

Heather Haynes
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Cynics posit that humans act solely out of self-interest, working only to gain for themselves. A study of copyright rules and case law in the United States would seem to prove that theory. Current copyright and fair use rules are poorly defined and difficult to apply as both try to simultaneously benefit the copyright holder, the appropriator of work, and the whole of society. Yet, neither is written in such a way as to absolutely ensure balance between interested parties. Congress consistently amends The Copyright Act to favor powerful copyright holders.

Within the last four decades, “copyright term increase[d], from a modest twenty-eight years, to the life of the author plus seventy years.”¹ While copyright holders “become an ever-expanding monopoly over creative works,”² the Fair Use Doctrine, intended to provide appropriators with a safe way to re-use work, easily became lost. In this digital age where photographs and other such intellectual property (IP) are more numerous and easier to access than ever before, the Copyright Act and Fair Use Doctrine must be studied and kept together to restore order to our self-interested society.

Although Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”³ that power has been amended to, on occasion with good reason, promote progress beyond the desire of the copyright holder. The terms of copyright “are limited

¹ Mitchell, Joshua. "Promoting Progress with Fair Use." *Duke Law Journal*. 60. no. 1639 (2011): 1639-1671., at 1640

² *Ibid.*

³ U.S. CONST. art. I, § 8, cl. 8.

in order to balance the competing interests of inventors and the public”⁴ and fair use exists to allow a framework for innovation within existing copyright policy.

The study of copyright as applied to photographers and photograph appropriators is particularly vital simply because very little precedent exists in the case law. Copyright law does in fact distinguish between different types of intellectual property, with “musical works, pictorial, graphical, sculptural, or audiovisual works” afforded fewer exemptions for infringement⁵. However, there is certainly “some order in fair use case law where others have seen only chaos,”⁶ especially in the weighted application of each of fair use’s four principles. With the digital revolution of the early 2000’s, society now has greater access to a vast amount of photography the likes of which have never been seen before. However, the nature of IP is so varying, even the types and applications of photographs variable, that this murky application of fair use is somehow appropriate.

While many scholars call for concrete rules concerning fair use or for a complete abolishment of the doctrine⁷, they often to overlook the fact that attempting to narrowly define types of IP and use is probably more work than it is worth while courts currently decide fair use on a case-by-case basis. Regarding photography, four cases set the standard for fair use application and are split in siding with the photographer or appropriator. This is extraordinarily appropriate for IP since no two photographs or appropriations are identical in intent or execution.

⁴ Bibb, Megan. "Applying Old Theories to New Problems: How Adverse Possession Can Help Solve the Orphan Works Crisis." *Vanderbilt Journal of Entertainment & Technology Law*. 22. no. 1 (2009): 149-181., at 7

⁵ Bibb, at 153

⁶ Netanel, Joshua Weinstock. "Making Sense of Fair Use." *Lewis & Clark Law Review*. 15. no. 3 (2011): 715-771., at 717

⁷ Campbell, Robert. "Why the Fair Use Doctrine Should be Eliminated." *Society*. 047. (2010): 322-327.

Although the lack of hard and fast rules can be frustrating and create a “chilling effect”⁸ to both parties, it speaks to the very nature of intellectual property rights.

To understand the current life and application of the fair use doctrine, a brief summation of United States copyright is needed. First ratified in 1976 and most recently updated in 2011, the Copyright Law of the United States serves to protect IP creators. The law defines photographs under “visual art,” as: “a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”⁹

With only a tenuous definition put forth, copyright’s application to photography is murky at best. Many photographers produce work without exhibition purposes and, especially in this digital era, do not print physical copies of their work. So far, printed medium of a photograph has not significantly come into play for fair use case law, leaving this broader for copyright holders. The current law clearly states six exclusive rights of copyright holders at the moment work exists in a digital and/or tangible form:

- (1) **to reproduce** the copyrighted work in copies or phonorecords;
- (2) **to prepare derivative works** based upon the copyrighted work;
- (3) **to distribute copies** or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform the copyrighted work publicly**;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display the copyrighted work publicly**; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹⁰

⁸ Snow, Ned. "Proving Fair Use: Burden of Proof as Burden of Speech." *Cardozo Law Review*. 31. no. 5 (2010): 1781-1822.

