application. This mode of interpretation is a typical common-law tool for exercising judicial discretion. *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 85–97 (Sari Bashi trans., 2005).

123. Interpretation is used not only with respect to statutes and cases but for fact-finding as well. Thus the fact-finding task is influenced by various factors including underlying policy goals. *See* Rosemary J. Coombe, *"Same as It Ever Was": Rethinking the Politics of Legal Interpretation*, 34 MCGILL L.J. 603, 615 (1989); Owen. M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739–40 (1982).

124. *See* Hughes, *supra* note 38, at 21 (arguing that in applying § 107, courts are not only equipped with the statutory language and the facts of the case, but also with prior decisions).

125. *See* Samuelson, *supra* note 19, at 2541. Barton Beebe conducted an empirical study of the fair-use cases under the 1976 Copyright Act. One of his conclusions is that the majority of the non-leading cases could be classified into groups, out of which some kind of formulation could be deduced. Barton Beebe, *An Empirical Study of U.S. Fair Use Opinions 1978–2005*, 156 U. PA. L. REV. 549, 553–56 (2008); *see also* PATRY, *supra* note 67, §§ 3.111–.144 (providing a review of the case law in leading treatises); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05 (2016).

126. *See, e.g.*, N.Y. Times v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977).

appropriation art;[127] biographies;[128] criticism and comments;[129] news reporting;[130] parodies;[131] and political or religious uses.[132] To some extent, this case law creates predictable and coherent patterns of decision-making.[133] Many commentators, such as Pamela Samuelson, Michael Madison, and William Patry have offered different taxonomies of fair use, arguing that "policy-relevant clusters" in which the underlying goal being promoted, e.g., freedom of speech, learning, or technological innovation, could help make fair use more predictable.[134] The outcome is ultimately rulification of the fair-use doctrine through a natural common-law process.[135] For example, use of copyrighted material for parody purposes is likely to qualify as fair use, particularly when used for non-commercial purposes.[136] Such concretization of the fair-use standard is inevitable and is not rejected by lower courts as an ultra vires ruling, because it does not conflict with the primary command to keep the standard open and case-sensitive.

Some emerging rules have been identified by commentators, and occasionally criticized on various grounds. For instance, Craig warned that the formulation of fair use in *Sony* and *Harper & Row* overemphasized commercial interests.[137] While Craig is concerned with the extreme utilitarian approach

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127. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

128. *See, e.g.*, New Era Publ'ns Int'l v. Carol Publ'g Grp., 904 F.2d 152, 156 (2d Cir. 1990); Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).

129. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265 (11th Cir. 2001).

130. *See, e.g.*, Fox News Network v. TVEyes, Inc., 43 F. Supp. 3d 379, 390–94 (S.D.N.Y. 2014); Righthaven LLC v. Hoehn, 792 F. Supp. 2d 1138, 1149 (D. Nev. 2011); Payne v. Courier-Journal, Nos. 05-5942, 05-6066, 2006 WL 2075345, at 399 (6th Cir. July 25, 2006).

131. *See, e.g.*, *Suntrust Bank*, 268 F.3d at 1268; Leibovitz v. Paramount Pictures Co., 137 F.3d 109, 112 (2d Cir. 1998).

132. *See, e.g.*, Hustler Magazine Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152–53 (9th Cir. 1986); Diamond v. Am-Law Publ'g Corp., 745 F.2d 142 (2d Cir. 1984).

133. *See* Samuelson, *supra* note 19, at 2541.

134. *See id.* at 2541–42; Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1645 (2004); Beebe, *supra* note 125, at 553–56. *See generally* WILLIAM PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1995).

135. Beebe concludes: "When we speak of modern U.S. fair use case law, we are speaking primarily of the 122 opinions generated by four courts—the Supreme Court, the Second and Ninth Circuits, and the Southern District of New York—and the progeny of these opinions in the other federal courts." Beebe, *supra* note 125, at 568.

136. *See id.* at 556; Samuelson, *supra* note 19, at 2550 (noting that after the *Campbell* case it was clarified that parodies should be ruled fair use even if they were made for commercial purposes). However, a number of uses have failed to qualify as parodies after the *Campbell* case, such as *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400–01 (9th Cir. 1997). That decision was severely criticized. *See* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y U.S.A. 513, 513–14 (1999); Tyler T. Ochoa, *The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 590–620 (1998).

137. CARYS J. CRAIG. COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 182 (2011) ("These and other cases suggest a

reflected by these rules, others were concerned by the rise of transformative use as a dominant factor.[138] Regardless of whether one agrees with one substantive rule or the other, the fact that there are scholarly debates over the justifiability or desirability of a particular rule demonstrates the existence of dynamic rulemaking in fair-use adjudication.

Another sound example of a judge-made rule generated through adjudication is the use of unpublished works. Following the *Harper & Row* ruling against the use of an unpublished work,[139] three successive Second Circuit decisions dismissed a fair-use claim against the use of unpublished works per se.[140] The outcome of *Harper & Row* was the creation of an almost rigid rule against fair use of unpublished works. Consequently, Congress amended the Copyright Act in 1992.[141] The amendment added a clarification at the end of § 107: "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."[142] This legislative intervention to clarify the scope of fair use was not to create a guideline per se or to express the view that such a judge-made rule was ultra vires, but rather to correct a mistaken rule.[143] Use of unpublished works may be justified under various circumstances, and therefore, Congress had to fix an erroneous judicial rule. This example fosters the idea that judge-made rules are generated within the fair-use framework and are not prohibited as such. In the case of an erroneous precedent, the legislature may intervene.

