

**PARODIES, PHOTOCOPIES, RECUSALS, AND  
ALTERNATE COPYRIGHT HISTORIES:**

**THE TWO DEADLOCKED  
SUPREME COURT FAIR USE CASES**

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## INTRODUCTION

In 1957, and again in 1974, the Supreme Court granted certiorari to review copyright decisions that had turned on the doctrine of fair use in the lower courts.<sup>1</sup> The 1957 case, *Columbia Broadcasting System v. Loew's, Inc.*, involved a fifteen-minute television skit called "Autolight," created by comedian Jack Benny as a parody of the 1944 movie "Gaslight."<sup>2</sup> The 1974 case, *Williams & Wilkins Co. v. United States*, concerned photocopying of articles in medical journals by the National Library of Medicine (NLM) and the library of the National Institutes of Health (NIH).<sup>3</sup> In *Columbia Broadcasting System* ("CBS"), both lower courts had held that the skit infringed copyright in the movie, rejecting the defendants' fair use arguments.<sup>4</sup> In *Williams & Wilkins*, the United States Court of Claims commissioner who heard the case concluded that the photocopying infringed copyright in the journals, but the full Court of Claims reversed, deciding in a four to three vote that the photocopying qualified as fair use.<sup>5</sup>

In both *CBS* and *Williams & Wilkins*, Supreme Court consideration ended in a deadlock after a recusal.<sup>6</sup> Justice Douglas recused himself in *CBS*; Justice Blackmun in *Williams & Wilkins*.<sup>7</sup> The eight remaining members of the Court then divided four to four.<sup>8</sup> The Court's longstanding rule is "that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be

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1. *Columbia Broad. Sys., Inc. v. Loew's, Inc.*, 353 U.S. 946, 946 (1957); *Williams & Wilkins Co. v. United States*, 417 U.S. 907, 907 (1974); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1361 (Ct. Cl. 1973); *Benny v. Loew's Inc.*, 239 F.2d 532, 536 (9th Cir. 1956).

2. 353 U.S. at 946; *Loew's Inc. v. Columbia Broad. Sys. Inc.*, 131 F. Supp. 165, 167, 169 (S.D. Cal. 1955).

3. 417 U.S. at 907; *Williams & Wilkins Co.*, 487 F.2d at 1347.

4. *Benny*, 239 F.2d at 536-37; *Loew's Inc.*, 131 F. Supp. at 186.

5. *Williams & Wilkins Co.*, 487 F.2d at 1346; *id.* at 1363 (Cowen, C.J., joined by Kunzig, J., dissenting); *id.* at 1366 (Nichols, J., dissenting).

6. *Williams & Wilkins Co. v. United States*, 420 U.S. 376, 376 (1975); *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43, 43 (1958).

7. *Williams & Wilkins*, 420 U.S. at 376; *Columbia Broad. Sys.*, 356 U.S. at 43.

8. *Williams & Wilkins*, 420 U.S. at 376; *Columbia Broad. Sys.*, 356 U.S. at 43.

rendered or order to be made.”<sup>9</sup> Following that rule, the Court in both cases let the lower court judgments stand, and took no other action.<sup>10</sup> Thus, there is good reason why these two cases have been largely forgotten: they were never decided.<sup>11</sup>

Yet there are two other things that *CBS* and *Williams & Wilkins* have in common. First, materials preserved in the papers of a number of Supreme Court Justices suggest that, but for the recusals, the Supreme Court would have reversed in both cases.<sup>12</sup> The Court would have ruled that the Jack Benny parody of “Gaslight” was not infringing, and that the government library photocopying was.<sup>13</sup> In *CBS*, Justice Douglas’s recusal came after the Court had voted to reverse the Ninth Circuit, and after Douglas had begun to write an opinion for the Court explaining why the “Gaslight” parody did not infringe the movie.<sup>14</sup> In *Williams & Wilkins*, Justice Blackmun’s recusal came after oral argument, and after Blackmun had written a memo outlining his thoughts on the case.<sup>15</sup> Those thoughts suggest he could well have backed a proposal developed by Justice Powell that would have reversed the Court of Claims and rejected

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9. *Durant v. Essex Co.*, 74 U.S. 107, 110 (1869). That rule has never been formalized in an official Supreme Court rule or a statute, but its existence has been acknowledged in a statute. *See* 28 U.S.C. § 2109 (2012) (“In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.”).

10. *Williams & Wilkins*, 420 U.S. at 376; *Columbia Broad. Sys.*, 356 U.S. at 43.

11. *See generally Williams & Wilkins*, 420 U.S. at 376 (affirmed by an equally divided Court); *Columbia Broad. Sys.*, 356 U.S. at 43 (affirmed by an equally divided Court). The conventional account is that after missing opportunities to weigh in on fair use in *CBS* and *Williams & Wilkins*, the Supreme Court finally got its chance in the 1984 case of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

12. *See* Memorandum from William Cohen on 1956 Term No. 833, *Columbia Broad. Sys. Inc. v. Loew’s Inc.* (Apr. 11, 1957), <http://www.robertbrauneis.net/fairuse/cbs/CohenMemo04111957.pdf>. (on file with Library of Congress, William O. Douglas Papers, Box 1193). A slip of paper attached to that Memo states, “Grant: Brennan, Harlan, Douglas, Black. Deny: Whittaker, Clark, Burton, FF, CJ.” *Id.* *See generally* Preliminary Memo, No. 73-1279, *Williams & Wilkins Co. v. United States*, (May 17, 1974), <http://www.robertbrauneis.net/fairuse/ww/CertMemoToBlackmun04241974.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199). In the memorandum to Justice Blackmun about the *Williams & Wilkins* petition, the last page is marked in red pen “No Participation—Mayo Foundation was in court below JJK 4/26/74.” *Id.* at 13. “JJK” is likely Blackmun’s law clerk James J. Knicely. *James J. Knicely of Williamsburg is Recognized for Tradition of Excellence*, VA. ST. BAR (June 7, 2011), <https://www.vsb.org/site/news/item/knicely-TOE-2011>.

13. *See* Memorandum from William Cohen on 1956 Term No. 833, *supra* note 12.

14. *Id.*

15. *See* Preliminary Memo, *supra* note 12, at 13.

the defendants' fair use claims.<sup>16</sup>

Second, the Justices' papers give reasons to doubt that either recusal was justified. Justice Douglas recused himself in order to pursue a business opportunity that might have involved CBS and that arose after the Court agreed to hear *CBS*.<sup>17</sup> Justice Blackmun apparently recused himself due to long-past employment by the Mayo Foundation, which was not a party to the case, and had participated only in signing on to a thirteen-party amicus brief in the Court of Claims, one of eight amicus briefs filed in that court.<sup>18</sup> Douglas's action almost certainly subordinated judicial duty to personal gain, and Blackmun's action may have avoided judicial duty in discomfort at deciding a case against the interests of a former employer.<sup>19</sup>

Absent those dubious recusals, two likely Supreme Court reversals: parody is fair use in 1958, photocopying is not in 1974. In that alternate history, how could copyright law look different than it does in the history we know? I explore that question at three different moments in time. First, I ask what copyright law could have looked like immediately after a *CBS* decision in 1958, and conclude that there might not have been a fair use doctrine separate from a general inquiry into copyright infringement. Second, I consider the moment after a 1974 Supreme Court decision in *Williams & Wilkins*, and sketch a fair use doctrine that focuses entirely on what have become known as "productive" or "transformative" uses, while excluding "nonproductive" uses and eschewing any distinction between commercial and noncommercial uses. Finally, I consider the present moment—as I am writing, 2017—and consider the possible continuing impact of hypothetical Supreme Court decisions in *CBS* and *Williams & Wilkins*. That involves asking both how different fair use doctrine is now than it might have been just after a *Williams & Wilkins* decision in 1974, and whether the holdings in *CBS* and *Williams & Wilkins* would have had lasting impact, or would have been altered by subsequent cases or legislation.

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16. *Id.*

17. Memorandum from Justice William O. Douglas to the Chief Justice (Mar. 11, 1958), <http://www.robertbrauneis.net/fairuse/cbs/DouglasMemoToChief03111958.pdf> (on file with Library of Congress).

18. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1345 (Ct. Cl. 1973) (acknowledging receipt of amicus briefs from the Mayo Clinic, along with eight other entities); see also John Fox, *Biographies of the Robes—Harry Andrew Blackmun*, PBS (Dec. 2006), [https://www.pbs.org/wnet/supremecourt/rights/robes\\_blackmun.html](https://www.pbs.org/wnet/supremecourt/rights/robes_blackmun.html).

19. See CANONS OF JUDICIAL ETHICS Canon 24 (AM. BAR ASS'N 1924), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/pic\\_migrated/1924\\_canons.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.authcheckdam.pdf); see also Preliminary Memo, *supra* note 12, at 6, 13.

I hope that I will be able to persuade you, as I have been persuaded, that but for two fateful recusals, *CBS* and *Williams & Wilkins* would both likely have reversed lower court decisions, and would have had some lasting impact on copyright doctrine. Ultimately, however, my goal is not to prove that *CBS* or *Williams & Wilkins* would have come out exactly as I propose they might have, or that the path of fair use doctrine or copyright infringement analysis could have been diverted in exactly the way I speculate it could have been. Rather, I want to use the materials that are available about those cases, and the realization that the Supreme Court came very close to deciding them, to free up my imagination, and yours, about how copyright law and the fair use doctrine could be different than they are.

In Part I of this Article, I provide a more detailed account of the facts, lower court treatment, and Supreme Court treatment of *CBS*, and I examine Justice Douglas's recusal and the aftermath of the case. In Part II, I provide a more detailed account of *Williams v. Wilkins*, and I focus particularly on a proto-draft opinion written by Justice Powell and on Justice Blackmun's recusal. In Part III, I consider possible alternate states of copyright doctrine in 1958, 1975, and 2017.

#### I. PARODIES: COLUMBIA BROADCASTING SYSTEMS, INC. V. LOEW'S

In 1944, Metro-Goldwyn-Mayer released "Gaslight," directed by George Cukor.<sup>20</sup> In the one-hour-and-fifty-four-minute-long movie, Charles Boyer plays a man who tries to lead his wife, played by Ingrid Bergman, to believe that she is going insane, in order to distract her from his criminal activities.<sup>21</sup> Bergman's character is eventually saved by a Scotland Yard inspector played by Joseph Cotten.<sup>22</sup> Many readers will know that the title of the movie has gained popular use as a transitive verb, meaning "to cause (a person) to doubt his or her sanity through the use of psychological manipulation."<sup>23</sup>

Comedian Jack Benny had twice performed parody versions of "Gaslight": an eight-minute version broadcast live on radio in 1945,<sup>24</sup>

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20. GASLIGHT (Metro-Goldwyn-Mayer 1944).

21. *Id.*

22. *Id.*

23. *Gaslight*, DICTIONARY.COM, <http://www.dictionary.com/browse/gaslight> (last visited Nov. 2, 2017); see, e.g., Erik Wemple, *Donald Trump Attempts to Gaslight the CIA*, WASH. POST, Jan. 21, 2017, [https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/01/21/donald-trump-attempts-to-gaslight-the-cia/?utm\\_term=.f7ff8425edb4](https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/01/21/donald-trump-attempts-to-gaslight-the-cia/?utm_term=.f7ff8425edb4).

24. *Loew's Inc. v. Columbia Broad. Sys. Inc.*, 131 F. Supp. 165, 168 (S.D. Cal. 1955). As of this writing, the episode of the Jack Benny Show that includes the parody of "Gaslight," broadcast on October 14, 1945, and featuring Ingrid Bergman in a parodic version of her

with the permission of Loew's, Inc., which owned Metro-Goldwyn-Mayer (MGM) and owned copyright in the movie, and a fifteen-minute version broadcast live on television in 1952, without its permission.<sup>25</sup> When Loew's learned in 1953 that Benny was preparing to film a third "Gaslight" parody, which he was going to dub "Autolight," it sued Benny and broadcaster Columbia Broadcasting System (CBS), seeking injunctive relief.<sup>26</sup> Although an initial temporary restraining order was modified to allow Benny to produce the film while litigation was pending,<sup>27</sup> the district court eventually granted a permanent injunction barring Benny from broadcasting or otherwise performing the film.<sup>28</sup> "Autolight," held the court, infringed "Gaslight" because "Autolight" took a substantial part of "Gaslight," including its locale and period (Victorian-era England), one of its settings (a living room), its characters, its plot, and its dialogue—although the court acknowledged that Benny had made some changes in all of those to render "Autolight" a parody or burlesque.<sup>29</sup> Whether it should make any difference that "Autolight" was a parody was, the district court asserted, "a question of first impression"; it held that it made no difference.<sup>30</sup> The Ninth Circuit affirmed.<sup>31</sup> Following the district court, it rejected the appellants' argument that "Autolight" involved a "fair use" of "Gaslight," holding that the "fair use" doctrine was confined to uses of factual works such as directories and train schedules.<sup>32</sup>

#### A. CBS in the Supreme Court

CBS and Benny petitioned the Supreme Court for review of the Ninth Circuit's decision.<sup>33</sup> When the matter came to conference, on April 29, 1957, four Justices, the bare minimum, voted to hear the case: Justices

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original role, is available to stream or download. *The Jack Benny Program: Gaslight*, OLD TIME RADIO DOWNLOADS (CBS television broadcast Oct. 14, 1945), <https://www.oldtimeradiodownloads.com/comedy/jack-benny-program/gaslight-1945-10-14>.

25. *Loew's Inc.*, 131 F. Supp. at 169. The 1952 television version first broadcasted on January 27, 1952; a recording of this program is preserved in the collection of the Paley Center for Media. *The Jack Benny Program: Gaslight*, PALEY CTR. MEDIA, (CBS television broadcast Jan. 27, 1952), <https://www.paleycenter.org/collection/item/?q=jack+benny&advanced=1&p=1&item=T76:0007>.

26. *See Loew's Inc.*, 131 F. Supp. at 167–69.

27. *Id.* at 169.

28. *Id.* at 186.

29. *Id.* at 170–71.

30. *Id.* at 167, 183.

31. *Benny v. Loew's Inc.*, 239 F.2d 532, 537 (9th Cir. 1956).

32. *Id.* at 536.

33. *See Columbia Broad. Sys., Inc. v. Loew's Inc.*, 353 U.S. 946, 946 (1957).

