

Intellectual Property

This section takes up intellectual property: rights governing the ownership of information. There is no one distinctive set of doctrines governing all intellectual property in the same way that the law of finders applies to all (well, most) personal property or the law of trespass applies to all (well, most) real property. Instead, the name “intellectual property” is a catch-all used to group several related sets of legal rights, each of which gives the rightsholder an exclusive right to use certain information in certain ways. A defendant who uses that information in that way without the rightsholder’s permission is said to be an *infringer*.

It is common, and in some respects accurate, to describe the rightsholder as the “owner” of the information, but keep in mind that only certain specified uses count as infringement. There is no body of intellectual property law that prohibits possessing or thinking about information, for example. Instead, different bodies of intellectual property law restrict different kinds of uses. In each case, the scope of the owner’s rights is closely tied to what kinds of information that body of law protects and to the rules governing when someone becomes a rightsholder. The latter is a familiar question: just as first possession gives initial title to personal property, and conquest is at the root of title to real property, creation can provide intellectual property rights. But the former is a new kind of question; we have taken it largely for granted that land is proper subject matter for real property and other tangible things are proper subject matter for personal property. Intellectual property is different, because not every kind of information qualifies. In copyright, for example, processes are not proper subject matter: as a consequence, the list of ingredients in a recipe and the steps for combining them are not copyrightable – even if they meet all of copyright law’s other requirements.

Learning a body of intellectual property law, therefore, requires learning its subject matter, its rules of initial ownership, and its rules of infringement. In this section, we will focus on copyrights and patents, and ignore other forms of intellectual property, including trademarks, trade secrets, rights of publicity, and design patents. Here is a brief overview of copyright and patent:

- Federal **copyright law** protects “original works of authorship,” like novels, biographies, songs, screenplays, paintings, blueprints, and sculptures. Copyright law

has a very low threshold for protection: a work must be original (not copied from someone else); it must also display a “modicum of creativity” and have been written down (“fixed in a tangible medium of expression”). The copyright so obtained is valid during its author’s lifetime, and for the next seventy years after that. It gives copyright owners the exclusive right to reproduce their works, to make adaptations of them, to distribute them to the public, and to perform or display them publicly – but this right only applies against people who copy from the owner. Someone who independently and coincidentally comes up with similar expression is an author in her own right, not an infringer. Below, for example, are two photographs of the same iceberg, taken by different photographers from nearby locations at almost exactly the same time. Neither infringes on the other.



Left: Sarah Scurr. Right: Marisol Ortiz Elfeldt

- Federal **patent law** protects “any new and useful process, machine, manufacture, or composition of matter.” Examples include mechanical devices like tractor plows and can openers, chemical processes used to refine oil, pharmaceutical products like anti-HIV drugs, and, a little infamously, a “Method and apparatus for automatically exercising a curious animal” by encouraging it to chase a laser pointer. *See* U.S. Pat. No. 6,701,872. To obtain a patent, an inventor must go through a detailed and expensive application process, which involves convincing the U.S. Patent and Trademark Office (USPTO) that her invention is genuinely new (“novel”), that it represents a sufficient advance on previous inventions (that it be “nonobvious”), and that it has some practical use in the world, however slight (“utility”). She must also disclose to the public, in detail, how her invention works and how best to use it. Once the USPTO issues a patent, it gives the owner the exclusive right for twenty years (from the date she filed her application with the USPTO) to make, use, offer to sell, or sell the invention.

Feist Publications, Inc. v. Rural Telephone Service Co.

499 U.S. 340 (1991)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

[Feist published a telephone directory, containing both white and yellow pages, covering a much larger geographic area. It contained 46,878 white-pages listings. Feist requested a license to Rural's listings; Rural refused.]

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees

were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed

II

A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. ...

The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. *Id.*, § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. ...

Originality is a constitutional requirement. The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.” In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U. S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (1884)—this Court defined the crucial terms “authors” and “writings.” In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality. ...

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." Nimmer, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. ...

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. ...

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. ...

B

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement. ...

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in *Jeweler's Circular Publishing Co.*, 281 F., at 88:

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than

industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author” (emphasis added).

... Without a doubt, the “sweat of the brow” doctrine flouted basic copyright principles. Throughout history, copyright law has “recognize[d] a greater need to disseminate factual works than works of fiction or fantasy.” *Harper & Row*, 471 U. S., at 563. But “sweat of the brow” courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. ...

C

... In enacting the Copyright Act of 1976, Congress dropped the reference to “all the writings of an author” and replaced it with the phrase “original works of authorship.” 17 U. S. C. § 102(a). ...

As discussed earlier, however, the originality requirement [for compilations] is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i. e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. Such works are incapable of sustaining a valid copyright. ...

In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not “sweat of the brow,” is the touchstone of copyright protection in directories and other fact-based works. ... The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101. ...