The international copyright arena offers further evidence to support the approach that the fair-use doctrine was not meant to include a "no rulification" instruction, but rather to allow its concretization by lower courts in compliance with international law standards. According to article 9, § 2 of the Berne Convention for the Protection of Literary and Artistic Works,[144] and article 13 of the TRIPS Agreement,[145] exceptions or limitations to exclusive rights should

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judicial tendency to establish rigid rules, evolved from in-built biases or assumptions, in the face of board provision conferring a general discretion. In the US this has resulted in overemphasis on competition, commercial considerations and owner's economic interests such that market harm dooms a fair use claim.").

138. *See, e.g.*, Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016); Liz Brown, *Remixing Transformative Use: A Three-Part Proposal for Reform*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 139 (2014).

139. Harper & Row v. Nation Enters., 471 U.S. 539, 569 (1985).

140. *See* Wright v. Warner Books, Inc., 953 F.2d 731, 737 (2d Cir. 1991); New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 583 (2d Cir. 1989); Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987).

141. Act of June 19, 1992, Pub. L. No. 102-492, 106 Stat. 3145.

142. 17 U.S.C. § 107 (2012).

143. *See* James Adkins, Note, *Fair Use and Unpublished Works: Public Law 102-492—An Amendment to the Fair Use Statute*, 38 ST. LOUIS U. L.J. 231, 249–53 (1993); Jennifer Leman, Note, *The Future of Unpublished Works in Copyright Law after the Fair Use Amendment*, 18 IOWA J. CORP. L. 619, 632–39 (1993).

144. Berne Convention for the Protection of Literary and Artistic Works art. 9(2), July 24, 1971, 1161 U.N.T.S. 31.

145. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) art. 13, April 15, 1994.

comply with the following three conditions, known as the "three-step test": (1) exceptions are limited to certain special cases; (2) they do not conflict with normal exploitation of the work; and (3) there is no unreasonable prejudice against the legitimate interests of the copyright owner.[146] Arguably, the open fair-use doctrine can be considered noncompliant with the first requirement of limitations to "certain special cases."[147] However, this claim is often rebutted by the argument that when a court decides whether or not the doctrine applies in a given case, the three-step test is met because the decision refers only to the specific case at hand. Indeed, commentators suggest that fair use is not a specific exception, but rather a structural mechanism for generating specific exceptions and limitations.[148] Justin Hughes recently argued that because fair use is not an exception, but instead a mechanism for establishing specific exceptions and limitations, it complies with the three-step test required by international treaties.[149] Moreover, as more decisions are handed down, the certain cases in which the doctrine applies will be clarified.[150] In other words, the fair-use doctrine will comply with the three-step test only if perceived as a permissive standard that allows further rulification by lower courts.

D. An Odd Exception: The Decision in Cambridge University Press

Congressional legislative history, Supreme Court precedents, and fair-use adjudication by lower courts all reflect a permissive approach that enables a certain degree of rulification of the fair-use standard. The decision of the Eleventh Circuit in *Cambridge University Press v. Patton* stands in sharp contrast to this general consensus.[151] In that case, several major academic publishers filed a lawsuit against GSU, claiming infringement of their copyrighted books through GSU's electronic course reserve system.

In a preliminary order, the district court examined GSU's 2009 Copyright Policy, which required each law professor to complete a "fair-use checklist" in

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146. *Id.*

147. *See* SAM RICKETSON, WIPO STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT 67–70 (WIPO Doc. SCCR/9/7) (2003). For the presentation of such an argument, see Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 114–23 (2000).

148. *See, e.g.*, Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381 (2005); Hughes, *supra* note 38, at 22 (arguing that because fair use is not a specific exception, but rather a mechanism for establishing specific exceptions and limitations, it complies with the three-step test required by international treaties). The three-step test, Hughes argued, requires that the national legislature apply the first step, which is not the case with fair use. *Id.* at 23–24.

149. *Id.* at 22–24.

150. *See, e.g.*, Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?*, 29 INT'L LAW. 99, 112 (1995); Tyler G. Newby, Note, *What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1637, 1647–48 (1999).

151. 769 F.3d 1232 (11th Cir. 2014).

order to determine if each item included in the reading list qualified as fair use.[152] The court examined whether the university's policy contributed to direct infringements by professors who uploaded materials to the e-reserve system. In an opinion exceeding three hundred pages, the lower court analyzed each of the sampled 99 instances of infringement claimed by the plaintiffs and found GSU liable for 5 instances in which the copied excerpts did not qualify as fair use.[153] The court held that fair use is fact-intensive and all four factors of fair use must be weighed on a work-by-work basis. Regarding the third fair-use factor, the court held that "the amount of the copying as a percentage of the book varies from book to book." At the same time, however, the district court held that the third factor favored fair use when the quantity of material copied was less than 10% of the original work, or no more than a single chapter.[154]

On appeal, the Eleventh Circuit endorsed a strict "no rulification" policy, holding that fair-use analysis should be applied to each particular instance, with no pre-accepted guidelines.[155] The court specifically held that the lower court "erred in setting a 10 percent-or-one-chapter benchmark," not because the quantitative measures selected by the court were wrong, but because no fixed benchmark should be set at all.[156] Because the case concerned systematic usage of copyright materials by a university for learning purposes, GSU claimed that the legality of its copyright policy should be discussed.[157] The court rejected the claim and opted for a strict case-by-case approach, requiring that each of the copies (in this case a representative sample of the allegedly infringing copies) be analyzed.[158]

In *Cambridge University Press,* the Eleventh Circuit explicitly addressed the question of whether fair use is a mandatory or permissive standard. In fact, it is the first decision that directly touches upon this issue. Citing the Supreme Court,