Black, Brennan, Douglas, and Harlan.<sup>34</sup> The case was briefed, and the Court heard oral argument on Wednesday, January 29, 1958.<sup>35</sup> When it met in conference two days later, on Friday January 31, five Justices voted to reverse—Justices Black, Brennan, Burton, Clark, and Douglas—and two voted to affirm—Chief Justice Warren and Justice Whittaker.<sup>36</sup> Justices Frankfurter and Harlan passed, because they wanted to see “Gaslight” and “Autolight” before deciding,<sup>37</sup> and at least two other Justices—Brennan and Whittaker—also expressed an interest in seeing the two works.<sup>38</sup>

A screening of both “Gaslight” and “Autolight” was arranged at the Court the following Monday, February 3.<sup>39</sup> The screening apparently convinced Justices Frankfurter and Harlan to vote to affirm, but none of the other Justices changed their votes, so the outcome was solidified as a five to four reversal.<sup>40</sup> Since the Chief Justice was in dissent, the most senior Justice in the majority, Justice Black, was responsible for assigning the Opinion for the Court.<sup>41</sup> On the day after the screening, Tuesday,

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34. See Memorandum from William Cohen on 1956 Term No. 833, *supra* note 12.

35. *Columbia Broad. Sys., Inc. v. Loew’s Inc.*, OYEZ, <https://www.oyez.org/cases/1957/90> (last visited Nov. 2, 2017).

36. See Memorandum from Roger Cramton (RCC) to the Supreme Court, *Columbia Broad. Sys., Inc. v. Loew’s Inc.*, (Apr. 17, 1957), <http://www.robertbrauneis.net/fairuse/cbs/CramtonCertMemo04171957.pdf> (on file with Library of Congress, Harold H. Burton Papers, Box 296) (illustrating that Justice Burton took notes in pencil on the back of the memo’s last page, labeled “1/31 90,” as to the Justices’ votes and views at conference). Justice Douglas also took notes on the Justices’ views and votes. See Conference Note on No. 90—*Columbia Broadcasting v. Loew’s* (Jan. 31, 1958) [hereinafter “Douglas Conference Notes”], [http://www.robertbrauneis.net/fairuse/cbs/DouglasConferenceNotes\\_01311958.pdf](http://www.robertbrauneis.net/fairuse/cbs/DouglasConferenceNotes_01311958.pdf) (on file with Library of Congress, William O. Douglas Papers, Box 1193).

37. See Memorandum from Roger Cramton (RCC) to the Supreme Court, *supra* note 36 (“F must see both . . . H must see it.”); Douglas Conference Notes, *supra* note 36 (“FF he wants to see the plays—can’t say there is infringement without seeing the plays . . . JMH wants to see the film before deciding.”).

38. See Memorandum from Roger Cramton (RCC) to the Supreme Court, *supra* note 36 (“Wh Aff must see it.”); Douglas Conference Notes, *supra* note 36 (“WJB reverses but wants to see it—CEW affirms “ ” “ ” it.”) (the ditto marks are placed just below “reverses but wants to see”).

39. *High Court Studies Benny’s TV Parody Of ‘Gaslight’ Film for Copyright Breach*, N.Y. TIMES, Mar. 16, 1958, at 82 (“On Feb. 3, in the east conference room of the marble building, the justices and a few of their law clerks saw . . . ‘Gaslight.’ . . . then they saw a half-hour kinescope of a Jack Benny show including his parody, called ‘Autolight.’”).

40. See Justice Douglas Conference Notes, *supra* note 36.

41. *Supreme Court History*, PBS NEWSHOUR (Jan. 1, 2003, 4:21 PM), <http://www.pbs.org/newshour/updates/law-jan-june03-courthistory/>; Assignment List of October Term, 1957 (Feb. 4, 1958), <http://www.robertbrauneis.net/fairuse/cbs/BlackAssignmentSheet02041958.pdf> (on file with the Library of Congress, Hugo Lafayette Black Papers, Box 331).

February 4, he assigned the opinion to Justice Douglas.<sup>42</sup> Justice Douglas, however, had not been present at the February 3 screening.<sup>43</sup> Douglas had already seen “Gaslight,” but on February 28, he wrote the Chief Justice to request a separate screening of “Autolight.”<sup>44</sup> That screening was arranged on March 6.<sup>45</sup> It is likely that Justice Douglas did not start drafting the Opinion of the Court until after that date.

Unfortunately, Douglas did not get very far; the extant draft breaks off just as it starts to get interesting. Here’s the most tantalizing part. After stating the facts, Justice Douglas starts to discuss copyright law:

By the terms of the Copyright Act, 17 U.S.C. 1, the owner of the copyright has “the exclusive right” to “publish” “the copyrighted work”. The aim of the law is to protect the author or creator of the copyrighted work from plagiarism, *see* *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1, 17; *Parris v. Hexamer*, 88 U.S. 674, and the common test of plagiarism is whether the copyright of one person was substantially appropriated by another. . . .

Yet a copyright is not like Black Acre. It differs from ordinary, conventional property. It may not be completely fenced and patrolled and used exclusively by the owner. The Constitution provides in Article I, Section 8 that “the Congress shall have power \* \* \* TO promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”. We have stated over and over again that the provision makes reward to the copyright owner secondary, benefit to the public primary. . . . The Committees of the Congress that enacted the Copyright Act of 1909 stated that unless a copyright law is one “which will promote the progress of science and the useful arts,” the Act would be “beyond the power of Congress.”<sup>46</sup>

And there it ends. On March 11, Justice Douglas wrote a memo to Chief Justice Warren withdrawing from the case:

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42. Assignment List of October Term, 1957, *supra* note 41.

43. *High Court Studies Benny’s TV Parody of ‘Gaslight’ Film for Copyright Breach*, *supra* note 39, at 82.

44. See Memorandum from William O. Douglas to the Chief Justice (Feb. 28, 1958), <http://www.robertbrauneis.net/fairuse/cbs/DouglasMemotoChief02281958.pdf> (on file with Library of Congress, Earl Warren Papers, Box 350).

45. *High Court Studies Benny’s TV Parody Of ‘Gaslight’ Film for Copyright Breach*, *supra* note 39, at 82 (“‘Autolight’ had a repeat performance in the court on March 6 for the benefit of Justice William O. Douglas, who had been away at the time of the first showing.”).

46. See Justice William O Douglas, Handwritten Draft of Opinion in *Columbia Broadcasting System v. Loews Inc.* 6–7 (Mar. 14, 1958) (unpublished manuscript) [hereinafter “Douglas CBS Draft”], <http://www.robertbrauneis.net/fairuse/cbs/DouglasCBSDraft.pdf> (on file with Library of Congress, William O. Douglas Papers).



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As I told you yesterday there is a possibility of a conflict of interest that I have in No. 90—Columbia Broadcasting System v. Jack Benny.

I think it is likely that it will be rather remote but on reflection I have thought I should lean over backwards because what seemed remote to me might not seem remote to others. And so I have decided to withdraw from the case which makes it necessary for the opinion to be reassigned.<sup>47</sup>

Three days later, the Court met in conference and a new vote on *CBS* was taken without Justice Douglas's participation.<sup>48</sup> None of the Justices changed his earlier vote, and the Court therefore deadlocked four to four.<sup>49</sup> On March 17, the Court issued an order affirming the Ninth Circuit.<sup>50</sup>

*B. Justice Douglas's Unwarranted Recusal*

Although that order ended the *CBS* litigation, two further aspects of the larger story are worth discussing. The first is Justice Douglas's recusal, which was almost certainly unwarranted. Douglas withdrew because he wanted to pursue a business deal with CBS, and he did not want his participation in *CBS v. Loew's* to get in the way.<sup>51</sup> He certainly had an ethical duty to avoid such a conflict,<sup>52</sup> but he should have done so by refraining from pursuing the business deal, not by turning away from his responsibilities as a Supreme Court Justice.

Let's start with what Douglas said about why he was withdrawing, a statement that turns out to be factually inaccurate. On a cover sheet attached to his unfinished draft opinion in *CBS*, he made a statement that was probably similar to what he had told Chief Justice Warren.

After I had worked on a draft opinion for the Court to reverse the judgment in the case I learned that CBS, one of the petitioners, had been negotiating with William Morris Agency and Helen Strauss [Douglas's literary agent] for possible purchase of television rights in [Douglas's

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47. Memorandum from Justice William O. Douglas to the Chief Justice (Mar. 11, 1958), *supra* note 17.

48. See Douglas CBS Draft, *supra* note 46, at 1 (indicating Douglas's recusal on the cover page of his draft opinion).

49. *Id.* ("Today at Conference a new vote was taken by the 8 and the result was 4-4.")

50. *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43, 43 (1958).

51. Douglas CBS Draft, *supra* note 46, at 1.

52. CANONS OF JUDICIAL ETHICS, *supra* note 19, at Canon 24.

book] *An Almanac of Liberty*.<sup>53</sup>

That statement makes it sound like CBS initiated those negotiations, and that Douglas only learned of them after they had been in progress for some time.<sup>54</sup> Even then, the proper response might have been to tell Helen Strauss that the negotiations had to stop, because CBS was a party in a case before the Supreme Court. In fact, however, Justice Douglas was far more active than he admits in pursuing the business deal that might have involved CBS.<sup>55</sup>

CBS's acquisition of television rights in *An Almanac of Liberty* was nothing new. In 1954, when the book was first published, CBS paid Justice Douglas about \$1,000 (\$900 after Helen Strauss had deducted her fee) to create a television adaptation, and it broadcasted such an adaptation on November 8 of that year as part of its Westinghouse Studio One series.<sup>56</sup> That past relationship, which concluded in the fall of 1954 when CBS paid Douglas in full for the rights,<sup>57</sup> provided no reason for Douglas to recuse himself in a case that did not reach the Supreme Court until 1957.<sup>58</sup>

Douglas, however, was constantly on the lookout for income to supplement his Supreme Court salary, in part because the terms of his 1954 divorce from his first wife required him to make large and escalating alimony payments.<sup>59</sup> On October 11, 1957, months after the Supreme Court had granted the petition to review *CBS*, a woman by the name of Marion Denitz wrote Douglas to express her interest in producing a series of television shows based on *An Almanac of Liberty*.<sup>60</sup> Denitz had apparently previously not done any television production herself, but she had worked at MGM and at the Cedars of Lebanon Hospital, which she said had given her "important connections in the motion picture and

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53. Douglas CBS Draft, *supra* note 46, at 1.

54. *See id.*

55. *See* Letter from Helen Strauss, Literary Agent, to Edith Allen, Sec'y to Justice Douglas (Sept. 17, 1954), <http://www.robertbrauneis.net/fairuse/cbs/StraussToAllen09171954.pdf> (on file with Library of Congress).

56. Letter from Helen Strauss to Edith Allen, *supra* note 55; *see Studio One: An Almanac of Liberty* (CBS television broadcast Nov. 8, 1954), <http://www.tv.com/shows/studio-one/an-almanac-of-liberty-227993/>. *See generally* WILLIAM O. DOUGLAS, *AN ALMANAC OF LIBERTY* (1954).

57. Letter from Helen Strauss to Edith Allen, *supra* note 55.

58. *See* CANONS OF JUDICIAL ETHICS, *supra* note 19, at Canon 24.

59. *See* BRUCE A. MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 395 (2003).

60. Letter from Marion Denitz to Justice William O. Douglas (Oct. 11, 1957), <http://www.robertbrauneis.net/fairuse/cbs/DenitzToDouglas10111957.pdf> (on file with Library of Congress).

television industries.”<sup>61</sup> Upon receiving that inquiry, Douglas wanted to find out whether he had already sold all television rights in *An Almanac of Liberty* to CBS, or whether he still had rights to sell.<sup>62</sup> He therefore had his secretary write to Helen Strauss to ask “whether the Studio One program some years back purchased all TV rights to the book, or only the rights to that one production.”<sup>63</sup> We do not know how Strauss responded, but on October 19, Douglas wrote Denitz that he would be happy to speak with her about the proposed television series.<sup>64</sup> On October 26, Denitz wrote back to tell Douglas that she had been in contact with producers who were interested in the proposed series, and to provide additional detail about the series’ format, which would include an introduction delivered by Justice Douglas himself.<sup>65</sup> Douglas had his secretary respond that he approved of the format and had no objection to participating, but would have to see the script before final approval.<sup>66</sup>

For the next few months, the television project apparently moved slowly, but on February 24, 1958, Marion Denitz both wrote and telephoned Justice Douglas.<sup>67</sup> Denitz told Douglas that after much delay, she had finally been able to get through to Hubbell Robinson, a production executive at CBS, and that CBS was interested in producing the series.<sup>68</sup> Recall that three weeks earlier, Justice Douglas had accepted the assignment from Justice Black to write the Opinion for the Court in

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61. *Id.*

62. See Letter from Nan Burgess, Sec’y to Justice Douglas, to Helen Strauss, Literary Agent (Oct. 14, 1957), <http://www.robertbrauneis.net/fairuse/cbs/BurgessToStrauss10141957.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 376).

63. *Id.*

64. Letter from Justice William O. Douglas to Marion Denitz (Oct. 19, 1957), <http://www.robertbrauneis.net/fairuse/cbs/DouglasToDenitz10191957.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 412).

65. Letter from Marion Denitz to Justice William O. Douglas (Oct. 26, 1957), <http://www.robertbrauneis.net/fairuse/cbs/DenitzToDouglas10261957.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 412).

66. Letter from Nan Burgess, Sec’y to Justice Douglas, to Marion Denitz (Nov. 16, 1957), <http://www.robertbrauneis.net/fairuse/cbs/BurgessToDenitz11161957.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 412).

67. Letter from Marion Denitz to Justice William O. Douglas (Feb. 24, 1958), <http://www.robertbrauneis.net/fairuse/cbs/DenitzToDouglas02241958.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 412); Phone Memorandum from Marion Denitz to Justice William O. Douglas (Feb. 24, 1958), <http://www.robertbrauneis.net/fairuse/cbs/PhoneMemoFAtoDouglas02241958.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 412).

68. Letter from Denitz to Justice Douglas (Feb. 24, 1958), *supra* note 67; Phone Memorandum from Denitz to Justice Douglas (Feb. 24, 1958), *supra* note 67.