III ...

The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly “select” to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution. ...

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning

Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, “great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.” *Baker v. Selden*, 101 U. S., at 105.

Campbell v Acuff-Rose Music

114 S.Ct. 1164 (1994)

Justice SOUTER delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976.

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc. Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work...." On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew's song. Acuff-Rose's agent refused permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" Nonetheless, in June or July 1989, 2 Live Crew released records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs entitled "As Clean As They Wanna Be." The albums and compact discs identify the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose. Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement.

II

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff–Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts..." U.S. Const., Art. I, § 8, cl. 8. For as Justice Story explained, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson v. Davies*, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass.1845). [F]air use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, [which contains the following section]:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of 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.

Congress meant § 107 “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way” and intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236, 110 S.Ct. 1750, 1767, 109 L.Ed.2d 184 (1990). The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.

A

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1). The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation, *Folsom v. Marsh*, *supra*, at 348; accord, *Harper & Row*, *supra*, 471 U.S., at 562, 105 S.Ct., at 2231 (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

[P]arody has an obvious claim to transformative value, as Acuff–Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson’s Court of Appeals dissent, as “a song sung alongside another.” 972 F.2d, at 1440, quoting 7 *Encyclopedia Britannica* 768 (15th ed. 1975). Modern dictionaries accordingly describe a parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the

original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred. The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." *Harper & Row, supra*, at 592, 105 S.Ct., at 2246 (Brennan, J., dissenting).

B

The second statutory factor [is] "the nature of the copyrighted work." This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the

fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” § 107(3) are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist’s justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives.

Parody presents a difficult case. Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original’s most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing “scrapper” noise, overlaying the music with solos in

different keys, and altering the drum beat. This is not a case, then, where “a substantial portion” of the parody itself is composed of a “verbatim” copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that “no more was taken than necessary,” but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original’s “heart.” As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song’s parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

D

The fourth fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.” § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market” for the original. The enquiry “must take account not only of harm to the original but also of harm to the market for derivative works.”

[When] the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions. We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because “parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,” the role of the courts is to distinguish between “[b]iting criticism [that

merely] suppresses demand [and] copyright infringement[, which] usurps it.” Fisher v. Dees, 794 F.2d, at 438.

III

We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

“Oh, Pretty Woman” by Roy Orbison and William Dees

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you
Mercy
Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?
Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty Woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight
Pretty Woman, don't walk on by,
Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,

Hey, O.K.
If that's the way it must be, O.K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

APPENDIX B TO OPINION OF THE COURT

“Pretty Woman” as Recorded by 2 Live Crew

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It'
Big hairy woman
Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice
Bald headed woman here, let me get this hunk of biz for ya
Ya know what I'm saying you look better than rice a roni
Oh bald headed woman
Big hairy woman come on in
And don't forget your bald headed friend
Hey pretty woman let the boys
Jump in

Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind
Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

The Natural Rights Theory of Property

John Lock, Two Treatises on Government (3rd ed. 1698)

Though the earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, as least where there is enough, and as good left in common for others.

He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. . . . And will anyone say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.

As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. . . . Nor was this appropriation of any parcel of land, by improving it, any prejudice [harm] to any other man, since there was still enough and as good left [for others].

The Personhood Perspective on Property

Margaret Jane Radin, *Property and Personhood* (1982)

This article explores the relationship between property and personhood.... The premise underlying the personhood perspective is that to achieve proper self-development – to be *a person* – an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement... For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo – perhaps no amount of money can do so.

The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value.... The archetype of such a good is, of course, money, which is almost always held only to buy other things.

A person cannot be fully a person without a sense of continuity of self over time. To maintain that sense of continuity over time and to exercise one's liberty or autonomy, one must have an ongoing relationship with the external environment, consisting of both "things" and other people.... One's expectations crystallize around certain "things," the loss of which causes more disruption and disorientation than does a simple decrease in aggregate wealth. For example, if someone returns home to find her sofa has disappeared, that is more disorienting than to discover that her house

has decreased in market value by 5%. If, by magic, her white sofa were instantly replaced by a blue one of equal market value, it would cause no loss in net worth but would still cause some disruption in her life.

The Economic Perspective on Intellectual Property and Fair Use

Wendy Gordon, *Fair Use as Market Failure* (1982)

Copyright and patent law create ownership rights in intellectual property, with the primary goal of generating monetary incentives for the production of creative works, thereby “promot[ing] the Progress of Science and useful Arts.” If the creators of intellectual productions were given no rights to control the use made of their works, they might receive few revenues and thus would lack an appropriate level of incentive to create. Fewer resources would be devoted to intellectual productions than their social merit would warrant.