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152. GSU claimed that it discouraged copyright infringements by faculty members, by adopting the copyright policy. In a preliminary decision, the court relied on GSU's copyright policy (which was updated in 2009 after the lawsuit was filed) requiring employees to provide a fair-use analysis before scanning or posting material. *See* Cambridge Univ. Press v. Becker, 2010 U.S. Dist. LEXIS 142236 (N.D. Ga. Sept. 21, 2010) (order denying Motions to Exclude). In its final opinion, however, the district court minimized the significance of a fair-use policy. Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190, 1363 (N.D. Ga. 2012) ("Defendants, in adopting the 2009 policy, tried to comply with the Copyright Act. The truth is that fair-use principles are notoriously difficult to apply. Nonetheless, in the final analysis Defendants' intent is not relevant to a determination whether infringements occurred."). Eventually, the court found infringement only in 5 instances out of the 99 alleged infringements that Plaintiffs maintained at the trial. Nevertheless, the court held that GSU policy did not provide sufficient guidance in determining the "actual or potential effect on the market or the value of the copyrighted work," a task which would likely be futile for prospective determinations (in advance of litigation). *Id.* The claimants appealed because the final outcome practically approved the majority of uses.

153. *Becker*, 863 F. Supp. 2d at 1363.

154. *Id.* at 1243.

155. *See Cambridge Univ. Press*, 769 F.3d at 1283.

156. *Id.*

157. *Id.* at 1272.

158. *Id.*

the Eleventh Circuit took the view that "[i]n drafting § 107 Congress 'resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.'"[159] This entailed, according to the Eleventh Circuit, a mandatory "work-by-work" analysis, requiring the lower court to apply fair-use principles to each work included in the lawsuit, even in cases of numerous instances of allegedly similar copyright infringements.[160]

However, as discussed above,[161] the case-by-case approach endorsed by the Supreme Court does not foreclose a court's authority to elaborate judicial guidelines.[162] The *Campbell* decision emphasized the need to preserve a court's discretion in fair-use adjudication. The question raised by the Eleventh Circuit ruling is different. The issue addressed here is whether courts should be allowed to craft rules for fair-use adjudication—not to replace a standard with rules, but rather to use rules to elaborate the standard without forgoing the court's decisional freedom to deviate from such guidelines in future cases in which applications of the underlying principles would be weighed differently. For instance, if a court adopts a general rule of thumb that states that copying less than "10 percent-or-one-chapter" could qualify for fair use, this does not revoke the discretion of subsequent courts. Therefore, in instances in which this rule is overinclusive or under-inclusive, courts will always have discretion to deviate from the rule, expand it, limit its defined benchmark, or to otherwise accommodate it to the specific circumstances.

The rigid anti-rulification holding by the Eleventh Circuit raises a fundamental question regarding the future of fair use and the role of courts in developing the doctrine. Should courts fully refrain from formulation of rules in fair-use analysis, or should fair use be rulified to some extent? Indeed, while many scholars have highlighted the importance of preserving the court's discretion in applying fair use, very little attention until recently was paid to the existence and desirability of rules in fair-use jurisprudence. Part III delves into these issues.

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159. *Id.* at 1258 (citing Harper & Row v. Nation Enters., 471 U.S. 539, 561 (1985)).

160. *Id.* at 1283. The Court explains that in the absence of such examination "[courts] would have no principled method of determining whether a nebulous cloud of [alleged] infringements purportedly caused by [a secondary user] should be excused by the defense of fair use." *Id.* at 1259.

161. *See supra* Section III.B.

162. The court in *Cambridge University Press* cited the seminal Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc*., where the Court held that the application of fair use "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." 510 U.S. 569, 577 (1994). The question is whether the "case-by-case analysis" methodology should ban any elaboration of judge-made rules. According to the *Cambridge University Press* court, the answer is affirmative: "case-by-case analysis" methodology should be interpreted as foreclosing any elaboration of rules. 769 F.3d at 1272.

III. WHY FAIR USE SHOULD BE RULIFIED

Assuming that the fair-use doctrine was legislated and applied as a permissive standard that allows rulification, we must still inquire whether this reflects a desirable legal policy. To address this question, further inquiry into the normative framework governing rulification is necessary. As the following discussion suggests, rulifying fair use may promote copyright goals. A permissible approach to fair use allows adjustment of this flexible standard while promoting predictability, thus encouraging permissible uses that contribute to achieving copyright goals. Moreover, rulifying fair use may yield additional significant advantages by enhancing transparency of adjudication processes and strengthening the rule of law.

A. Rulified Fair Use Promotes Copyright Goals

Copyright law seeks to "promote the progress of science" and serve societal prosperity.[163] Congress crafted the fair-use doctrine as an open standard because it was impossible to codify each and every appropriate exception to copyright, and therefore discretion was transferred to the courts.[164] The courts were assigned responsibility for employing this discretion in a manner that best achieves the underlying purpose of copyright law. Much has been written about the deficiencies of the fair-use doctrine. One major drawback of open-ended fair use is that it creates uncertainty. The courts apply the four factors of fair use retrospectively, and this *ex post* determination does not generate any *ex ante* guidance for users as to the scope of the legal risk.[165] Consequently, potential users may find it difficult to predict how these factors will be applied, and how courts will determine the scope of permissible use. This high level of uncertainty may lead to a detrimental chilling effect.[166] Risk-averse users may avoid socially desirable uses that might qualify as fair use, simply because they are unwilling to take the risk. The clear solution to this legal deficiency is to elaborate the open standard using guiding rules, while maintaining the flexible framework of the standard.[167] At first glance, such a solution seems impossible if standards and rules

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163. U.S. CONST. art. I, § 8, cl. 8 (stating the purpose as follows: "[t]o 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").

164. *See supra* notes 22–23.

165. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 895–98 (2007). For further discussion on the chilling effect created by fair-use uncertainties, see Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use*, 33 CARDOZO ARTS & ENT. L.J. 1 (2015).

166. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) (fair use is "the right to hire a lawyer"); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); Gibson, *supra* note 165, at 895–98.