CBS.<sup>69</sup> Upon receiving that communication from Denitz, Douglas could and should have avoided any conflict by declining to pursue any further deal with Denitz that would necessitate the involvement of CBS.<sup>70</sup> Instead, he forwarded Denitz's letter to Helen Strauss, asking her to negotiate terms as his agent.<sup>71</sup> Two days later, on March 6—the day of the special “Autolight” screening for Justice Douglas<sup>72</sup>—Strauss wrote back, stating that she would have “our California office talk to Mitchell Hamilburg, Mrs. Denitz' agent,” and that she would also be “talking to Hubbell Robinson at CBS, who is back in New York, about it.”<sup>73</sup>

Five days later, Douglas withdrew from the case to avoid what he told Chief Justice Warren was a “possib[le]” conflict of interest, even though Douglas thought that it was “likely that it will be rather remote.”<sup>74</sup> It turned out to be remote indeed, because as far as I can tell, the Denitz project was never implemented.<sup>75</sup> Nonetheless, Douglas was placing potential personal gain over judicial duty. In the words of Canon 24 of the *Canons of Judicial Ethics*, at that time considered persuasive guidelines for judicial conduct,<sup>76</sup> Justice Douglas was seeking to “incur obligations, pecuniary or otherwise” that would “interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions,”<sup>77</sup> and he decided to avoid a conflict by shirking his official functions. It is particularly striking that in order to pursue a deal that might involve CBS, Douglas was willing to take action that he knew would injure CBS, causing it to lose a case that it would have won in the Supreme Court.

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69. Assignment List of October Term, 1957, *supra* note 41.

70. See CANONS OF JUDICIAL ETHICS, *supra* note 19, at Canon 24 (“[A judge] should not accept inconsistent duties; nor incur obligations . . . which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.”).

71. See Letter from Helen Strauss, Literary Agent, to Justice William O. Douglas (Mar. 6, 1958), <http://www.robertbrauneis.net/fairuse/cbs/StraussToDouglas03061958.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 376).

72. *High Court Studies Benny's TV Parody of 'Gaslight' Film for Copyright Breach*, *supra* note 39, at 82 (“‘Autolight’ had a repeat performance in the court on March 6 for the benefit of Justice William Douglas, who had been away at the time of the first showing.”).

73. Letter from Strauss to Justice Douglas (Mar. 6, 1958), *supra* note 71.

74. Memorandum from William O. Douglas to the Chief Justice (Feb. 28, 1958), *supra* note 17.

75. See Letter from Justice William O. Douglas to Helen Strauss, Literary Agent (Apr. 18, 1958), <http://www.robertbrauneis.net/fairuse/cbs/DouglasToStrauss04181958.pdf> (on file with Library of Congress, William O. Douglas Papers, Box 376) (“I have not heard from Mrs. Denitz concerning the proposed television production of *An Almanac of Liberty*.”).

76. Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 273–74 (2007).

77. CANONS OF JUDICIAL ETHICS, *supra* note 19, at Canon 24.

*C. The Eventual Broadcast of “Autolight”*

The second aspect of the larger *CBS* story worth mentioning is that even though *CBS* lost the “Autolight” litigation, it ended up broadcasting the show.<sup>78</sup> In the fall of 1958, Jack Benny’s production company, J & M Productions, acquired licenses from MGM and from Patrick Hamilton—author of the play on which the movie “Gaslight” was based—to present parody versions of “Gaslight” for seven years.<sup>79</sup> Permission thus secured, “Autolight,” produced in 1953, finally aired on the Jack Benny Program on January 11, 1959.<sup>80</sup>

From that sequence of events, one might conclude that MGM would always have been willing to license a commercial parody version for a reasonable fee, and thus that restriction of speech was never really at stake in the case. The story is more complicated, however. In the six years between 1946, when Benny broadcast his first “Gaslight” parody (on radio), and 1952, when Benny broadcast his second parody (on television), the percentage of American homes that had a television set rose from 0.2% to over 34%; average weekly attendance at American movie theaters declined from 82.4 million to 46 million; and the percentage of Americans’ entertainment budgets spent at the movies declined from 36% to 18.8%.<sup>81</sup> Not irrationally, motion picture studios felt threatened by television.<sup>82</sup>

At least the second “Gaslight” parody, like the first, was performed live, as many radio and TV broadcasts were at the time.<sup>83</sup> Live broadcast performances were not quite as threatening to the motion picture industry, since unrecorded live performances could not be rerun, and could not duplicate the entertainment experiences produced in movies through visual and soundtrack editing and manipulation.<sup>84</sup> However, Jack Benny

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78. See *The Jack Benny Program—Season 9*, TV.COM, <http://www.tv.com/shows/the-jack-benny-program/season-9> (last visited Nov. 2, 2017).

79. Dennis McLennan, *Manager Helped Jack Benny, George Burns*, LA TIMES, (Aug. 15, 2012), <http://articles.latimes.com/2012/aug/15/local/la-me-irving-fein-20120815>; *Jack Benny Gets Rights to Satirize Movie ‘Gaslight,’* CHI. DAILY TR., Nov. 11, 1958, at 54.

80. *The Jack Benny Program—Season 9*, *supra* note 78. As of this writing, this version is available for viewing. *Autolight*, YOUTUBE (Jan. 11, 1959), <https://www.youtube.com/watch?v=EN6qMK2tid4>.

81. KERRY SEGRAVE, MOVIES AT HOME: HOW HOLLYWOOD CAME TO TELEVISION 5 (1999); *Film’ Downtrend Data—’46–’52*, VARIETY, Apr. 22, 1953, at 3.

82. SEGRAVE, *supra* note 81, at 6.

83. *Loew’s Inc. v. Columbia Broad. Sys. Inc.*, 131 F. Supp. 165, 169 (S.D. Cal. 1955); ENCYCLOPEDIA OF TELEVISION 1002 (Horace Newcomb ed., 2d ed. 2013) (explaining that ninety percent of new television shows aired in the 1950s were live).

84. See KEITH M. JOHNSTON, COMING SOON: FILM TRAILERS AND THE SELLING OF HOLLYWOOD TECHNOLOGY 28 (2009) (“[Hollywood] saw technology as a new (or at least improved) audience lure, coaxing people back into movie theaters and away from new

was going to record the third “Gaslight” parody on film, and according to one commentator, that was why MGM and Loew’s, which along with other major studios had already refused to let any movies be shown on TV,<sup>85</sup> decided to sue.<sup>86</sup> As that commentator put it, “Film WAS Hollywood. Film WAS the movie theaters of the world . . . Hollywood wanted to prove a point in 1953. No MGM movie in ANY FORM ever would be shown on TV . . .”<sup>87</sup> As counsel for Loew’s said in oral argument at the Supreme Court, “Benny’s motion picture program of his parodies on motion picture film, it can be exhibited and re-exhibited all over the country on television. It can be exhibited at motion picture theaters.”<sup>88</sup> If MGM became willing to grant a license in 1958, it may have been because by then, the relationship between movie studios and television had changed: “MGM films, leased to TV were making millions; MGM was in TV production; MGM’s customers, the theater owners, no longer had exclusive rights to showing film. It was a whole new world.”<sup>89</sup>

## II. PHOTOCOPIES: WILLIAMS & WILKINS v. UNITED STATES

The *Williams & Wilkins* case involved, not the alleged infringement of a single work by another single work, but the ongoing practice of library photocopying of many works.<sup>90</sup> Two federal government libraries—the library of the NIH and the NLM—both subscribed to a large number of medical journals.<sup>91</sup> They also both had photocopy services that would provide single photocopies of articles in those

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pursuits—the rival technology of television, the move to suburbs, and the expansion of leisure activities.”); SEGRAVE, *supra* note 81, at 8 (explaining that Hollywood studios associated television with “flat lighting”, “inadequate make-up”, and “imperfect cameras”).

85. *Loew’s Inc.*, 131 F. Supp. at 169; see Erskine Johnson, *After Six Years and Supreme Court Hearing, Jack Benny Showing His ‘Gaslight’ TV Satire*, TIMES DAILY, Dec. 28, 1958, § 2, at 7. Erskine Johnson was a staff correspondent for the Newspaper Enterprise Association, which sold content to newspapers, and so this article appeared in many newspapers in late December 1958 and early January 1959. See, e.g., Erskine Johnson, *After Six Years and a Supreme Court Hearing, Jack Benny is Showing His ‘Gaslight’ TV Satire*, BEATRICE DAILY SUN, Dec. 28, 1958, at 6.

86. Johnson, *supra* note 85, § 2, at 7.

87. *Id.*

88. Oral Argument at 1:18:37, *Columbia Broad. Sys., Inc. v. Loew’s Inc.*, (Jan. 29, 1958), [https://apps.oyez.org/player/#/warren6/oral\\_argument\\_audio/13477](https://apps.oyez.org/player/#/warren6/oral_argument_audio/13477).

89. Johnson, *supra* note 85, at 7; see SEGRAVE, *supra* note 81, at 42 (“By October 1956, all of the Hollywood majors (except Paramount and Universal) had made [their] pre-48 movie backlog[s] available to television outlets.”).

90. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1346–47 (Ct. Cl. 1973).

91. See *id.* at 1347, 1349.

journals to researchers who requested them.<sup>92</sup> The photocopy services operated on quite a large scale. In 1970 the NIH library distributed 93,000 photocopies of articles to requesters, and in 1968 the NLM distributed 120,000 photocopied articles.<sup>93</sup> The NIH library's annual budget for photocopying was \$86,000, which slightly exceeded its annual budget of \$85,000 for acquiring periodicals.<sup>94</sup> Williams & Wilkins (since acquired by Wolters Kluwer) published a number of the medical journals subject to photocopying by both libraries.<sup>95</sup> It sued the United States, seeking compensation for what it argued was copyright infringement; the United States defended principally on the ground that photocopying under the conditions imposed by the libraries was fair use.<sup>96</sup>

The litigation was widely viewed as a test case on the copyright implications of library photocopying.<sup>97</sup> Both the trial judge and the full Court of Claims on appeal made a point of emphasizing the case's novelty and importance: it was "ground-breaking" litigation involving the "long-troublesome" problems of "[modern] photocopying," which had been "much-discussed" but "never before been mooted or determined by a court."<sup>98</sup> The case attracted the participation of numerous amici curiae on both sides at every level of litigation, from trial up through the Supreme Court; when *Williams & Wilkins* decided that it could not afford to take the case to the Supreme Court, the Association of American Publishers organized a fund that collected \$110,000 to defray litigation expenses.<sup>99</sup>

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92. *Id.* at 1348.

93. *Id.* at 1348–49.

94. *Id.* at 1347–48.

95. *Williams & Wilkins Co.*, 487 F.2d at 1347, 1349; see *Wolters Kluwer Health Acquires Medknow*, REUTERS (Dec. 7, 2011, 4:44 AM), <http://in.reuters.com/article/wolters-kluwer-health-acquires-medknow/wolters-kluwer-health-acquires-medknow-idINDEE7B608T20111207>.

96. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 79–80 (rev. ed. 2003).

97. *Id.* at 65–66.

98. *Williams & Wilkins Co.*, 487 F.2d at 1346–47; *Williams & Wilkins Co. v. United States*, 1972 WL 17712, \*1 (Ct. Cl. 1972) ("This suit is one of first impression; raises long-troublesome and much-discussed issues of library photocopying of copyrighted materials.").

99. See GOLDSTEIN, *supra* note 96, at 89–90. See generally *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (acknowledging receipt of amicus curiae briefs from the American Chemical Society; the American Society for Testing and Material; the American Guide of Authors and Composers; the Association of American Publishers, Inc.; the Authors League of America, Inc.; the Information Industry Association; the Magazine Publishers Association, Inc.; the Associated Councils of the Arts; the American Library Association and the Special Libraries Association; the Association of Research Libraries; and the National Education Association); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (acknowledging receipt of amicus curiae briefs from The Authors League of America, Inc.; The Association of Research Libraries; Medical Library Association; American Dental Association; Mayo Foundation; The National Education Association of the United States; The American Library Association; The Association of American Publishers, Inc.; The American

*A. Williams & Wilkins in the Supreme Court*

In his 1994 book *Copyright's Highway*, Paul Goldstein tells the story of the litigation of the *Williams & Wilkins* case in great detail,<sup>100</sup> and so I refer the reader who wishes to learn more about the course of that litigation to his excellent account. However, Goldstein did not have access to any of the papers of the Justices who were on the Supreme Court at the time,<sup>101</sup> and so I'd like to focus on what can be learned from those papers about the Court's deliberation and its potential resolution of the case. The materials available in those papers have convinced me that, had Justice Blackmun continued to participate in the case, he most likely would have voted to reverse the Court of Claims, tipping the Court against a finding of fair use, and might well have supported an approach championed by Justice Powell that aligns with the approach Blackmun took—a decade later—in *Sony Corp. of America v. Universal City Studios*.<sup>102</sup> The materials have also led me to question whether Justice Blackmun's withdrawal from the case was warranted.

Here is the basic chronology of the Supreme Court's consideration of *Williams & Wilkins*. When the Court voted on May 17, 1974 to review the Court of Claims's judgment in the case, Justice Blackmun did not participate, because he already knew that the Mayo Foundation, his former employer, had signed on to one of the amicus briefs filed in the Court of Claims.<sup>103</sup> However, Blackmun postponed deciding whether to withdraw from the case, and he participated in oral argument on December 17.<sup>104</sup> Three days later, he was present at the conference at which the Justices considered the case, and he recorded all of their votes

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Chemical Society; The American Institute for Physics Incorporated; The American Society for Testing and Materials; and National Council of Teachers of Mathematics); *Williams & Wilkins Co. v. United States*, 172 WL 17712 (Ct. Cl. 1972) (acknowledging receipt of amicus curiae briefs from the Association of American Publishers, Inc., The Authors League of America, The American Library Association, and the Association of Research Libraries, Medical Library Association, and American Association of Law Libraries).

100. GOLDSTEIN, *supra* note 96, at 62–116.

101. See GOLDSTEIN, *supra* note 96, at 222–25. The papers of some of the Justices on the Court at the time, such as those of Chief Justice Burger, are still not available. See *Warren E. Burger Collection*, WM. & MARY LIBR., <https://libraries.wm.edu/research/special-collections/warren-burger-collection> (last visited Nov. 2, 2017). Warren E. Burger papers are closed to researchers until 2026. *Id.*

102. Compare 464 U.S. 417, 478–80 (1984) (Blackmun, J., dissenting), with *Williams & Wilkins Co.*, 487 F.2d 1345, 1353, 1357, 1359, 1363 (Ct. Cl. 1973) *aff'd*, 417 U.S. 907 (1975) (affirmed by an equally divided court with Justice Blackmun not taking part in the decision).