Economists ordinarily characterize intellectual property law as an effort to cure a form of market failure stemming from the presence of “public goods” characteristics. A public good is often described as having two defining traits. First, it is virtually inexhaustible once produced, in the sense that supplying additional access to new users would not deplete the supply available to others. Second, and more important for the instant purposes, persons who have not paid for access cannot readily be prevented from using a public good. Because it is difficult or expensive to prevent “free riders” from using such goods, public goods usually will be under-produced if left to the private market. A familiar example of a public good is national defense. Since it is not possible to use a radar early-warning network in a way that discriminates between one person who has paid for defense and his neighbor who has not, a less than optimal amount of national defense will be produced if its purchase is left to the usual consensual market mechanisms of voluntary purchase. Some sort of compulsory payment, such as taxation, and central decision-making may be necessary to eliminate free riders and obtain the socially desirable amount of defense.

Books and inventions exhibit certain public goods characteristics. Once the literary work or the discovery embodied in the invention is made available to the public, the sequence of words or the discovery might be used by countless consumers without exhausting the supply. Any number of persons can simultaneously use the newly invented process or reprint the literature without physically depriving others of its use. Physical control, therefore, does not offer its usual potential as a mode of inexpensive enforcement for excluding free riders.

Though taxation and centralized purchasing might provide a satisfactory solution for some public goods problems, such an approach is inappropriate for much intellectual property. A democratic society demands decentralized and diverse creation in the intellectual sphere; freedom from state control is essential lest freedom of expression be curtailed by fear of governmental reprisal. Thus, for works of expression, the public goods problem is addressed by another method. Statutes create special property rights for authors; they can sell the physical copies of their works and at the same time retain legal control over the reproduction and certain other uses of the work embodied in those copies. In other words by the law provides a means for excluding nonpurchasers. Copyright law therefore allows a market for intellectual property to function.

Copyright markets will not, however, always function adequately. [A]t times bargaining may be exceedingly expensive or it may be impractical to obtain enforcement against nonpurchasers, or other market flaws might preclude achievement of desirable consensual exchanges. In those cases, the market cannot be relied on to mediate public interests in dissemination and private interests in remuneration. Fair use is one label courts use when they approve a user's departure from the market. A useful starting place for analysis of when fair use is appropriate is therefore an identification of when flaws in the market might make reliance on the judiciary's own analysis of social benefit appropriate.

Fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner. The first element of this test ensures that market bypass will not be approved without good cause. The second element of the test ensures that the transfer of a license to use from the copyright holder to the unauthorized user effects a net gain in social value. The third element ensures that the grant of fair use will not undermine the incentive-creating purpose of the copyright law. The test will now be explored in detail.

[Three reasons for market failure:]

[Transactions costs] A particular type of market barrier [i.e. market failure] is transaction costs. As long as the cost of reaching and enforcing bargains is lower than anticipated benefits from the bargains, markets will form. If transaction costs exceed anticipated benefits, however, no transactions will occur. Thus, the confluence of two variables is likely to produce a market barrier: high transaction costs and low anticipated profits.... This may explain why the “personal,” “individual” nature of copying has been held relevant to fair use, and why “home use” may be relevant to the reach of copyright law. Consider, for example, the impact of the photocopy machine or the tape recorder. Each makes it possible for individuals to make use of copyrighted works in new and potentially valuable ways. From the point of view of the individual user, the anticipated “profit” is likely to be small, so his use will be easily discouraged by transaction costs. From the point of view of the copyright owner, the costs of enforcement against a diffuse group of individuals might outweigh anticipated receipts. A custom of use without payment will easily arise in such contexts unless the transaction costs of seeking permission or of enforcement are in some way reduced.

Externalities, Nonmonetizable Interest, and Noncommercial Activities. An analysis of the limitations of markets can also illuminate the special status that certain uses, such as scholarship, have in fair use tradition. The costs and benefits of the parties contracting for the uses often differ from the social costs and benefits at stake, so that transactions leading to an increase in social benefit may not occur. Thus, for example, a critic of the Warren Commission’s investigation of the Kennedy assassination might write a “serious, thoughtful and impressive” book that will further public interest more than the revenues of his book alone would indicate. One might say that publication of his book gives an “external benefit” to persons who might gain knowledge from the public debate sparked by the book without having purchased the book itself. Similarly, teaching and scholarship may yield significant “external benefits”; all of society benefits from having an educated citizenry and from advances in knowledge, yet teacher salaries and revenues from scholarly articles are arguably smaller than such benefit would warrant. When a defendant’s works yield such “external benefits,” the market cannot be relied upon as a mechanism for facilitating socially desirable transactions.