167. Commentators have proposed various ways to fix fair use in order to enhance certainty. For example, it was proposed to establish a low-cost administrative tribunal that would review pre-ruling applications. *See generally* Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006). Others

are considered mutually exclusive. However, as explained in Part II, rules and standards are in fact the two ends of a spectrum of contingencies, while most existing rules and standards lie somewhere in between. The content of fair use is generated each time a court decides a case and applies the fair-use standard to a particular set of circumstances, and the accumulative precedential force of these decisions creates a rule within the fair-use standard.

1. Copyright Goals Require Enhanced Certainty

The purpose of fair use is grounded in general theories of copyright law. Judge Pierre Leval has eloquently argued:

> Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, not as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.[168]

Copyright law seeks to promote production of creative works for the benefit of the public. Fair use plays an important role in promoting copyright goals.[169] Securing incentives for authors is only one means of promoting creativity, while other equally important mechanisms focus on securing adequate rights for users to access copyrighted materials. Creating new knowledge involves learning and research, transforming preexisting materials, and sharing a cultural language. Legitimate use of copyrighted materials should be encouraged to promote copyright goals while considering the various aspects of the creative ecosystem.

The fair-use standard is rather vague and indeterminate, creating a high risk of liability. Uncertainty regarding permissible uses and the risk of liability may impede uses that are otherwise legitimate. For instance, the high level of uncertainty regarding the scope of permissible use for educational purposes according to the fair-use standard might have a strong chilling effect on making materials available to students for purposes of teaching and learning. Educational institutions are often risk-averse and might obtain a license even when such a license is unwarranted. They might also avoid any unlicensed use for fear that courts would not find it fair. Teachers, college professors, and researchers cannot be expected to conduct a sophisticated analysis of fair use for each particular item included in their list of reading materials. Librarians cannot apply the court's detailed analysis, which in the case of *Cambridge University Press v. Patton* was hundreds of pages long, to the thousands of reading items that they handle every

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suggested that the U.S. Copyright Office develop fair-use guidelines. *See* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 93 (2004). It was proposed to codify concrete "safe harbors." Parchomovsky & Goldman, *supra* note 60, at 1489, 1511–18. And the establishment of "fair-use best practices" was upheld as reducing uncertainty and promoting copyright goals. *See* Elkin-Koren & Fischman-Afori, *supra* note 165, at 42.

168. Leval, *supra* note 2, at 1107.

169. As suggested by Pamela Samuelson, limitations on the rights of copyright owners are necessary "to aid education, cultural participation, the creation of new works, and the development of new forms of creative output." Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1181 (2010).

semester. The only remaining alternative for schools or libraries is to acquire a license for uses that are actually permitted (therefore free) or to compromise their educational mission by refraining from making any materials available to their students throughout the educational process.

Individual users may also suffer from a chilling effect due to the high level of uncertainty regarding what constitutes permissible use. Individuals often lack the necessary legal knowledge and skills to acquire a license to use copyrighted materials, and even more importantly, they often lack a business model for funding a license fee. The uncertainty regarding permissible uses and the risk of liability dampens users' engagement in cultural works and impedes participation in generating culture.

Copyright users need guidance. This problem was expressed clearly by the counsel for the Copyright Committee of the 1976 Copyright Act: "What education needs is a statute which will enable teachers easily to know when they can use copyrighted materials. Proposed Section 6 does not give this certainty, but means that a teacher in preparing every single lesson must either consult a lawyer or act at her risk."[170] However, because it is impossible to codify clear, distinct exceptions for each desirable use due to the dynamic nature of these uses and the desired scope of exceptions, Congress opted for a standard while conferring judicial discretion on the courts to determine its applications.[171]

The fair-use doctrine should therefore strive to foster more predictability by elaborating upon some of the rules that arise per this standard. Applying the fair-use standard and adjusting it to typical contemporary situations contributes to its specification, which provides some degree of guidance for potential users. Predictability of permissible uses would encourage desirable uses, thus promoting the underlying purpose of copyrights: incentivizing creativity for the benefit of the public.

2. Promoting Fair Use via Rulification

Common-law-style rulification, as stressed above, may generate different kinds of rules in terms of specification and guidance. In common-law terms, the inductive, logical fair-use pattern that has been generated maintains its "built-in" flexibility, and therefore the scope of accurate guidance that it can generate is limited.[172] In that regard, fair-use rulification will rarely reach the level of a "safe harbor," which as previously explained denotes a much more concrete rule that guarantees legal immunity when followed.[173] Fair-use safe harbors would probably have to be attained through a legislative act.[174] This is not to say that the common-law mechanism is unsuitable for generating judicial-made safe harbors. On the

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170. *See* PATRY, *supra* note 67, § 9.7; Litman, *supra* note 76, at 887.

171. *See supra* Section II.A.

172. As Judge Pierre Leval has admitted, judges do not share a common understanding of fair use. Leval, *supra* note 2, at 1106*; see also* Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990).

173. *See supra* notes 60–63 and accompanying text.

174. *See* Parchomovsky & Goldman, *supra* note 60, at 1511–18.

contrary, the common-law mechanism is apt for such an end result.[175] For instance, in the fair-use context, the *Sony* case generated a safe harbor for home-taping users.[176] Yet, the dialectic nature of the fair-use doctrine, which seeks both flexibility and certainty, requires the adoption of a more sophisticated and softened judicial-made rule that would provide a reasonable degree of guidance and also enable future refinements.[177]

For instance, *Campbell* generated a rule that favors parodies as fair use because they reflect transformative use even when used for commercial purposes. Nevertheless, this does not mean that parodies would always qualify as a fair use.[178] Though the likelihood of qualifying parodies as fair use is high, the rule is not a mechanical one.[179] One of the virtues of the common-law system has been expressed by Frederick Schauer: "Lawmaking is better done in context, and it is the beauty of the common law, or so it is said, that every act of lawmaking takes place in a concrete context involving real people having real disputes."[180] The susceptibility of the judge-made rules may no doubt erode their certainty. However, in circumstances in which reconciliation of a complex nexus of interests is at stake—as in the case of fair use—judge-made rules are a good solution.[181]

One example of a judge-made rule that could have been adopted is the academic use of works for teaching purposes, as discussed in *Patton*.[182] Not surprisingly, the most significant attempt to create statutory fair-use safe harbors was through the adoption of the "Classroom Guidelines," agreements regarding permitted uses, reached by educational institutions and publishers.[183] However, Congress did not incorporate these guidelines into the Copyright Act itself—they

175. *See supra* notes 62–63.