103. See Preliminary Memo, *supra* note 12, at 6.

104. See generally Transcript of Oral Argument, *Williams & Wilkins Co. v. United States*, OYEZ (Dec. 17, 1974), <https://www.oyez.org/cases/1974/73-1279> (illustrating Justice Blackmun's participation in oral arguments).



and views.<sup>105</sup> However, he decided not to participate in the vote, which left the Justices split evenly: Chief Justice Burger and Justices Douglas, Brennan, and White voted to affirm; while Justices Stewart, Marshall, Powell, and Rehnquist voted to reverse.<sup>106</sup> Justice White indicated that he might be persuaded to join an approach to reversing suggested by Justice Powell.<sup>107</sup> Seeking to gain Justice White's vote, Justice Powell circulated an eight-page memo that was typeset by the Court printer like a slip opinion, which makes it look very much like an opinion draft.<sup>108</sup> Ultimately, however, Justice Powell's memo, though gaining approval from Justice Rehnquist,<sup>109</sup> did not convince Justice White to change his vote.<sup>110</sup> On February 25, 1975, the Court issued its per curiam opinion affirming the Court of Claims by an equally divided Court, without the participation of Justice Blackmun.<sup>111</sup>

*B. Blackmun's Views and Powell's Memo: The Case for Reversal*

It is of course difficult to say how Justice Blackmun would have voted in *Williams & Wilkins* had he not recused himself. But a good case can be made that he most likely would have voted to reverse the judgment of the Court of Claims and hold that the government library photocopying was not fair use. Blackmun's position is probably best outlined in a memo

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105. Justice Harry A. Blackmun, Notes on No. 73-1279, *Williams & Wilkins Co. v. United States* (Dec. 20, 1974), <http://www.robertbrauneis.net/fairuse/ww/ConferenceNotes12201974.pdf> (on file with Library of Congress).

106. *Id.*

107. See Jonathan Band & Tara Weinstein, *The Blackmun Papers: A Peek Behind the Scenes of a Quarter Century of Supreme Court Copyright Jurisprudence*, 28 COLUM. J. L. & ARTS 315, 320 (2005).

108. See generally Memorandum of Mr. Justice Powell on *Williams & Wilkins Co. v. United States* (circulated Dec. 30, 1974) [hereinafter "Powell Memo"], <http://www.robertbrauneis.net/fairuse/ww/PowellMemo12301974.pdf> (on file with Library of Congress).

109. Letter from Justice William H. Rehnquist to Justice Lewis Powell (Jan. 3, 1975), <http://www.robertbrauneis.net/fairuse/ww/RehnquistMemo01031975.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199) (affirming that he would join Powell's memo as the Opinion of the Court and copying the other Justices).

110. See *Williams & Wilkins Co. v. United States*, 420 U.S. 376, 376 (1975). In response to Justice Powell's memo, Justice White wrote that he was not yet convinced, and had a number of concerns. Letter from Justice Byron R. White to Justice Lewis Powell (Jan. 8, 1975), <http://www.robertbrauneis.net/fairuse/ww/WhiteToPowell01081975.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199). The following day, Justice Powell wrote another letter to Justice White, trying to address those concerns. Letter from Justice Lewis Powell to Justice Byron R. White 1 (Jan. 9, 1975), <http://www.robertbrauneis.net/fairuse/ww/PowellToWhite01091975.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199). Ultimately, however, he did not obtain Justice White's support. See *Williams & Wilkins*, 420 U.S. at 376.

111. *Williams & Wilkins*, 420 U.S. at 376.

that he wrote the day before oral argument, organizing his own thoughts on the case.<sup>112</sup> The last two paragraphs sum up his reaction:

When I was at the Mayo Clinic I was really shocked at what I regard as the medical profession's abuse in requesting reprints at the expense of the author and by what further seemed to me to be a wholesale end run around the copyright laws. I can give full and sympathetic attention to the needs of medical research. I do feel, however, that researchers have abused the privilege and, finding it easy, have overextended the habit. Somewhere some financial responsibility ought to come into play.

. . . At this moment, my inclination is to side with the dissenters in the court of claims. If this view were to prevail and we were wrong, then of course Congress could easily amend this statute . . . . Thus, for the moment, I am inclined to reverse, but I am not at all frozen into that view.<sup>113</sup>

That position—skeptical of claims of fair use when the use seems to be substituting for purchases of the plaintiff's work—is consistent with Blackmun's position in fair use cases both before and after *Williams & Wilkins*.<sup>114</sup> In a copyright infringement case Blackmun had heard while a judge on the Eighth Circuit, he voted to reverse a district court ruling that the defendant's actions qualified as fair use.<sup>115</sup> In the appellate opinion that Blackmun joined, the court stated: "Whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe."<sup>116</sup>

When Justice Blackmun did get a chance to participate in a fair use case, ten years after *Williams & Wilkins* in *Sony Corp. of America v.*

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112. See Memorandum from Justice Blackmun on No. 73-1279—*Williams & Wilkins Co. v. United States* 5–6 (Dec. 16, 1974) [hereinafter "Blackmun Pre-Argument Memo"], <http://www.robertbrauneis.net/fairuse/ww/BlackmunPreArgumentMemo12161974.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199).

113. *Id.*

114. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 457–99 (1984) (Blackmun, J., dissenting) (disagreeing with the Court's holding that a manufacturer of video recorders did not infringe copyrights); *Wihtol v. Crow*, 309 F.2d 777, 778–82 (8th Cir. 1962) (holding that the defendant's adaption of a hymn infringed on the plaintiff's copyright).

115. *Wihtol*, 309 F.2d at 777. The defendant in *Wihtol*, who directed a school choir and a church choir in Clarinda, Iowa, had made a choral arrangement of the plaintiff's song. *Wihtol v. Crow*, 199 F. Supp. 682, 683 (S.D. Iowa 1961). He made about forty-eight copies of his arrangement on a school duplicating machine for use of those two choirs, each of which performed the arrangement once. *Id.* The defendant's use would probably have never come to the composer's attention but for the fact that the defendant made the mistake of writing the composer to suggest that the composer might be interested in marketing the defendant's choral arrangement. *See id.* at 683–84.

116. *Wihtol*, 309 F.2d at 780.

*Universal City Studios*, he wrote what ultimately turned out to be the dissent in the case, concluding that home recording of television shows was not fair use.<sup>117</sup> Blackmun's *Sony* dissent concludes that a use is a fair use only if it is "a productive use, resulting in some added benefit to the public beyond that produced by the first author's work . . . . [W]hen a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply."<sup>118</sup> That approach echoes, and was likely influenced by, the quasi-draft-opinion memo that Justice Powell wrote in *Williams & Wilkins*.<sup>119</sup>

In that memo Justice Powell begins by drawing a distinction that should sound very familiar to those acquainted with Blackmun's *Sony* dissent:

[U]se of a copyrighted work is fair when it is for the purpose of creating something essentially new, and when the economic value of the new work does not derive primarily from its incorporating sections of the old.

. . . .

However justifiable and socially beneficial the libraries' photocopying practices may be, they cannot be characterized as a "fair use" within the established meaning of that term. The sole value of the photocopies derives precisely from the original copyrighted work. The copy adds nothing new and has no economic value independent of the work of the copyright holder.<sup>120</sup>

Under Justice Powell's approach, the photocopying infringes; the compromise is struck by adjusting the remedy.<sup>121</sup> Powell proposed holding that owners of copyright can usually obtain neither statutory damages nor injunctive relief from noncommercial photocopiers such as individuals and libraries.<sup>122</sup> Without either of those remedies, copyright owners would be limited to seeking actual damages, since the Copyright

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117. 464 U.S. at 480–81 (Blackmun, J., dissenting).

118. *Id.* at 478–79 (Blackmun, J., dissenting). Of course, there is still a bit of room for distinguishing Justice Blackmun's formula from Justice Powell's. Justice Blackmun points to quotation of a work in scholarship as a paradigm example of a fair use. *See id.* at 481–82. What if a scholar found it convenient to photocopy an entire article for the purpose of choosing a portion of that article to quote in her own scholarship? That photocopying then becomes part of a process that culminates in a productive use. If the concept of productive use could be expanded in that direction, it would diverge from Justice Powell's inquiry as to whether the value of the immediate copy made stems entirely from the value of the original. *See Powell Memo, supra* note 108, at 3.

119. Powell Memo, *supra* note 108, at 3.

120. *Id.*

121. *See id.* at 3–8 (discussing awarding remedies in cases of photocopying).

122. *Id.* at 4.

Act provided for actual damages or profits,<sup>123</sup> and noncommercial copiers would not normally be making profits from photocopying.<sup>124</sup> Restricting remedies to actual damages would, in Powell's view, avoid any "seriou[s] and advers[e] [e]ffects [on] the public interest in dissemination of knowledge in the inexpensive, convenient form that photocopying allows."<sup>125</sup>

As to individuals who photocopy for their own use a single item in a larger work, it would be nearly impossible for the proprietor to establish loss . . . . With respect to library photocopying for patrons, the copyright holder might in some cases be able to demonstrate that he did lose a modest amount, since the library (or its patrons) might have purchased additional copies. . . . Allowing the proprietor to recover for these slight losses . . . would probably lead to the institution of a system of modest license fees added to the subscription rates of those subscribers—mostly libraries—that plan to xerox.<sup>126</sup>

Thus under Powell's approach, fair use doctrine is only for uses that add something of independent value to the underlying work. A distinction between commercial and noncommercial uses is made, not within that doctrine, but within the doctrine governing remedies for copyright infringement.

While Justice Powell's approach did not end up convincing Justice White to switch his vote, it could easily have gained Justice Blackmun's support. Powell's finding of infringement but denial of statutory damages against noncommercial copiers could have reconciled Blackmun's conclusion that "researchers have abused the privilege and . . . have overextended the habit" with his "sympathetic attention to the needs of medical research."<sup>127</sup> And, as already mentioned, Blackmun's *Sony* dissent—joined by Justices Powell, Rehnquist, Marshall, all of whom voted to reverse in *Williams & Wilkins*—takes an approach quite similar to Powell's memo.<sup>128</sup> However, instead of casting a vote in *Williams*, Blackmun withdrew from participation, and it is to that recusal that we now turn.<sup>129</sup>

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123. 17 U.S.C. § 504 (1976 & 2012).

124. Powell Memo, *supra* note 108, at 4.

125. *Id.* at 1.

126. *Id.* at 4–5.

127. Blackmun Pre-Argument Memo, *supra* note 112, at 6.

128. Compare *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 457–99 (1984) (Blackmun, J., dissenting), with Powell Memo, *supra* note 108 (illustrating the similar approaches taken by the two Justices).

129. *Williams & Wilkins Co. v. United States*, 420 U.S. 376, 376 (1975).

*C. Blackmun's Dubious Recusal*

Blackmun recused himself in *Williams & Wilkins* for reasons that have something to do with his past connection with the Mayo Foundation, but that remain enigmatic and questionable. When the case was in the Court of Claims, the Mayo Foundation had joined a thirteen-party amicus brief that was one of the eight amicus briefs submitted in that court.<sup>130</sup> That brief supported the position of the United States that its photocopying was fair use.<sup>131</sup> Blackmun had been in-house counsel to the Mayo Clinic, owned by the Mayo Foundation,<sup>132</sup> from 1950 to 1959, when he left that position to become a judge on the Eighth Circuit.<sup>133</sup> Since 1959, however, fifteen years before *Williams & Wilkins* reached the Supreme Court, he had had no formal relationship with the Mayo Clinic or the Mayo Foundation.<sup>134</sup> Nonetheless, Blackmun fretted about the Mayo Foundation's amicus participation in the Court of Claims.<sup>135</sup>

The day before oral argument, Blackmun had written in his pre-argument memo: "I must also look at the posture of Mayo Foundation in one of the amicus briefs filed with the court of claims. If this is embarrassing to me, I should step out of the case."<sup>136</sup> Blackmun also asked one of his law clerks, Karen Nelson Moore—now herself a judge on the Sixth Circuit Court of Appeals—to research the issue of whether a past relationship with an amicus curiae in lower court proceedings would be disqualifying under federal law and under the Code of Judicial Conduct for United States Judges adopted in 1973 by the federal Judicial Conference.<sup>137</sup> Moore's memo concluded that Blackmun's past

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130. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1345 (Ct. Cl. 1973) (indicating the court received an amici curiae brief from Philip B. Brown for the Association of Research Libraries; Medical Library Association; American Association of Law Libraries; American Medical Association; American Dental Association; Mayo Foundation; Robert H. Ebert, M.D., as Dean of the Faculty of Medicine for Harvard University; The University of Michigan Medical School; The University of Rochester, School of Medicine and Dentistry; American Sociological Association; Modern Language Association of America; and History of Science Society).

131. See Blackmun Pre-Argument Memo, *supra* note 112, at 6.

132. Fox, *supra* note 18.

133. *Id.*

134. *Id.*

135. See Blackmun Pre-Argument Memo, *supra* note 112, at 6.

136. *Id.*

137. 28 U.S.C. § 455 (2012) ("Disqualification of justice, judge, or magistrate judge."); CODE OF CONDUCT FOR U.S. JUDGES, Canon 3(A)(1) (U.S. JUD. CONF. 1975), [http://www.uscourts.gov/sites/default/files/vol02a-ch02\\_0.pdf](http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf); see Memorandum from K[aren] N[elson] M[oores], Law Clerk, to Justice Harry A. Blackmun (Dec. 14, 1974), <http://www.robertbrauneis.net/fairuse/ww/MooreToBlackmun12141974.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199). Karen Nelson Moore was commissioned as a judge for the Sixth Circuit on March 24, 1995. *United States Court of*

relationship with the Mayo Clinic did not require him to withdraw under either the federal statute or the Code of Conduct.<sup>138</sup> Blackmun nonetheless decided to withdraw.<sup>139</sup> A penciled note on Blackmun's pre-argument memo states: "Recuse, & in any ev[en]t, do not write[.] 1. Reas[on] – too close[,] 2. M[ayo] F[oundation][.]"<sup>140</sup>

Were those sufficient grounds for Blackmun to withdraw? Unlike Justice Douglas, Justice Blackmun cannot be accused of placing personal gain ahead of judicial duty. Yet judges surely have a general duty to decide the cases that they hear—a duty that has been more recently made explicit in Canon 3(A)(2) of the Code of Conduct for United States Judges: "A judge should hear and decide matters assigned, unless disqualified."<sup>141</sup> Thus, if by "too close," Blackmun meant that he thought the case was too difficult, with strong arguments on both sides, that could not have been a sufficient reason to withdraw.<sup>142</sup> Alternatively, perhaps Blackmun felt himself to be "too close" to the facts of the case, as he himself had been involved in medical research that probably involved photocopying.<sup>143</sup> Just two years before, Blackmun had engaged in extensive medical research in connection with what would become his most famous and controversial opinion, his opinion for the Court in the abortion case of *Roe v. Wade*.<sup>144</sup> He conducted part of that research with a "massive collection of materials," perhaps photocopied, that Mayo

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*Appeals for the Sixth Circuit: Judges*, USCOURTS.GOV, <http://www.ca6.uscourts.gov/judges> (last visited Nov. 3, 2017).