In cases of externalities, then, the potential user may wish to produce socially meritorious new works by using some of the copyright owner's material, yet be unable to purchase permission because the market structure prevents him from being able to capitalize on the benefits to be realized. Though such inability would not itself justify fair use, it may signal to the court that it should investigate whether the social costs of relying on the market are unacceptably high. It is therefore not surprising that section 107 of the Copyright Act, which addresses fair use, lists several uses that potentially exhibit positive externalities, such as "teaching," "scholarship," and "research," among the uses for which fair use may be given.

Anti-Dissemination Motives. Section 107 places first among the purposes for which fair use is appropriate "criticism" and "comment," uses that a copyright owner might be reluctant to license. Similarly, the treatment of burlesques and satires, which can be considered types of commentary, has been a volatile subject of fair use law. These uses share a type of market failure that helps to explain their fair use treatment and that is particularly important in a field where advancement of knowledge is the ultimate goal. The case law has tended to grant fair use treatment where copyright owners seemed to be using their property right not for economic gain but to control the flow of information.

The usual economic assumption is that the owner of a resource will either exploit that resource himself, or will sell it to someone else who will. The owner of a copyright, however, may not be willing to exploit all of the possible derivative works over which his copyright would ordinarily give him control. Even if money were offered, the owner of a play is unlikely to license a hostile review or a parody of his own drama; a publicity-shy tycoon who owns the copyright on magazine articles discussing his life is unlikely to license a biographer to use these articles; a candidate for governor is unlikely to license his copyrighted campaign music to be utilized in his opponent's televised advertisement; and the publisher of a periodical is unlikely to license his competitor to use his copyrighted magazine covers in comparative advertising. Because the owner's antidissemination motives make licensing unavailable in the consensual market, and because the free flow of information is at stake, a strong case for fair use can be advanced in these cases. Thus, it has often been suggested that

burlesques and satires of copyrighted works deserve generous fair use treatment, since the copyright owners are unlikely to produce or license such work themselves.

Notes and Questions

1. Do you agree with the *Feist* decision as a matter of law and/or policy? Which theories of property rights – Natural Rights, Personhood, Economic (Demsetz and/or Gordon) -- would support property rights for Rural’s white pages? Which would not?

For Questions 2-4, consider whether the following works satisfy the “originality” requirement for copyright protection as set out in *Feist*. Also, do you think that, as a matter of policy or theory, they should be protected by copyright law? Be sure to consider the theories mentioned above -- Natural Rights, Personhood, and Economic.

2. A translation of Homer’s *Iliad*.
3. Your civil procedure, contracts, or torts textbook.
4. Google’s database of streets, stores, mountains and other geographic features. That is, the information (data) behind Google Maps.
5. Do you agree with the *Campbell* decision as a matter of law and/or policy? Which theories– Natural Rights, Personhood, Economic (Demsetz and/or Gordon) -- would support 2 Live Crew’s right to use aspects of *Oh, Pretty Woman*? Which would support Acuff–Rose Music’s right to enforce its copyright?
6. Suppose a court decided that Acuff-Rose Music had the right to enforce its copyright. What would be the appropriate remedy? Damages measured by the harm to Acuff-Rose’s sales of *Oh, Pretty Woman*? Damages measured by 2 Live Crew’s profits from its parody? An injunction barring 2 Live Crew from future performance and sale of their parody? A combination of two or more of these remedies?

For Questions 7-13, consider whether the following actions would qualify as fair use. In evaluating these actions, consider the statutory factors in Copyright Act § 107 (quoted in the *Campbell* decision), the Supreme Court’s interpretation of these factors

in *Campbell*, and the three-part test set out in Wendy Gordon's article. In all of these examples, assume that the actions were done without permission of the copyright holder.

7. Someone writes a highly critical book review, in which she quotes several full paragraphs from the book being reviewed.
8. A faculty assistant photocopied excerpts from an article by Demsetz on property rights for distribution to a 1L class.
9. You use a DVR (digital video recorder) or VCR (video-cassette recorder) to record over-the-air broadcast television. Would it matter if the DVR or the VCR had a feature that allowed users to fast-forward or skip through commercials?
10. A company purchases scientific journals and keeps the bound volumes in its library. When employees want to read an article, the library photocopied the requested article and delivers it to the employee.
11. James "Mad Dog" Mattis is fired by President Trump and decides to write a book about his time in the Trump Administration. The New York Times obtains a leaked draft of the book and publishes two full newspaper pages of excerpts. The excerpts contain what the New York Times editors believe are the most important parts of the book.
12. A rap musician "samples" music from a classic Beatle's album and uses it in her latest album.
13. A Harry Potter fan publishes an Encyclopedia of Harry Potter. Many entries include quotations from the Harry Potter books.
14. Locke argues that it is legitimate and no one is harmed when one person takes things (e.g. acorns or land) out of the commons and makes them private property "at least where there is enough, and as good left in common for others" or "since there was still enough and as good left [for others]." Is there enough and as good land left in common for others to appropriate now? If so, what does that suggest about private property in land or other things?