176. *See supra* notes 83–90 and accompanying text.

177. CARDOZO, *supra* note 58, at 22–23 (quoting Munroe Smith: "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered"); *see also* Landes & Posner, *supra* note 55, at 249.

178. For a parody that was not qualified as a fair use, see *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997). *See also* Jason M. Vogel, Note, *The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in* Dr. Seuss Enterprises v. Penguin Books USA, Inc., 20 CARDOZO L. REV. 287 (1998) (discussing *Dr. Seuss* in light of *Campbell*).

179. *See* CARDOZO, *supra* note 58, at 22–23; *see also* Kathryn D. Piele, *Three Years After Campbell v. Acuff-Rose Music, Inc.: What Is Fair Game For Parodists?*, 18 LOY. L.A. ENT. L.J. 75, 76 (1997) (explaining how courts applied the fair-use doctrine before and after the *Campbell* decision); *infra* note 200.

180. Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 777–78 (2004).

181. A judge-made rule formulation provides rules for specific cases but avoids "incompleteness" by also providing a vague fallback. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 536 (1988).

182. 769 F.3d 1232 (11th Cir. 2014).

183. *See* Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, H.R. REP. NO. 94-1476, at 68–70 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5661–63.

were only included in the House report that accompanied the Act.[184] Therefore, the guidelines were criticized for failing to achieve either certainty or flexibility;[185] and, in any case, the guidelines are not legally binding because they have neither the force of law nor have courts adopted them.[186] Given that there are no statutory safe harbors for the use of copyrighted works for teaching purposes, courts have the opportunity to establish a common-law-style rule. For example, a court could consider approving a general rule that copying approximately 10% of a work, under specified terms, would be considered a fair use.[187] Such a judge-made rule may generate both desired end-results—a reasonable degree of certainty, as well as flexibility to deviate from the rule in appropriate cases or to refine it in the future. Accordingly, in certain cases, courts might rule that the use of 9% of a work does not qualify as fair use or approve the use of 11% of the material, because the judge-made rule is not a strictly codified safe harbor. Yet, a judge-made rule applies more concrete grounds of proximity and predictability to an entirely open norm. Unfortunately, the *Cambridge University Press* court adhered to a strict "no rulification" position, thus failing to generate any guidance for future uses while maintaining the inherent judicial consideration.

B. Addressing Concerns Regarding Fair-Use Rulification

The primary concern related to the rulification of fair use is that rules will eschew discretionary flexible standards. In other words, exercising judicial decision-making power according to rules will lead to a formalistic, rigid application of the law. When courts engage in a case-by-case analysis they can determine the correct scope of fair use (and consequently the scope of copyright protection) in each particular case. On the other hand, applying rules may cause judges to exclude considerations or circumstances that would have otherwise been taken into account when deciding whether fair use applies.

Rulification of fair use is unlikely to impair its flexible nature because fair use is a statutory standard and judicial authority is always delegated to the courts, which may deviate from former decisions at any time. Existing fair-use decisions that were handed down by lower courts do not serve as legal precedents because the doctrine is always fact-sensitive. Therefore, the ever-adjustable mechanism embedded in the fair-use doctrine guarantees that the doctrine will not be converted into strict and rigid rules by courts. In other words, the basic case-sensitivity of the fair-use doctrine remains intact.

Many fair-use cases demonstrate the doctrine's ever-adjustable mechanism, which enables reliance on rules while preserving the courts' inherent discretion. For instance, parodies were ruled to be generally fair use, but some

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184. *Id.*; *see also* Litman, *supra* note 76, at 875.

185. *See, e.g.*, Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001).

186. *Id.* at 664 ("All of the guidelines fail any valid claim that they might have binding, legal authority."); *see also* PATRY, *supra* note 67, at §§ 9.25, .28.

187. Indeed, such a general rule was rejected by the Eleventh Circuit in *Cambridge University Press v. Patton*. The court held, however, that the rule could still be adopted by other courts. 769 F.3d at 1232.

parodies do not qualify.[188] Likewise, in many copyright cases involving copying a brief section of an audiovisual work and incorporating it into other informational work, such as television news-report items, courts considered this use fair, yet some courts have occasionally concluded otherwise.[189] Sequels of famous novels may or may not qualify as fair use,[190] and the list goes on. Another case demonstrating the courts' vested authority to deviate from a well-established fair-use rule is the recent decision by Judge Easterbrook of the Seventh Circuit in *Kienitz v. Sconnie Nation, LLC.*[191] That case involved a typical fair-use scenario in which an amateur t-shirt company incorporated an unlicensed professional photograph of a mayor, portrayed in a manner mocking him. In the post-*Campbell* era, transformative use of this sort in which the use creates *a new purpose* for a certain work is considered a dominant factor.[192]

Though the use was ultimately qualified as fair use, Judge Easterbrook questioned the *Campbell* ruling and the subsequent 20 years of fair-use common-law ruling, arguing that the term "transformative use" does not appear anywhere in the text of 17 U.S.C. § 107 and "also could override 17 U.S.C. § 106(2), which protects derivative works."[193] Moreover, Judge Easterbrook challenged the *Campbell* rule that gave the first fair-use factor (the purpose of use) a dominant status that overrides the fourth factor (the economic effect of use). The *Kienitz* court concluded that "[w]e think it best to stick with the statutory list, of which the most important [factor] usually is the fourth (market effect)."[194] In other words,

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188. *See supra* note 136.