138. See Memorandum from M[oore] to Justice Blackmun (Dec. 14, 1974), *supra* note 137.

139. See Preliminary Memo, *supra* note 12, at 13 ("No Participation—Mayo Foundation was in court below.").

140. The bracketed portions are my interpretations of the abbreviations. Blackmun Pre-Argument Memo, *supra* note 112, at 6. Blackmun never publicly explained why he had withdrawn, rebuffing inquiries on at least two occasions. See Letter from Barrett McGurn, Pub. Info. Officer, to Justice Harry A. Blackmun (Feb. 25, 1975), <http://www.robertbrauneis.net/fairuse/ww/McGurnToBlackmun02251975.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199); Letter from Justice Harry A. Blackmun to Paul Goldstein (Oct. 15, 1992), <http://www.robertbrauneis.net/fairuse/ww/BlackmunToGoldstein10151992.pdf> (on file with Library of Congress, Harry A. Blackmun Papers, Box 199). On the former occasion, Blackmun penciled in a note on a memo addressed to him by the Court's public information officer Mr. Barrett McGurn: "told B. McG. why but not to publicize because of C.J.'s posture." See Letter from Barrett McGurn, Pub. Info. Officer, to Justice Harry A. Blackmun (Feb. 25, 1975), *supra* note 140. Evidently, Blackmun did not want to provoke questioning about whether Burger should have recused himself as well. See generally *id.*

141. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 137, at Canon 3(A)(2).

142. See *id.* at Canon 3(C)(1); Blackmun Pre-Argument Memo, *supra* note 112, at 6.

143. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 90 (2005).

144. 410 U.S. 113, 116 (1973); GREENHOUSE, *supra* note 143.

Clinic librarian Thomas Keys had sent him.<sup>145</sup> But as Blackmun himself noted, judges engage in legal research all the time, including research that might involve photocopying.<sup>146</sup> If having used photocopies disqualified judges from hearing cases considering whether certain photocopying practices infringed copyright, it would be very difficult to get those cases decided.

As for Blackmun's reference to the Mayo Foundation, it was probably not his formal employment relationship with Mayo, terminated fifteen years previously,<sup>147</sup> that most deeply affected him. As far as formal relationships with Mayo were concerned, Chief Justice Burger had a far more recent one, having served as a Trustee of the Mayo Foundation from 1959 to 1969, while he was a judge on the U.S. Court of Appeals for the District of Columbia Circuit.<sup>148</sup> He resigned from that position only when he was appointed as Chief Justice of the Supreme Court in 1969.<sup>149</sup> Yet Burger remained active in *Williams & Wilkins*, and voted to uphold the Court of Claims' judgment exonerating the government, in line with the amicus position taken by the Mayo Foundation.<sup>150</sup>

Blackmun's identity, however, was tied far more closely to the Mayo Clinic. In 1994, he said that his time as counsel to the Mayo Clinic was "the happiest decade of my life," and that "[i]f I had to do it over again, I'd probably go to medical school."<sup>151</sup> He strongly identified with the medical profession, and as many have commented, his opinion in *Roe v. Wade* was framed as protecting doctors as much as women: "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for [state]

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145. TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 219 (2008) ("[Thomas] Keys sent the justice [Blackmun] a massive collection of materials on the subject [history of abortion] [in the summer of 1972]."). Blackmun also visited the Mayo Clinic library the week of July 24, 1972. *Id.*

146. See Blackmun Pre-Argument Memo, *supra* note 112, at 3–4.

147. Fox, *supra* note 18.

148. Duane Benton & Barrett J. Vahle, *The Burger-Blackmun Relationship: Lessons for Judicial Collegiality from the Blackmun Papers*, 70 MO. L. REV. 995, 1005 (2005). Burger's work at the Mayo Foundation while serving as a federal judge had been subject to some scrutiny and criticism when the outside activities of Justices Douglas and Fortas had become controversial. Douglas resigned from a position with the Parvin Foundation, while Fortas left the Supreme Court after criticism of his outside activities, which included a position with the Wolfson Foundation. See *Giving Up Committee Work in A.B.A., Burger Discloses*, CHI. TRIBUNE (Aug. 13, 1969), <http://archives.chicagotribune.com/1969/08/13/page/31/article/giving-up-committee-work-in-a-b-a-burger-discloses#text>.

149. Benton & Vahle, *supra* note 148, at 1005.

150. Band & Weinstein, *supra* note 107, at 319–21.

151. YARBROUGH, *supra* note 145, at 27.

intervention.”<sup>152</sup> Blackmun and his wife returned “home to Rochester, Minnesota each summer to see their friends and have their annual medical checkups”<sup>153</sup> at the Mayo Clinic. And when Blackmun died, family members scattered some of his ashes at the Mayo Clinic.<sup>154</sup>

It remains doubtful whether those close emotional ties are a good reason for withdrawing from participation in a case, especially when withdrawal will result in the inability of the Supreme Court to decide a case and the affirmance by default of the judgment below.<sup>155</sup> A group of doctors from the Mayo Clinic, including the Chairman of the Department of Obstetrics and Gynecology and the Head of Gynecological Surgery, joined in an amicus brief in favor of the abortion rights of “Jane Roe” in *Roe v. Wade*.<sup>156</sup> Yet that did not lead Justice Blackmun to recuse himself in that case, and his opinion acknowledging those rights “was welcomed at the Mayo Clinic.”<sup>157</sup> Whether Blackmun recused himself in *Williams & Wilkins* in part to avoid deciding the case in a way that would not be welcomed at Mayo is a question that will have to stay open.

### III. SPECULATIVE COPYRIGHT FICTION:

#### WHAT DECISIONS IN *CBS* AND *WILLIAMS & WILKINS* MIGHT HAVE DONE

With the stories of *CBS* and *Williams & Wilkins* over, all that remains is to speculate. If Justices Douglas and Blackmun had not

152. 410 U.S. 113, 165–66 (1973).

153. Wanda S. Martinson, *In Memoriam: My Twenty-Five Years with “Old Numberthree,”* 99 COLUM. L. REV. 1405, 1405 (1999).

154. GREENHOUSE, *supra* note 143, at 248.

155. *See, e.g.,* Laird v. Tatum, 409 U.S. 824, 837–38 (1972). Chief Justice Rehnquist is among those who have expressed particular wariness at recusals that would result in an evenly divided Court.

[T]he disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not ‘bending over backwards’ in order to deem oneself disqualified.

*Id.*; *see* Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000) (Rehnquist, C.J., dissenting) (making a similar statement about recusals and equally divided courts); Ryan Black & Lee Epstein, *Recusal on Appeal: Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 76 (2005).

156. *See generally* Brief for American College of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Appellants, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (indicating signatures by David G. Decker, M.D., Professor and Chairman, Department of Obstetrics and Gynecology, Mayo Clinic Rochester; Joseph H. Pratt, M.D., Professor of Surgery, University of Minnesota School of Medicine, Head, Gynecological Surgery, Mayo Clinic Rochester; Mary E. Mussey, M.D. Consultant in Gynecology, Department of Obstetrics and Gynecology, Mayo Clinic Rochester).

157. GREENHOUSE, *supra* note 143, at 101.



withdrawn, what would those decisions have held, and how might they have affected the development of copyright law, and of fair use doctrine? As I stated above, I would like to approach these questions in three stages, asking how copyright law might look immediately after a decision in *CBS v. Loew's* in 1958; how it might look immediately after a decision in *Williams & Wilkins* in 1975; and how it might look in the present day.

*A. 1958: Collapsing Fair Use into Infringement Analysis as a Unified Inquiry*

Here is the first take on alternative copyright history. The *CBS* Court could well have collapsed what we now think of as the fair use inquiry into general infringement analysis, rather than framing it as an exception to what otherwise would be infringement under a standard of substantial similarity. That could have directly influenced the drafting of the Copyright Act of 1976 (the “1976 Act”), because the report on fair use that informed that drafting was published immediately after the Court’s announcement of its deadlock in *CBS*, and had clearly been held awaiting the *CBS* decision.<sup>158</sup>

It is tempting to look back at previous law through a 1976 Act lens, and to see § 106 and § 107 as merely codifying a previous judicially-developed structure that separated initial infringement analysis from a fair use exception.<sup>159</sup> Indeed, various legislative history materials prompt such a perspective.<sup>160</sup> The House Report on the 1976 Act frames § 107 as an “express statutory recognition” of “[t]he judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners.”<sup>161</sup> That language can be traced back all the way to the 1961 Register’s Report on Copyright Law Revision, which notes that “[t]he doctrine of ‘fair use,’ . . . is now firmly established as an implied limitation on the exclusive rights of copyright owners[,]”<sup>162</sup> and recommends that a new copyright statute “include a provision affirming and indicating the scope of the principle that fair use does not infringe the copyright owner’s rights.”<sup>163</sup>

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158. ALAN LATMAN, COPYRIGHT LAW REVISION STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG., 1 (Comm. Print Mar. 1958); *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43, 43 (1958).

159. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. §§ 106–07 (1976 & 2012)).

160. H.R. REP. NO. 94-1476, at 65.

161. *Id.*

162. REGISTER OF COPYRIGHTS, 87th CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961).

163. *Id.* at 25.

However, courts have not always treated fair use analysis as separate from initial infringement analysis, and general acceptance of the separation is much more recent than usually acknowledged.<sup>164</sup> Many courts and commentators trace American recognition of the fair use doctrine back to Justice Story's 1841 opinion in *Folsom v. Marsh*,<sup>165</sup> and indeed, Justice Story enunciates principles in that case that sound a lot like the factors set forth in § 107, and that undoubtedly influenced the drafting of that section.<sup>166</sup> But Story does not treat "fair use" as a separate exception; he frames his principles as addressing "the question of piracy," that is, the issue of infringement.<sup>167</sup>

Fast forward about a century. By the 1930s and 1940s the term "fair use" was certainly known and in use; yet even then, many courts did not use the term to refer to a separate stage of analysis. In the 1930 case of *Nichols v. Universal Pictures Corp.*, for example, Judge Learned Hand notes that some copyright cases involve literal copying of, for example, dialogue from a play; "Then," he says, "the question is whether the part so taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work . . ."<sup>168</sup> That statement sets up "fair use" as the opposite of "substantial use."<sup>169</sup> Six years later, in *Sheldon v. Metro-Goldwyn*

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164. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4901).

165. *Id.* at 348. For cases and commentary tracing the fair use doctrine to *Folsom*, see, e.g., *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 550 (1985) ("As early as 1841, Justice Story gave judicial recognition to the [fair use] doctrine in [*Folsom v. Marsh*] . . ."); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977) ("Justice Story denied the fair use defense in *Folsom* . . ."); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 975 (2007) ("[*Folsom* is] the seminal case on fair use . . ."); Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (tracing the fair use doctrine to *Folsom*).

166. See 9 F. Cas. at 348; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. §§ 106-07 (1976 & 2012)). For example, Story states that courts should "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Folsom*, 9 F. Cas. at 348. That sounds a lot like factors 2, 3 and 4 in § 107, which instructs courts to consider "(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 90 Stat. at 2546. Elsewhere in the *Folsom* opinion, Story suggests that one should "balance . . . the comparative use made in one of the materials of the other," and consider "the objects of each work." *Folsom*, 9 F. Cas. at 344. This statement sounds similar to § 107(1), which instructs courts to consider "the purpose and character of the use." 90 Stat. at 2546.

167. *Folsom*, 9 F. Cas. at 344. I am certainly not the first to recognize that Justice Story was not framing his factors as a fair use defense; for a classic reading of *Folsom* as formulating an infringement test, see L. Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and Its Legacy*, 5 J. INTEL. PROP. L. 431, 432 (1998).

168. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

169. See *id.*

*Pictures Corp.*, Judge Hand extends the “fair use” inquiry to all cases of alleged infringement, literal or non-literal, stating that “it is convenient to define . . . [fair] use by saying that others may ‘copy’ the ‘theme,’ or ‘ideas,’ or the like, of a work, though not its ‘expression.’”<sup>170</sup> That seems to equate fair use with what has come to be known as the idea/expression doctrine.<sup>171</sup> Into the mid-1960s, the terms “fair use” and its opposite, “unfair use,” are frequently equated with general infringement analysis.<sup>172</sup>

In *CBS*, CBS argued that the Court should create a parody exception to the general rule that substantial use of a work amounted to infringement.<sup>173</sup> That is a narrow approach to the case, which CBS lawyers may have felt was the safest because it disturbed existing doctrine the least.<sup>174</sup> Loew’s argued that there should be no special rule for parodies, but it did not contend that “substantiality” was a simple matter of determining whether a use was trivial or de minimis.<sup>175</sup> The issue of whether a use was substantial, it argued, involved the full,

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170. 81 F.2d 49, 54 (2d Cir. 1936); see *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 537 (2d Cir. 1938) (“Fair use is defined as copying the theme or ideas rather than their expression.”).

171. *Sheldon*, 81 F.2d at 54; see Pamela Samuelson, *Reconceptualizing Copyright’s Merger Doctrine*, 63 J. COPYRIGHT SOC’Y 417, 417 (2016).

172. See, e.g., *Bradbury v. Columbia Broad. Sys. Inc.*, 287 F.2d 478, 485 (9th Cir. 1961) (citing *Sheldon*, 81 F.2d at 54) (“Fair use may permit copying of theme or ideas of copyrighted work but not its expression.”); *Becker v. Loew’s, Inc.*, 133 F.2d 889, 892 (7th Cir. 1943) (“[D]id defendant actually use the plaintiff’s work, and if so, was there such similarity between the two works as to constitute an unfair use?”); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (equating the issue of “fair use” with comparing the plaintiff’s and the defendant’s work to see whether there would not be infringement even if copying-in-fact were admitted); *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653, 655 (S.D.N.Y. 1965) (quoting *Nutt v. Nat’l Inst., Inc. for Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929)) (“The test for copyright infringement is ‘whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant’s work.’”).

173. Brief for Petitioner at 30–35, *Columbia Broad. Sys., Inc. v. Loew’s Inc.*, 356 U.S. 43 (1958) (No. 90) [hereinafter “CBS Brief”]. CBS framed the issue as one of whether a parody should be “limited to only such insubstantial use of a copyrighted work as is permitted the ordinary literary appropriator.” *Id.* at 3. It argued that a parody “must use a pre-existing work,” but that “authors whose works most need the pin prick of parody would be the least likely to consent,” even though the parody, as a comedy, would by definition not significantly compete for the audience of the serious target work. *Id.* at 30, 35.

174. See *Sheldon*, 81 F.2d at 59 (“[I]t is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”); *Nutt*, 31 F.2d at 237 (first citing *W. Publ. Co. v. Edward Thompson Co.*, 169 F. 833, 857 (E.D.N.Y. 1909); and then citing *Hartford Printing Co. v. Hartford Directory & Pub. Co.*, 146 F. 332, 334 (D. Conn. 1906)) (“[T]he test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant’s work.”).

175. See Brief for the Respondents at 6–7, *Columbia Broad. Sys.*, 356 U.S. 43 (No. 90) [hereinafter *Loew’s Brief*].

complex consideration of the factors that Justice Story pursued in *Folsom*, and thus would take everything into account that a “fair use” inquiry would.<sup>176</sup> Perhaps Loew’s recognized that the Supreme Court would likely decide that a broader substantiality inquiry was necessary, but was hoping that in that case, it would still defer to the district court’s finding that CBS’s use was substantial. However, the *CBS* Court could have articulated a broader view of substantiality, including all of the *Folsom* factors, and yet reversed outright or remanded, indicating that parodies would rarely infringe given the way those factors would usually apply to parodies. In other words, the Court could have collapsed fair use into substantiality and hence into general infringement analysis.

There is certainly reason to think that Justice Douglas would not have been content to write a narrow, parody-exception opinion. Justice Douglas and Justice Black (who, recall, assigned the opinion in *CBS* to Douglas) were the two most pronounced intellectual property skeptics on the Supreme Court,<sup>177</sup> and Douglas would have taken the opportunity to

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176. *Id.* at 31 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4901)) (“[C]ourts look to one or more of the following: (1) the quantity and quality of the parts taken; (2) the nature and objects of the selections made; and (3) the degree to which their use may prejudice the demand for or profits of the original.”).

177. Either separately or together, Justices Black and Douglas were responsible for some of the least patent-friendly formulations and opinions of an anti-patent era in the Supreme Court, such as the “flash of creative genius” inventiveness test for patentability. *See Cuno Eng’g Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1941). Justice Black’s opinion led to the invalidation of “means-plus-function” claiming. *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 11 (1946). An opinion by Justice Douglas led to the limitation of secondary liability for infringement. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669–70 (1944).

For their similarly minimalist tendencies in copyright law, see *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 54–55 (1939) (Black, J., dissenting) (arguing that copyright should not be granted to those who fail to deposit copies of their work); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 235 (1952) (Black, J., dissenting) (citing *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935)) (arguing that statutory damages should be awarded only when the law renders it impossible or difficult to prove damages); *Mazer v. Stein*, 347 U.S. 201, 221 (1954) (Douglas, J., joined by Black, J., concurring) (arguing that the case should be scheduled for reargument on the issue of whether Congress could grant copyright to statues under a constitutional provision that extended only to “writings”).

The copyright minimalism of Douglas and Black was consistent with their emerging positions as strong first amendment advocates. *See, e.g., Roth v. United States*, 354 U.S. 476, 509 (1957) (Douglas, J., joined by Black, J., dissenting) (arguing that statutes criminalizing the distribution of obscene speech violated the first amendment); *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting); *id.* at 587–91 (Douglas, J., dissenting) (arguing that law criminalizing the advocacy of overthrowing the United States government violated the first and fourteenth amendments as applied to the facts of the case); *Feiner v. New York*, 340 U.S. 315, 323–29 (1951) (Black, J. dissenting); *id.* at 329–31 (Douglas, J., joined by Minton, J., dissenting) (arguing that conviction of inflammatory speaker for incitement of breach of the peace violated the first and fourteenth amendments).

make a broader statement, as even the fragment we have of his draft suggests.<sup>178</sup> Is there any reason to think that Justice Douglas would have pursued the formal route of an integrated substantiality test, rather than constructing a separate doctrine of fair use? The evidence is admittedly thin, but three sentences in his draft opinion are worth a few words of comment. “[A] copyright is not like Black Acre. It differs from ordinary, conventional property. It may not be completely fenced and patrolled and used exclusively by the owner.”<sup>179</sup> That passage can reasonably read to suggest that the elements of copyright infringement should not be formulated like the elements of trespass, because the copyright owner does not have as capacious and bright-line rights against infringement as the real property owner has against trespass. As such, a transformative, non-substitutional use of a work might better be seen, not as justified or excused infringement, but as not satisfying the elements of copyright infringement in the first place.<sup>180</sup> That would at least be in the spirit of a unified infringement inquiry, rather than an inquiry that treated fair use as a distinct exception.<sup>181</sup>

How might a unified-infringement-test opinion in *CBS* have affected subsequent development in copyright law? I’d like to sketch two answers to that question—one focusing on the 1976 Act, the other more generally on the effect of fair use as integrated into infringement analysis rather than as an exception.

As for potential impact on the 1976 Act, *CBS* was heard at an unusually fluid moment in the history of United States copyright law.<sup>182</sup> Important copyright doctrine was still in flux in the lower courts, and the Supreme Court had never previously decided a case on the standard for copyright infringement or on “fair use,” leaving it unconstrained by precedent.<sup>183</sup> Of equal importance, the drafting of what was to become the Copyright Act of 1976 was just getting underway.<sup>184</sup> The first stage of what was then known as the Copyright Law Revision project involved the production of a series of thirty-four studies on various aspects of copyright law.<sup>185</sup> The study on fair use, written by Alan Latman—who

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178. See Douglas CBS Draft, *supra* note 46, at 6.

179. *Id.*

180. See *id.*

181. See *id.*

182. See Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT & TECH. L. 1, 4–5 (2007) (discussing the uncertainties under copyright law prior to the Copyright Act of 1976).

183. *Loew’s Inc. v. Columbia Broad. Sys. Inc.*, 131 F. Supp. 165, 167 (S.D. Cal. 1955).

184. See generally REGISTER OF COPYRIGHTS, 87th CONG., *supra* note 162.

185. *Id.* at 147.

coincidentally would later become counsel for Williams & Wilkins—was published in March 1958, within a week or two after the Court summarily disposed of *CBS*.<sup>186</sup> That timing cannot be coincidence; the study's publication was no doubt held pending the outcome in *CBS*, and had the Court issued a set of opinions in that case, the study would no doubt have prominently featured and closely tracked the case.<sup>187</sup> Thus, *CBS* could have exercised an outsized influence on the structure and content of the 1976 Act's infringement analysis provisions.

As for the larger question of the effect of a hypothetical *CBS* unified-infringement-analysis opinion, it must be conceded that form has no binding effect on substance.<sup>188</sup> Separating fair use may seem to make implementation of certain distinctions easier.<sup>189</sup> For example, it may be that the rights of copyright owners in unpublished works should be broader than their rights in published works. Under the 1909 Act, some courts implemented that distinction by holding that common-law copyright did not recognize a fair use privilege, while federal statutory copyright did.<sup>190</sup> Yet that distinction could be spelled out without recognizing a "fair use exception"; one could simply state that different standards of substantiality applied under statutory and common-law copyright.<sup>191</sup>

However, form can be used to tint or slant substance, and it has been so used in copyright law.<sup>192</sup> Copyright maximalists have used the separation of fair use from substantial similarity to push in the direction of greater protection, and copyright minimalists could possibly use that separation as well.<sup>193</sup> The maximalist uses of separating fair use are easier

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186. LATMAN, *supra* note 158, at 1; *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43, 43 (1958).

187. *See* LATMAN, *supra* note 158, at 9–10 (noting the importance of the Supreme Court's grant of certiorari in *Columbia Broad. Sys. Inc. v. Loew's* to the problem of parody as fair use, and the uncertainty that came with the Court's subsequent 4–4 decision).

188. *See* David Fagundes, *Efficient Copyright Infringement*, 98 Iowa L. Rev. 1791, 1840 (2013).

189. *See* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1488 (2007) (arguing that categories of per se fair use copying would provide needed certainty to potential creators).

190. *See, e.g., Stanley v. Columbia Broad. Sys. Inc.*, 221 P.2d 73, 78 (Cal. 1950) (quoting 18 C.J.S. *Contribution—Corporations* § 2 (1939)); *Golding v. R.K.O. Pictures, Inc.*, 221 P.2d 95, 97–98 (Cal. 1950) (citing *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906, 907 (S.D.N.Y. 1937)). Of course, in 1992, Congress amended the Copyright Act to abolish any rule that fair use was categorically inapplicable to unpublished works. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified at 17 U.S.C. § 107 (1992 & 2012)).

191. *See Stanley*, 221 P.2d at 82 (Schauer, J., concurring).

192. *See Fagundes, supra* note 188, at 1840.

193. Pamela Samuelson, *The Copyright Grab*, 29 U. West. L.A. L. Rev. 165, 168 (1998); *see Parchomovsky & Goldman, supra* note 189, at 1532.

to see.<sup>194</sup> Setting out fair use as an exception makes it seem natural to treat the inquiry into its factors as part of an affirmative defense, thus shifting the burden to the defendant to raise consideration of those factors, to present evidence relating to them, and to prove to the court that they weigh in its favor.<sup>195</sup> In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court concluded that fair use was indeed an affirmative defense, including all the burden shifts that apply, apparently influenced by little more than the structural placement of fair use as an exception in the 1976 Act.<sup>196</sup> Although *Campbell v. Acuff-Rose* is generally viewed as a defendant-friendly decision,<sup>197</sup> it confirmed that fair use was indeed an affirmative defense, shifting burdens of assertion, evidence and proof to the defendant.<sup>198</sup> A *CBS* decision that introduced the fair use factors as part of unified infringement analysis would have made it much more difficult to conceive of fair use as an affirmative defense.

More generally, separating fair use from substantial use or substantial similarity makes it easier to think of fair uses as uses that invade copyright owners' rights, taking something from copyright owners that is rightfully theirs. This leaves the realm of positive law, and connects with theories of copyright based on labor or personality. Thus, although Congress may have the power to create a fair use exception, listing it among other exceptions suggests that we should perhaps view it the same way that we might view exceptions for agricultural or horticultural fairs<sup>199</sup> or for veterans or fraternal organizations<sup>200</sup>: as a transfer of wealth from copyright owners, who earned it, to politically

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194. See *The Copyright Grab*, *supra* note 193, at 168.

195. See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 561 (1985) (citing H.R. REP. NO. 83, at 29, 37 (1967)).

196. *Harper & Row Publishers*, 471 U.S. at 547–48. *But cf.* Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 167–68 (2011) (noting that it is uncertain why the *Harper & Row* Court stated that fair use was an affirmative defense, and suggesting that it might be traced back to treatment in a 1944 copyright treatise written by Horace Ball).

197. See Mark Sableman, *Artistic Expression Today: Can Artists Use the Language of Our Culture?*, 52 ST. LOUIS L.J. 187, 194–95 (2007) (“The *Campbell* decision also recognized that parody inherently involves copying, and even sometimes substantial copying.”).

198. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”); *id.* at 599 (Kennedy, J., concurring) (“Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist.”). *But see* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 712 (2015) (arguing that fair use should be treated as a defense that shapes the copyright owner’s rights, rather than an affirmative defense).

199. See 17 U.S.C. § 110 (2012); 17 U.S.C. § 110(6) (2012).

200. See 17 U.S.C. § 110(10).

powerful, favored groups.<sup>201</sup> Similarly, from a utilitarian perspective, separating fair use from substantial similarity makes it easier to view the latter as defining the baseline property right that would result in static and dynamic economic efficiency in a frictionless world.<sup>202</sup> Fair use is then relegated to the role of solving the specific problem of transaction costs.<sup>203</sup>

It is possible, of course, that copyright minimalists might embrace a separate fair use doctrine and try to use it to suggest that copyright protection is narrow. Fair use may be more open than substantial similarity to characterization as a balancing test, which weighs the harm to the copyright owner against the benefit to the public.<sup>204</sup> If courts were open to that characterization, then fair use could be used to narrow copyright protection in the name of benefit to the public, even when doing so caused some loss in value of a work of authorship.

*B. 1975: Fair Use as Promoting Creativity Regardless of Commercialism, But Not as Promoting Dissemination*

Moving forward seventeen years, what would fair use be in 1975 had the Supreme Court decided both *CBS* and *Williams & Wilkins*? There is a good case to be made that it would be a doctrine that promoted creativity but not dissemination, and that made little or no distinction between commercial and noncommercial uses.

*1. The Creation and Dissemination Sides of Fair Use*

Under an instrumentalist theory, copyright should seek an optimum balance between promoting production of creative works—which requires granting authors some ability to exclude those who do not pay for access to works—and allowing the dissemination of those works, which increases the utility generated by access to the works.<sup>205</sup> One

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201. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (arguing that one of the concerns of the fair use doctrine is the public's interest in the transfer of control over the use to the defendant in *Williams & Wilkins*).

202. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2017) (discussing that fair use, as opposed to substantial similarity, is a necessary doctrine to prevent unnecessary litigation on the issue of copyright infringement).

203. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 570 (1998); Gordon, *supra* note 201, at 1629–30.

204. Richard Dannay, *Factorless Fair Use? Was Melville Nimmer Right?*, 60 J. COPYRIGHT SOC'Y 127, 144 (2013).

205. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).



purpose of a fair use doctrine might be to further promote creativity, by finding no infringement when the user of a work is adding additional creative content (by, for example, creating a derivative work) and when a finding of non-infringement would be unlikely to reduce the incentive to create the underlying work. We might call that “creation-side” fair use; it later becomes known as “productive use” in Justice Blackmun’s dissent in *Sony*,<sup>206</sup> and as “transformative use” in *Campbell*.<sup>207</sup> Another purpose of fair use doctrine might be to promote dissemination of works, by finding no infringement when the type of use in question seems to be generating additional utility (by, for example, providing access to a group of people who could not otherwise afford it) and when a finding of non-infringement would be unlikely to reduce the incentive to create the underlying work. We might call that “dissemination-side” fair use.

If the Supreme Court had decided both *CBS* and *Williams & Wilkins*, it is likely that fair use doctrine in 1975, immediately before the enactment of the 1976 Act, would have been entirely “creation-side,” with little or no room for “dissemination-side” claims. *CBS* was certainly a “creation-side” case, involving a parody that commented on an earlier work, and both in its brief and at oral argument, CBS articulated the core idea common to “transformative use” and “productive use,” most clearly when quoting Zechariah Chafee.<sup>208</sup> While “[n]obody else should market the author’s book . . . [s]ome use of its contents must be permitted in connection with the independent creation of other authors.”<sup>209</sup> As CBS put it later in its brief, verbatim reproduction of a work was not fair use, because “[t]here was no attempt to transmute or change [the work] in any way. Literary creation—authorship—by the accused was not involved.”<sup>210</sup> And of course Justice Douglas’s opinion fragment argues that copyright must “promote the Progress of Science and the Useful Arts,”<sup>211</sup> which could have been prefatory to an assertion that uses of a work that change its character through alteration or addition, like changing a tragedy into a comedy to lead viewers to reevaluate it, are the kinds of uses that copyright law should lean toward allowing.