189. In many cases courts approved a few-second copy of an audiovisual material that was incorporated in a documentary work or other informational work as fair use. *See, e.g.*, Monster Commc'ns, Inc. v. Turner Broad. Sys. Inc., 935 F. Supp. 490 (S.D.N.Y. 1996). *See generally Documentary Filmmakers' Statement of Best Practices in Fair Use*, ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS (2005), http://archive.cmsimpact.org/sites/default/files/fair_use_final.pdf (describing such successful fair-use claims in court decisions). However, courts do not always qualify such uses as fair use; for instance in 1982 the Second Circuit ruled that a 75-second copy out of a 72-minute film on Charlie Chaplin, used in a news report item on Chaplin's death was not fair use because it took the "heart" of the film. Roy Exp. & Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1100 (2d Cir. 1982). In 1997, the Ninth Circuit ruled that a 30-second copy of a video which recorded an attack of a truck driver (Denny Reginald) used in a news report item was not fair because, once again, it took the "heart" of the video. L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1123 (9th Cir. 1997).

190. In a case involving a sequel of the famous novel *Gone With the Wind*, written by Margaret Mitchell, the Eleventh Circuit held that the use was transformative and therefore qualified as fair use. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1279–80 (11th Cir. 2001) (Marcus, J., concurring) (citation omitted). Yet, eight years later, in a case involving a sequel of the famous novel *Catcher in the Rye*, written by J.D. Salinger, a different court —the Southern District of New York—held that the use was not fair because it was not transformative enough. Salinger v. Colting, 641 F. Supp. 2d 250, 250 (S.D.N.Y. 2009).

191. 766 F.3d 756 (7th Cir. 2014)

192. *See supra* notes 113–22 and accompanying text.

193. *Kienitz*, 766 F.3d at 758.

194. *Id.*

despite the clear guidance of the Supreme Court and subsequent massive adjudication, a judge can still exercise authority and freedom to deviate from rules generated by a former line of authority. This decision demonstrates that fair-use rulification does not foreclose future courts' freedom to shape the doctrine as they see fit.

A second concern related to rulification of fair use is that the inherent problems that stem from rigid rules will emerge from a rulified standard as well; the over- or under-inclusiveness of a rule generates decisions that are "obtuse, unfair, or otherwise contrary to the 'spirit' of the doctrinal inquiry being conducted."[195] Accordingly, the underlying reason for the no-rulification approach is to prevent lower courts from relying on categorizations and other "shortcuts" as substitutes for holistic, case-by-case application of the standard itself.[196] The concern is that a "checklist" approach may generate arbitrary results.[197] In the context of fair use, optimal copyright policymaking requires forward-looking analysis and the authority of the court to adjust limitations on copyright to dynamic technological and economic circumstances. Introducing rules could prevent adjustments of this kind.

The deficiencies presumed to stem from rulification of a standard may be reconciled, at least with respect to the fair-use doctrine, by understanding that "rulification" does not necessarily mean creation of rigid and strict rules of the nature of speed limit laws ("driving over 50 mph is forbidden"). As explained above, rulification may be created in various ways, to varying degrees and scope.[198] Very strict rules—such as driving speed limits—are one extreme edge of the spectrum. Some rulification is certainly not equivalent to creation of strict and rigid rules.[199] For instance, determining that the transformativeness of a use should outweigh its commerciality is a rule; however, it is not a rigid one but merely an instructive one that offers some guidance as to how judicial discretion should be applied. Courts will always maintain their judicial discretion to change the generated rule, thereby correcting any over- or under-inclusive outcomes.[200] In

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195. Coenen, *supra* note 32, at 681.

196. *Id.*

197. *Id.* at 682 (citing Florida v. Harris, 462 U.S. 213, 238 (1983) ("The Court openly worried that the Florida Supreme Court's "checklist" approach to probable cause review would sometimes generate crude and seemingly arbitrary results.").

198. For example, examining the Supreme Court's fair-use cases reveals various types of rulifications. The Court in *Campbell v. Acuff-Rose Music Inc*., 510 U.S. 569 (1994), ruled that the fourth factor, concerning the economic effect of the use, does not override the other considerations. *Id.* at 570. This is a principle-based rulification. In contrast, the Court in *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985), ruled that an unpublished work would enjoy some special concern when applying the four-factor analysis. *Id.* at 564. This is a more fact-based rulification which is nevertheless not totally decisive. *See* PATRY, *supra* note 67, at § 4.02.

199. *See, e.g.*, the kind of rulification developed by *Campbell*, 510 U.S. at 569.

200. Post-*Campbell* parody cases illustrate the integral judicial authority delegated to courts. In the *Dr. Seuss*, case the Ninth Circuit rejected the use of a well-known children's book, *The Cat in the Hat*, because there was "no critical bearing on the substance or style" of the book. Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997). The narrow interpretation of fair-use parodies in the *Dr. Seuss* case was

other words, when discussing the desirability of rulifying fair use, this Article envisions rules that are concrete enough to generate certainty while still preserving the inherent flexibilities embedded in the doctrine.