Justice Powell’s approach to fair use in *Williams & Wilkins* would have doubled down on the “creation-side” approach, rejecting a claim that dissemination of medical knowledge justified the photocopying at

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206. 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting).

207. 510 U.S. 569, 579 (1994).

208. CBS Brief, *supra* note 173, at 22.

209. *Id.*; Oral Argument, *supra* note 88, at 14:17.

210. CBS Brief, *supra* note 173, at 44.

211. Douglas CBS Draft, *supra* note 46.

issue in that case.<sup>212</sup> As he said in his memo, “use of a copyrighted work is fair when it is for the purpose of creating something essentially new, and when the economic value of the new work does not derive primarily from its incorporating sections of the old.”<sup>213</sup> That statement is completely consistent with the likely approach of the Court in *CBS*, but would of course have led to the opposite result, a finding of infringement, in *Williams & Wilkins*. Consistency of one sort between *CBS* and *Williams & Wilkins* does not mean that the Justices who were on the Court for both cases would have voted to reverse in both of them. In fact, only Justices Douglas and Brennan were on the Court for both cases, and they both would have been in dissent in *Williams & Wilkins*, being copyright minimalists across the board, rather than taking a “creation-side” view of fair use. Thus, it is conceivable that copyright law would have ended up with a creation-side fair use doctrine only because of changes in Supreme Court composition—but that would not have been the first time that an area of copyright doctrine was shaped by such changes.<sup>214</sup>

### 2. Fair Uses: Commercial and Noncommercial

Opinions for the Court in both *CBS* and *Williams & Wilkins* would also likely have denied or softened any role for “commerciality” in fair use analysis. Justice Douglas’s opinion in *CBS* would almost certainly have had to comment on and reject arguments that Benny’s use was not a fair use because it was “commercial,” since Loew’s stressed the commercial character of the television show,<sup>215</sup> and the dissent was sure to point out that CBS and Benny were making money from “Autolight.” In most senses of that term—and there are at least four senses in which courts had previously used it—Benny’s parody was commercial.

First, “commercial” might refer to a use that directly or indirectly produces revenue, or results in a flow of money, which Benny’s and CBS’s use of Gaslight certainly did.<sup>216</sup> In rejecting the position that

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212. See Powell Memo, *supra* note 108, at 3.

213. *Id.*

214. See, e.g., *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657–58 (1943) (holding that an author’s pre-assignment of a renewal term is enforceable if she is still living at the beginning of that term). *But see Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 376 (1960) (holding pre-assignment not enforceable if she has already died). The three Justices who were on the Court for both cases flipped sides in those cases—Frankfurter was in the majority in *Fred Fisher* and in dissent in *Miller Music*, while Black and Douglas dissented in *Fred Fisher* and were in the majority in *Miller Music*. See *Fred Fisher*, 318 U.S. at 643, 659; *Miller Music*, 362 U.S. at 378.

215. Loew’s Brief, *supra* note 175, at 27–29.

216. See *id.* at 37 (citing *Associated Music Publishers, Inc. v. Debs Mem’l Radio Fund*, 141 F.2d 852, 855 (2d Cir. 1944)). The Second Circuit held that the broadcast of a musical

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monetization precluded fair use, the *CBS v. Loew*'s majority would likely have agreed with CBS that:

Like most literary criticism (which unquestionably has the right of fair use), burlesque and parodies of course are written for "commercial gain." They always have been. Even the Greeks contended for the crowns of laurel which meant financial success. . . . "Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well."<sup>217</sup>

Second, other courts constructing fair use doctrine used "commercial" to refer to a residual category of content that was not scientific, medical, legal, learned, or artistic.<sup>218</sup> A writer of a scientific treatise, for example, could be given wide latitude in quoting from an earlier scientific work because that was necessary to the progress of science, regardless of whether the writer or publisher were in it for the money.<sup>219</sup> Content that did not fall in a favored category was commercial content.<sup>220</sup> "Autolight" cannot be counted as scientific, medical, or legal, or even artistic in the undoubtedly highbrow sense in which courts used that term, and thus Douglas's opinion would likely have rejected the

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work on a nonprofit radio station was not fair use, because it "aid[ed] in building up a listening audience" and the radio station sold advertisements to companies that wanted to reach that listening audience. *Associated Music Publishers, Inc.*, 141 F.2d at 854–55. It could "make no difference that the ultimate purposes of the corporate defendant were charitable or educational" when that defendant "was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury." *Id.*

217. CBS Brief, *supra* note 173, at 38 (quoting *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys. Inc.*, 216 F.2d 945, 950 (9th Cir. 1954)). *Warner Bros.* was the relatively well known case that held that Dashiell Hammett did not infringe copyright in his own work, "The Maltese Falcon"—copyright in which he had assigned to Warner Brothers—by writing other stories featuring the character Sam Spade, because characters are only protected by copyright if they "really constitute[d] the story being told." 216 F.2d at 946, 948, 951.

218. *See Simms v. Stanton*, 75 F. 6, 17 (N.D. Cal. 1896); *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905).

219. *See Simms*, 75 F. at 17 (holding that the defendant's book on physiognomy did not infringe the plaintiff's book on the same subject, and that the use that it made of the prior book was fair use); *Sampson & Murdock Co.*, 140 F. at 541 ("With reference to [works in regard to the arts and sciences, including medical and legal works], any publication is given out as a development in the way of progress, and, to a certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped."); *Thompson v. Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950) (citing *Arnstein v. Porter*, 154 F.2d 464, 475 (2d Cir. 1946)) (holding that infringement could not be decided on summary judgment because there was a triable issue of fact as to whether the defendant's magazine "Sexology" was scientific or medical with greater fair use privileges); CBS Brief, *supra* note 173, at 23–24 (citing *Simms*, 75 F. at 17); *Loew's Brief*, *supra* note 175, at 32, 35, 41 (first citing *Simms*, 75 F. at 17; and then citing *Sampson & Murdock Co.*, 140 F. at 541).

220. *Thompson*, 94 F. Supp. at 454.

proposition that nonlearned uses were disfavored as fair uses.<sup>221</sup>

Third, under another precedent that Loew's cited prominently, "commercial" could more narrowly mean use in advertising.<sup>222</sup> Loew's argued that because The Jack Benny Show was sponsored by the American Tobacco Company, and included several advertisements for Lucky Strike cigarettes, the entire show should be treated as an advertisement, with "Autolight" being only the lure for the audience to watch the promotion of Lucky Strikes.<sup>223</sup> Here, the *CBS v. Loew's* Court would likely have noted that any promotion of cigarettes occurred during segments of the show that were clearly distinct from "Autolight." As counsel for CBS put it at oral argument:

The parody wasn't an advertisement. That's simply a new method which we have developed over the years in this country for . . . the economics of it. Television and radio operates and they produce their works of art if you want to call them that, and they are paid for by advertising sponsor, but that doesn't make what they produced commercial.<sup>224</sup>

Fourth, "commercial" might, oddly enough, mean "nontransformative," or "substitutional."<sup>225</sup> Quotation of a work in a second work that is not "bona fide criticism," because the quotation is so extensive as to substitute for the original, is "a substantial appropriation made to further one's own commercial purposes."<sup>226</sup> That approach, without the use of "commercial" to characterize a substitutional use, goes all the way back through Justice Story's opinion in *Folsom v. Marsh*.<sup>227</sup>

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221. See *Loew's Inc. v. Columbia Broad. Sys. Inc.*, 131 F. Supp. 165, 167 (S.D. Cal. 1955).

222. See *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 303 (E.D. Pa. 1938) (quoting LEON FELDERMAN, *THE HUMAN VOICE, ITS CARE AND DEVELOPMENT* 242 (1931)) (holding that a cigarette company could not advertise its wares through the unauthorized quotation of three sentences from a book on the human voice that concluded that "tobacco, when properly used, has no ill effect on the auditory passages."). Though framed as a copyright infringement case, the *Henry Holt & Co.* case had strong overtones of false endorsement, channeled into copyright before the Lanham Act made the use of a name that "deceive[s] as to . . . approval of . . . goods . . . by another person" an independent federal cause of action. 15 U.S.C. § 43(a)(1)(a) (2012); see *Conde Nast Publ'n v. Vogue Sch. of Fashion Modelling*, 105 F. Supp. 325, 333 (S.D.N.Y. 1952) (holding that the defendants' reproduction of the plaintiff's magazine covers in promotional brochure for the plaintiff's business was for a commercial purpose and not fair use).

223. Loew's Brief, *supra* note 175, at 2–3.

224. Oral Argument, *supra* note 88, at 38:50.

225. See *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (D. Mass. 1841) (No. 4901).

226. Loew's Brief, *supra* note 175, at 38.

227. See 9 F. Cas. at 344–45 ("On the other hand, it is as clear, that if [a reviewer] thus cites the most important parts of the work, with a view, not to criticise [sic], but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.").

It stretches the meaning of “commercial” to equate it with “substitutional,” and the *CBS* Court might have said so.

Any rejection in *CBS* of a distinction within fair use doctrine between commercial and noncommercial uses would likely have carried through to *Williams & Wilkins*. As noted above, Justice Powell’s memo did not propose to exonerate or favor government library photocopying as a fair use because it was noncommercial.<sup>228</sup> Rather, he proposed holding that the photocopying was infringing, but that as noncommercial infringement, was not subject to statutory damages.<sup>229</sup> He likely would have drawn a commercial/noncommercial distinction, but only as a matter of remedy, not as a matter of liability.<sup>230</sup> Thus, immediately after *CBS* and *Williams & Wilkins*, there would have been little or no distinction drawn within fair use doctrine between commercial and noncommercial uses.

*C. 2017: Would CBS and Williams & Wilkins Have Had Lasting Impact?*

Lastly, let us consider the path of fair use doctrine from 1975 to the present: if the Supreme Court had decided *CBS* and *Williams & Wilkins* as I suggest they would have, would copyright law and fair use doctrine look different in 2017 than it actually does? That question can be divided into two parts. First, how different is fair use doctrine in 2017 than it would be under the hypothetical *CBS* and *Williams & Wilkins* decisions? Second, to the extent that it is different, how likely is it that fair use doctrine would have moved in the direction of its present state after 1975, and how likely is it that it would have taken a different path?

*1. Comparing Fair Use in CBS and Williams & Wilkins with Fair Use Today.*

As for the first question, there are some definite differences between the fair use doctrine of *CBS* and *Williams & Wilkins* and the fair use doctrine we know today. First, of course, there *is* a fair use doctrine separate from initial infringement analysis, framed procedurally as an affirmative defense—the fair use factors are not part of a unified infringement analysis as *CBS* might have made them.<sup>231</sup>

Second, fair use doctrine as we know it today has a “dissemination side,” born with the first fair use case that the Supreme Court actually

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228. Powell Memo, *supra* note 108, at 6.

229. *Id.*

230. *See id.* at 4.

231. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 608 (1985).

decided.<sup>232</sup> In *Sony Corporation of America v. Universal City Studios*, the Court held that when private individuals made copies of audiovisual works broadcast on television for purposes for viewing them at a later time—“time-shifting”—they were making fair uses of those works.<sup>233</sup> *Sony’s* shadow may not have been large enough to protect private copying in the context of file-sharing systems,<sup>234</sup> but it was large enough to dictate the design of the “remote storage digital video recorder” at issue in *Cartoon Network LP v. CSC Holdings, Inc.*, and to deter the parties from litigating whether subscribers’ use of that system was fair use, or whether the defendant had any contributory liability that would depend on the subscribers being directly liable.<sup>235</sup> Similarly, the dissemination side of fair use opened up by *Sony* was not broad enough to protect the copy shop serving college students in *Princeton University Press v. Michigan Document Services, Inc.*,<sup>236</sup> but it supported successful claims of fair use in seventy of seventy-five instances considered by the district court in the university intranet case of *Cambridge University Press v. Becker*.<sup>237</sup> The most recent straightforward application of *Sony*-inspired dissemination-side fair use was in *Author’s Guild, Inc. v. HathiTrust*, in which the Second Circuit ruled that verbatim copying of complete works to provide access to the print-disabled was fair use—a classic “dissemination-side” situation in which the particular type of dissemination in question is critically important and is unlikely to diminish the incentive to create any specific work or type of work.<sup>238</sup> In addition, clever litigants and courts have used creation-side rhetoric to bolster dissemination-side fair use, and perhaps to erode the distinction, as “transformative use” has expanded into “transformative purpose.”<sup>239</sup> “Transformative purpose” has been used to justify verbatim copying of complete works in order to provide full-text search of those works,

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232. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 485–86 (1984).

233. *Id.* at 449–50.

234. *See, e.g.*, *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1070 (9th Cir. 2001) (affirming the district court’s holding that copying of sound recordings by private individuals using Napster’s peer-to-peer system was not fair use, and was “commercial” because it substituted for the purchase of those copies).

235. *See id.* at 123–24 (noting that the defendants waived any defense based on fair use, and that the plaintiffs refrained from alleging theories of contributory infringement).

236. 99 F.3d 1381, 1392 (6th Cir. 1996) (holding the defendant copy shop liable for copyright infringement for making “coursepacks” containing excerpts of works under copyright for college student use).

237. 863 F. Supp. 2d 1190, 1363–64 (N.D. Ga. 2012).

238. *See* 755 F.3d 87, 103 (2d Cir. 2014).

239. *See* Jane C. Ginsburg, *Copyright 1992–2012: The Most Significant Development?*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 465, 488 (2013).

viewing of “snippets” of text surrounding the search terms,<sup>240</sup> and plagiarism detection.<sup>241</sup>

Third, *Sony* also granted Supreme Court imprimatur to a fair use distinction between commercial and noncommercial uses by developing a presumption that split along those lines:

[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . . [N]oncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.<sup>242</sup>

To be sure, the principal function of the distinction may have been to legitimize noncommercial, dissemination-side fair use. Moreover, the Court substantially softened the distinction in *Campbell*, in which it remarked that if “commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107,” because they “are generally conducted for profit in this country.”<sup>243</sup> More broadly, *Campbell* represents Supreme Court sanction of creation-side fair use, immediately inspired by the Pierre Leval article that coined the term “transformative use,”<sup>244</sup> but in a lineage that includes Justice Blackmun’s dissent in *Sony*, Justice Powell’s memo in *Williams & Wilkins*, and the comments of Zechariah Chafee that could have ended up being cited by a *CBS* Court.<sup>245</sup>

However, *Campbell* did not overrule *Sony*, and courts now routinely consider whether a use is commercial or noncommercial, as well whether it is transformative or nontransformative, when evaluating fair use claims.<sup>246</sup> Some uses are deemed not to be fair in some substantial part because they are commercial;<sup>247</sup> other uses are deemed to be fair largely

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240. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216–17 (2d Cir. 2015); *HathiTrust*, 755 F.3d at 98 (citing *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013)).