Moreover, in the event that a rigid rule does evolve, Congress may interfere by adding clarifications to § 107 of the Copyright Act, thereby re-standardizing the rule created. In fact, the only amendment introduced into § 107 reflects precisely a scenario of this kind, in which adjudication generated a rule against fair use of unpublished works. Congress then clarified that such a rule is erroneous.[201]

Beyond the basic concerns that stem from rulification of a standard, several additional ancillary concerns emerge as well. If the lower courts follow strict categorization, there will be no "experimental" decision-making, and hence no chance for the Supreme Court to discuss the matter thoroughly and generate a guiding precedent.[202] In addition, rulification of a standard may foreclose the authority of lower courts to generate independent outcomes that are not in line with the instructions handed down by higher-level courts.[203] At the same time, the rulification of a standard may result in a diversity of the case law that develops in various jurisdictions (or circuits). Non-uniformity of substantive law generates many negative externalities, such as forum shopping.[204]

Experimentation is a dominant narrative in fair-use discourse. Fair use, after all, was meant to create a mechanism by which the court can examine the evolving needs of users and craft the appropriate balance between these needs and the importance of encouraging creation through copyright entitlements.[205] In an age of rapid technological and social changes, the fair-use mechanism turns into a "field laboratory," in which the court constantly examines cutting-edge initiatives. The recent *Authors Guild Inc. v. Google Inc.* and *Authors Guild Inc. v. HathiTrust*

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followed by a few courts. *See, e.g.*, Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179 (C.D. Cal. 1998); Williams v. CBS, Inc., 57 F. Supp. 2d 961 (C.D. Cal. 1999). But other courts were free to exercise their inherent judicial discretion and approve a similar type of use, namely, use of a work as a framework, without critical bearing on its substance. For example, the Fifth Circuit approved the use of a known children's character, Barney the dinosaur, as a parody because the comic effect achieved by its re-contexting was transformative enough. Lyons P'ship v. Giannoulas, 14 F. Supp. 2d 947, 955 (N.D. Tex. 1998), *aff'd*, 179 F.3d 384 (5th Cir. 1999). By the same token, the Second Circuit approved the use of a commercial advertisement for Gucci sandals by the artist Koons in order to create a critical and satirical comment on typical commercial advertisements abusing the female body. Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006). The court found such use sufficiently transformative, although there was no critical bearing on the specific substance of the ad. *Id.*

201. *See supra* notes 99, 111 and accompanying text.

202. *See* Coenen, *supra* note 32, at 683–87.

203. *See id.* at 687–90.

204. *See id.* at 690–93.

205. *See* Sag, *supra* note 148, at 404–05 ("In addition, a structural analysis of fair use indicates that the doctrine is meant to be used as a flexible standard through which the judiciary can determine the application of copyright in response to social and technological changes—fair use was never intended to preserve the status quo in the face of change."). *See generally* Hughes, *supra* note 38.

cases demonstrate the experimental function of the fair-use doctrine in examining new, innovative uses of works.[206] Both cases deal with the mass digitization of library collections, and in both cases the court held that such uses should be qualified as fair because this new database of the collection was created to serve new purposes that do not replace the original use of the published books.[207]

Fair-use discourse is further policy-oriented. Fair-use case law can be categorized into "policy-relevant clusters,"[208] and rulification of fair use remains at a policy discourse level. Therefore, "rulification" in the fair-use context would serve as a catalyst for Supreme Court precedents and certainly would not inhibit such an outcome. As fair-use decisions are not fact-driven but rather policy-oriented, they could be perceived as a call for the Supreme Court to uphold or reject the policy at hand.[209]

Finally, as to the relationships between instances, the statutory discretion of lower courts guarantees their independence.[210] The evolution of different legal "schools" and non-uniformity of case law, though a general trait of the common-law system,[211] can be eased by the inherent authority of any court to "cross the line" and adopt another circuit's legacy.[212] Moreover, fair-use case law, to date, does not appear to be developing in a manner that produces jurisdictional segregation.

C. Enhancing Legal Transparency

Common-law-style rulification of fair use may have additional advantages beyond the primary goal of offering guidance. One important byproduct of rulification is the enhanced transparency of court decisions and the judicial decision-making process.[213] A common complaint regarding the way

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206. *See supra* notes 118–21 and accompanying text.

207. Authors Guild Inc. v. HathiTrust, 755 F.3d 87, 102 (2014); Authors Guild Inc. v. Google Inc., 954 F. Supp. 2d 282, 291–92 (S.D.N.Y. 2013).

208. *See* Samuelson, *supra* note 19, at 2541.

209. *See* Sag, *supra* note 148, at 419 ("Judges cannot avoid making copyright policy in fair-use cases. As discussed in the preceding sections, the indeterminacy of the statutory fair-use factors, and the reluctance (or inability) of the legislature to enact specific rules in response to technological and social changes affecting copyright, necessitates that judges fill in the substantial gaps in copyright law.").

210. For a discussion on the case law concerning parodies, demonstrating that lower courts do not necessarily follow mid-level courts' rulings, see *supra* note 200.

211. *See, e.g.*, K. N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L. J. 1243 (1938).

212. *See, e.g.*, *supra* note 192, for a discussion on case law concerning parodies: the Ninth Circuit narrowly interpreted the parody exception in a 1997 ruling, while the Fifth and Second Circuits opted for a more liberal approach. Nevertheless, in 2007 a California lower court followed the liberal approach, easily concluding that the parody at stake was protected by fair use despite the fact that it targeted the creator of the work and not strictly the work itself. Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007).

213. Legal theory scholarship tackles the issue of transparency of court decisions from various points of view, such as efficiency of the common-law mechanism, morality, and legal realism. *See generally* Jody S. Kraus, *Transparency and Determinacy in Common*

courts apply fair use alleges that they seem to manipulate the four-factor analysis to underpin a predetermined final outcome.[214] In other words, the fear is that judges, descriptively speaking, do not conduct a sincere legal analysis. Similar concerns are typical of cases where judges are called upon to apply an open-ended standard, resulting in reliance on informal rules of thumb to guide resolutions of factually similar cases.[215] This concern is certainly not unique to copyright cases as it also arises in other fields, such as contract law.[216] Rulification of fair use may force judges to fully disclose their underlying analyses, thereby promoting transparency in the decision-making process. Moreover, any deviation from the accepted rule would require sound reasoning and a clear explanation of the circumstances that justify a nuanced or different decision. The court would then have no choice but to explicitly disclose its trajectory, with no need to manipulate the four-factor analysis.