241. *A.V. v. iParadigms, LLC*, 562 F.3d 630, 639–40 (4th Cir. 2009).

242. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

243. 510 U.S. 569, 584 (1994) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 592 (1985)).

244. *Id.* at 579; Leval, *supra* note 165, at 1127.

245. *See* 464 U.S. at 481–82 (Blackmun, J., dissenting); Powell Memo, *supra* note 108, at 8; CBS Brief, *supra* note 173, at 22 (quoting Zechariah Jr. Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945)).

246. D.R. Jones, *Commerciality and Fair Use*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 620, 622 (2015).

247. *See* *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012) (first citing *Sony*, 464 U.S. at 451; and then citing *Harper & Row Publishers*, 471 U.S. at 562).

because they are noncommercial.<sup>248</sup> Entire distribution systems are designed to focus attention on a noncommercial user, to try to shield the companies that are running the systems from infringement liability.<sup>249</sup> Thus, fair use doctrine today is different than it would have been just after Supreme Court decisions in *CBS* and *Williams & Wilkins*, which would possibly have collapsed fair use into a unified infringement analysis, and in any event would have focused on “creation-side” fair use with little or no “commercial or noncommercial” distinction.

*2. Would Fair Use Have Moved Toward Today’s Doctrine After CBS and Williams & Wilkins?*

Would the effects of the Supreme Court decisions in *CBS* and *Williams & Wilkins* still be reverberating today? Answers to that question are more likely to reveal historiographical prejudices than tight causal chains. Those who are inclined to believe that legal systems tend to produce efficient rules could imagine corrections from any temporarily inefficient holdings.<sup>250</sup> The *Campbell* Court corrected *Sony*’s tilt away from creation and commerciality; some other case would have corrected *Williams & Wilkins*’s tilt away from useful, harmless dissemination.<sup>251</sup> Those who are inclined to believe in path dependence in law can more easily imagine lingering effects of the Supreme Court decisions in *CBS*

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248. See, e.g., *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1224 (N.D. Ga. 2012) (first citing *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991); then citing *Princeton Univ. Press v. Mich. Document Servs., Inc.* 99 F.3d 1381, 1388–89 (6th Cir. 1996); and then citing *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)) (“Because Georgia State is a purely nonprofit, educational institution and the excerpts at issue were used for purely nonprofit, educational purposes, this case is distinguishable from *Kinko’s*, *Michigan Document Services*, and *Texaco*.”).

249. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008) (concerning Cablevision’s Remote Storage-Digital Video Recorder system, which is configured to automatically implement subscribers’ instructions to create copies of television programs on Cablevision’s server—one copy for each requesting subscriber—thus mimicking the home video recorders at issue in *Sony*); *Am. Broad. Co. v. Aereo, Inc.*, 134 S. Ct. 2498, 2500 (2014) (concerning Aereo’s system for receiving broadcast television programs, making copies of them, and transmitting them over the Internet to subscribers, using separate antennas and copies for each subscriber, and thus mimicking the individual television sets and home video recorders at issue in *Sony*).

250. On the movement of common-law systems toward efficient rules, see Richard Posner, *Economic Analysis of Law* 315–20 (8th ed. 2011); Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 *Ga. J. Int’l & Comp. L.* 307, 309 (2012); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 *J. Legal Stud.* 393, 393 (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. Legal Stud.* 65, 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 *J. Legal Stud.* 51, 51 (1977).

251. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing *Sony*, 464 U.S. at 455).



and *Williams & Wilkins*.<sup>252</sup>

Here I cannot hope to trace any causal chain forward from 1975 to 2017. What I would like to do instead is focus on two moments after 1975 that might have been turning points: pre-passage amendments to § 107 of the 1976 Act, and the *Sony* case and its reasoning.

As mentioned above, the Copyright Revision Study on fair use was undoubtedly held pending announcement of the decision in *CBS*, and an opinion of the Court in that case could have influenced the approach taken in that study.<sup>253</sup> The first articulation of the four factors now enshrined in § 107 followed shortly thereafter, in the July 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*.<sup>254</sup> The first factor, the “purpose of the use,” became the “purpose and character of the use” in the first formal draft of the new copyright law, released in 1964.<sup>255</sup> Conceivably, language like “transformative” or “productive,” if featured in a *CBS* decision, could have made it into the articulation of that first factor. But of course, there was no *CBS* decision, and thus “the purpose and character of the use” became the wording that persisted through numerous drafts, hearings, and bills, all the way until March 1976.<sup>256</sup> That’s when an additional clause was spliced into § 107(1): “The purpose and character of the use, *including whether such use is of a commercial nature or is for nonprofit educational purposes . . .*”<sup>257</sup> That additional language, added in committee at the eleventh hour without any hearings or other vetting, stemmed from the negotiations between publishers and educational institutions that also produced the addition of “educational (including multiple copies for classroom use)” to the list of illustrative uses in the first sentence of § 107, and the “Classroom

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252. For discussions of path dependence in law, see John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787, 787 (2013); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001); Craig LaChance, *Nature v. Nurture: Evolution, Path Dependence and Corporate Governance*, 18 ARIZ. J. INT’L & COMP. LAW 279, 281 (2001); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996).

253. LATMAN, *supra* note 158, at 9–10.

254. REGISTER OF COPYRIGHTS, 87TH CONG., *supra* note 162, at 24.

255. *Id.*; COPYRIGHT LAW REVISION, 88TH CONG., PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT 6 (Comm. Print 1964).

256. *See* REGISTER OF COPYRIGHTS, 87TH CONG., *supra* note 162, at 24; *see also* COPYRIGHT LAW REVISION, 88TH CONG., *supra* note 254, at 6.

257. 17 U.S.C. § 107(1) (2012) (emphasis added). It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012) (citing *Harper & Row Publishers v. National Enters.*, 471 U.S. 539, 562 (1985)).

Guidelines” that were included in the House Report on the 1976 Act.<sup>258</sup> Educators wanted a specific exception in the Copyright Act for educational uses; this is what they got instead.<sup>259</sup> As Bill Patry has put it, the reference to commercial uses was made “only to make the gesture to educators less obvious.”<sup>260</sup> One can easily imagine that the late, somewhat capricious reference to “commercial nature” of a use could have been precluded by a *CBS* decision that rejected commerciality as a factor in fair use inquiry, and a *Williams & Wilkins* decision that placed a commercial or noncommercial distinction outside of fair use, in the doctrine relating to remedies. Thus, § 107 could have passed without any language suggesting that commercial uses were to be disfavored, or noncommercial uses favored.

Four years after the 1976 Act took effect, *Sony* reached the Supreme Court.<sup>261</sup> It may be the single strangest quirk in the history of fair use doctrine that the first time the Supreme Court addressed fair use, in its 1984 *Sony* decision, happened also to be the very first fair use litigation in which the defendant alleged to be directly liable was a private individual acting purely for his own enjoyment.<sup>262</sup> Fair use doctrine had developed in dozens of lower court decisions, and the defendants in every one of them were companies or individuals pursuing business or professional goals.<sup>263</sup> In many of those cases, the commercial character of the defendant’s use simply wasn’t mentioned, because it was taken for granted that copyright litigants were business entities.<sup>264</sup> The *Sony* Court

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258. H.R. REP. NO. 94-1476, at 5, 68 (1976).

259. *See id.*

260. WILLIAM F. PATRY, PATRY ON FAIR USE § 3.3 (2014). Patry continues: “It is the greatest of ironies that a cosmetic amendment intended purely as a political gesture to nonprofit educators has been misconstrued both as a statement of the nature of the factor as a whole, and a judgment by Congress that commercial uses . . . are to receive unfavorable treatment.” *Id.* The House Report makes the nature of the gesture even clearer, by stating that “[t]his amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works.” H.R. REP. NO. 94-1476, at 5, 68 (1976). The real object was to protect educational uses, whether nonprofit or for-profit, not to disfavor commercial uses. *See id.*

261. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417 (1984).

262. *Id.*; *see* Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 651, 656–57 (2015) (“[*Sony*] was . . . the first suit seeking to hold a manufacturer of a device liable for facilitating allegedly infringing behavior by millions of consumers in their homes.”).

263. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1663 (1988) (“Until recently, the lower federal courts molded the fair use doctrine without meaningful guidance from the Supreme Court.”); *cf. Campbell at 21/Sony at 31*, *supra* note 262, at 656–57 (noting that *Sony* was the first suit involving individuals).

264. *See, e.g., Sony*, 464 U.S. at 495–96 (Blackmun, J., dissenting) (“Purely consumptive uses are certainly not what the *fair use* doctrine was designed to protect.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S., 151, 156 (1975) (“The immediate effect of our copyright law

was free to ignore that because it happened to be considering fair use in the only case to date that featured a direct-liability defendant who was a private individual engaged in copying for his own enjoyment.<sup>265</sup>

A decision in *Loew's Inc.* that emphasized transformation over commerciality, and a decision in *Williams & Wilkins* that rejected an appeal to the noncommercial status of the defendant libraries, would almost certainly have made *Sony* a narrower decision. At its heart, *Sony* was about private or home copying—copying by individuals during their leisure time, typically taking place at home—a far narrower concept than noncommercial copying, which could include copying by nonprofit organizations and governments engaged in educational, research, archival, charitable, and other missions.<sup>266</sup> A *Sony* that followed on the heels of *Williams & Wilkins* would have had to limit itself to that narrower context, and would probably not have been able to create a distinction between commercial and noncommercial uses with such broad strokes.

Moreover, as is well known, the entire case turned on Justice O'Connor's views. Between *Williams & Wilkins* and *Sony*, the Supreme Court had seen the replacement of two Justices—John Paul Stevens had replaced William O. Douglas, and Sandra Day O'Connor had replaced Potter Stewart.<sup>267</sup> Douglas had of course voted for the copyright defendant in *Williams & Wilkins*, and Stewart had voted for the plaintiff.<sup>268</sup> Stevens would turn out to have a broad vision of fair use, as Douglas did.<sup>269</sup> But how would O'Connor vote? She initially voted against fair use in *Sony*, believing that Congress had not exempted home videotaping from copyright infringement,<sup>270</sup> only to slowly come around

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is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”) (emphasis added)); *Benny v. Loew's Inc.*, 239 F.2d 532, 536 (9th Cir. 1956) (“The so-called doctrine of fair use . . . appears in cases in federal courts having to do with compilations, listings, digests, and the like.”), *aff'd by an equally divided court sub non*, *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

265. *Sony*, 464 U.S. at 420 (1984) (majority opinion).

266. *Id.*

267. *Reagan's Nomination of O'Connor*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/features/oconnor.html> (last updated Aug. 15, 2016); Jeffrey Toobin, *After Stevens: What Will The Supreme Court Be Like Without Its Liberal Leader?*, NEW YORKER (Mar. 22, 2010), <https://www.newyorker.com/magazine/2010/03/22/after-stevens>; 'Out of Order' At The Court: O'Connor On Being The First Female Justice, NPR (Mar. 5, 2013, 2:00 PM), <http://www.npr.org/2013/03/05/172982275/out-of-order-at-the-court-oconnor-on-being-the-first-female-justice>.

268. Douglas Conference Notes, *supra* note 36.

269. *See Sony*, 464 U.S. at 454–55.

270. Jessica Litman, *The Story of Sony v. Universal Studios: Marry Poppins Meets the Boston Strangler*, in INTELLECTUAL PROPERTY STORIES 358, 367 (Jane C. Ginsburg &

to the view that fair use should encompass some unproductive uses as well as productive uses, even if the productive character of a use would weigh in favor of fair use.<sup>271</sup> However, if *Williams & Wilkins* had left little room for unproductive uses in fair use doctrine, and Congress had not specifically altered that conclusion in the 1976 Act, Justice O'Connor might well have stuck with her initial vote—particularly if the 1976 Act, following the Powell memo in *Williams & Wilkins*, had left the Court some room for tinkering with the remedy, so that Sony would not be faced with staggering statutory damages for its secondary liability.<sup>272</sup> If *Sony* had found infringement, but did not impose statutory damages, conditions might have been more ripe for interested parties to coalesce around a levy scheme, which was proposed but never made it to a vote in the Senate during the *Sony* litigation,<sup>273</sup> and which in the meantime has been adopted for a narrow category of devices and media in the Audio Home Recording Act of 1992, and has been adopted more broadly in many other countries.<sup>274</sup>

#### CONCLUSION

The Supreme Court's involvement in *CBS v. Loew's, Inc.* and *Williams & Wilkins Co. v. United States* will remain a footnote in copyright history, because recusals led to deadlocks in both cases, and the lower court decisions were affirmed without comment.<sup>275</sup> Because of the deadlocks, the Supreme Court lost an opportunity to weigh in on fair use during the drafting of the Copyright Act of 1976, and therefore had no influence on the structure or content of § 107. The absence of Supreme Court decisions in those cases, however, has at least one advantage; it has given me, and now I hope you as well, the opportunity to consider

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Rochelle Cooper Dreyfuss eds., 2006).

271. *Sony*, 464 U.S. at 454–55.

272. *The Story of Sony v. Universal Studios: Marry Poppins Meets the Boston Strangler*, *supra* note 270, at 366–67 n.28 (noting that Sony might well be liable for statutory damages or profits as a contributory infringer).

273. Home Recording Act of 1983, S. 31, 98th Cong. (1983), <https://www.congress.gov/bill/98th-congress/senate-bill/31/all-actions> (indicating that the last action taken on the Home Recording Act of 1983 was a referral to a subcommittee on October 25, 1983).

274. Audio Home Recording Act of 1992, Pub. L. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–10 (1992 & 2012)); *see generally* WORLD INTELLECTUAL PROP. ORG., INTERNATIONAL SURVEY ON PRIVATE COPYING: LAW AND PRACTICE (2012), [http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo\\_pub\\_1037\\_2013.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo_pub_1037_2013.pdf) (comparing private copying compensation systems internationally).

275. 420 U.S. 376, 376 (1975) (affirming the lower court's holding after Justice Blackmun's recusal); 356 U.S. 43, 43 (1958) (affirming the lower court's holding after Justice Douglas's recusal).

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whether the recusals were valid; how the cases would have turned out had they been decided; and how they might have changed the course of copyright law, for better or worse.