A more transparent decision-making process in fair-use adjudication will enable courts to develop a more comprehensive fair-use doctrine. It will also help to promote the rule of law and instill a general sense of fairness and justice in copyright adjudication.[217] As observed, "law is transparent only if the expressed legal reasoning accurately describes the actual legal reasoning."[218] In that sense, a legal decision should not be "presented as a mere window dressing: it is meant to explain why the plaintiff did not win."[219] The gap that is formed between the legal reasoning and the actual set of legal considerations taken by the court is not motivated by a conspiracy to misrepresent the actual reasoning, but rather is generated by the structure of legal reasoning which is prone to indeterminacies.[220]

Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 VA. L. REV. 287, 287 (2007).

214. *See generally* Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after* Campbell v. Acuff-Rose Music, 12 DUKE L. & TECH. REV. 92 (2014); William Henslee, *You Can't Always Get What You Want, But If You Try Sometimes You Can Steal It and Call It Fair Use: A Proposal to Abolish the Fair Use Defense for Music*, 58 CATH. U. L. REV. 663, 665 (2009); Litman, *supra* note 91, at 652 ("The most common complaint is that *Campbell's* instruction to focus on the transformativeness of defendant's use has given lower courts license to find a use fair whenever they are so inclined.").

215. Coenen, *supra* note 32, at 693.

216. *See* Kraus, *supra* note 213, at 289–90. *See generally* STEPHEN A. SMITH, CONTRACT THEORY (2004).

217. For this particular reason, mandatory arbitration, a non-transparent legal process, was criticized as harming democratic legal values. *See* Richard C. Reuben, *Mandatory Arbitration: Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROB. 279, 301 (2004).

218. *See* SMITH, *supra* note 216, at 24 ("Law is transparent to the extent that the reasons legal actors give for doing what they do are their real reasons."); Kraus, *supra* note 213, at 289.

219. *See* SMITH, *supra* note 216, at 25.

220. *See* Kraus, *supra* note 213, at 300–01 ("I argue that the relative indeterminacy of deontic moral concepts would have proved fatal to their use in the judicial reasoning necessary to decide hard cases and that the evolution of a consequentialist interpretation of moral terms within the common law would have been a natural development.").

There are various measures that can overcome this undesirable gap, including translating general moral principles into concrete concepts.[221]

In the narrower fair-use context, concretizing fair use may yield transparent decisions in the sense that identical terminology will be used for both the legal reasoning and the actual considerations taken by the court. Such an outcome may reduce existing distrust in the doctrine's qualification to serve copyright goals and would no doubt minimize complaints of judicial manipulation. Current fair-use doctrine has been cynically described as the "right to hire a lawyer."[222] This statement reflects the entire problem—current fair use is unpredictable; courts do not follow clear guidelines beyond the vague four-factor analysis; and court decisions are eclectic and manipulated. Consequently, court decisions are perceived as non-transparent and there is little confidence in the doctrine's ability to promote underlying policy goals. Rulifying fair use may generate a counter-development, as the norms become more predictable when the court follows acknowledged guidelines and concrete concepts, and court decisions become less eclectic or manipulated because rulings are reached either by applying concrete concepts or by employing clarified deviations. Consequently, court decisions will be more transparent and confidence in the appropriate function of the doctrine will be gained.

CONCLUSION

Fair use is a legal doctrine that reflects the fundamental tenets of copyright law. Fair use was first crafted as a legal standard by the judiciary and then codified by the legislature, intending to allow courts to reconcile the copyright of authors with the public interest. Each fair-use case defines the scope of boundaries of copyright and user rights and thereby contributes to the gradual evolution of the rights. Therefore, when elaborating fair use, courts should be attentive to the crucial role that fair use plays in promoting the goals of copyright law.

Current fair-use scholarship has been focused on questions concerning the substantial trajectories of fair-use application: what consideration should be taken into account by the courts; which of the codified factors should take priority; or how should fair use be accommodated to new technological settings. This Article departs from this scholarship by focusing on the nature of fair-use adjudication. This Article argues that by placing fair use within the context of common-law adjudication, one may minimize some of the ills associated with the unpredictable nature of fair-use case law.

This Article has shown that Congress initially designed fair use as a permissive standard, namely as a legal framework that should be applied by courts in a way that concretizes the law. This fundamental character of fair use should be espoused, in order to avoid wrong conceptions according to which fair use should be left as a "pure," unspecified, and un-rulified legal standard. Fair-use rulification, as this Article stresses, is not only the common practice of the courts,

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221. *See* SMITH, *supra* note 216, at 30; Kraus offers another mechanism, based on determinacy of the legal craft of reasoning. *See* Kraus, *supra* note 213, 301.

222. LESSIG, *supra* note 166, at 187.

but also the desirable policy, serving the delicate balance copyright law seeks to promote. Fair-use rulification can be achieved within the flexible and ever-adjustable framework of the statutory standard, thus enhancing the predictability of fair use among copyright owners and users and strengthening trust in the legal system. The command that was stressed by Congress to elaborate fair use on a case-by-case basis, which became part of the customary fair-use "manual," should not be misinterpreted as foreclosing judiciary rulification but rather as emphasizing its flexible general framework. Enhancing fair-use rulification while maintaining its flexible framework, therefore, reflects the true nature of fair use that could promote the betterment of copyright law.