⁹ 17 U.S.C. § 101 (2011)

¹⁰ 17 U.S.C. § 106 (2011)

These rights unarguably achieve the desired control most copyright holders would want over their work. In its original intent, this legislation promoted innovation by protecting those able and willing to innovate; a balance between self- and public interest. Although the rights of copyright holders have not expanded, the length of eligibility of these rights grew to a current term of the life of the copyright holder plus seventy years.¹¹

The expansion of copyright term allows powerful corporations to retain their most noteworthy characters as property, but also stifles public interest by intentionally keeping works from the public domain. The only “additional safeguards against Congress’s copyright powers”¹² that the public has for using copyrighted work is the weakly worded fair use doctrine.

What originally served as a safeguard for innovators using currently copyrighted work are now only poorly understood and underutilized guidelines. Explained only as limitations to the copyright holder’s rights, fair use appears in Copyright Law as:

For purposes such as criticism, comment, news reporting, teaching, 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹³

In short, appropriation falls under fair use when it uses the original for education or parody purposes, uses an insignificant amount of the original, and does not infringe upon the market of the original. Most use of copyrighted works probably falls into this category, although

¹¹ 17 U.S.C. § 303 (2011), for works created after January 1, 1978

¹² Turetzky, Matthew. "Applying Copyright Abandonment in the Digital Age." *Duke Law & Technology Review*. 019. (2010)., at 3

¹³ 17 U.S.C. § 107 (2011)

blatant, unenlightened rip-offs do still occur. The simplest way to understand the balance between holders and appropriators is to assume that all copyrighted works make society a better place, and an appropriation is considered fair use if its end result also betters society. Of course, that is not always the way in which scholars, lawyers, and copyright holders view the law.

Perhaps the most major development in IP since the development of United States copyright law is the Internet. While the Computer Crime Enforcement Act¹⁴ of 2000 and the recently proposed Stop Online Piracy Act¹⁵ attempt to address the advent of online sharing, neither do a particularly effective job. The latter, proposed ten days before the writing of this paper, is too new and controversial to merit serious study in this context.

Photographs are infinitely easier to find and manipulate solely online than in previous years. While most photo appropriation is probably permissible under the fair use doctrine, very little case law exists to provide guides and precedents as to the application of fair use. Currently, the “confluence of digital technology, extended copyright terms, and international harmonization requires legislators and judges alike to rethink the limits of copyright protection.”¹⁶ Based on the four most popular cases on the subject, the first and fourth factors of fair use weigh most heavily for legal decisions.

If the purpose and market of the second work are substantially different from the original, courts typically side in favor of fair use. Perhaps the most universally accepted venue for fair use is clear parody, which relies most heavily on the first factor; “The first factor is typically used to

¹⁴ U.S. Government Printing Office, "106th Congress Public Law 572." Last modified November 24, 2010. Accessed November 5, 2011. <http://www.gpo.gov/fdsys/pkg/PLAW-106publ572/html/PLAW-106publ572.htm>.

¹⁵ Library of Congress, "Bill Text - 112th Congress (2011-2012) - THOMAS (Library of Congress)." Last modified October 26, 2011. Accessed November 5, 2011. <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3261>.

¹⁶ Turetzky, Matthew. "Applying Copyright Abandonment in the Digital Age." *Duke Law & Technology Review*. 019. (2010)., at 13

determine whether a parody exists,” and subsequently “factors two, three, and four all depend upon a determination of the first.”¹⁷ When determined as a parody, the second factor is irrelevant and the fourth has never yet been a problem.¹⁸

The landmark case concerning photography fair use law, however, involves an intended parody that was not considered by the courts as so. The 1992 decision of *Rogers v. Koons*¹⁹ sided with photographer Art Rogers, who sued for misappropriation of his photograph “Puppies” by sculptor Jeff Koons. Koons chose to make a sculpture out of the photo for a show on the banality of everyday life, since the picture was commonly used on greeting cards and other merchandise. Koons “viewed the picture as part of the mass culture—‘resting in the collective subconsciousness of people regardless of whether the card had actually ever been seen by such people.’”²⁰ The Second Circuit court sided with Rogers because Koons’ parody was not self-evident; his “use was a satirical critique of our materialistic society rather than a parody of the copied work.”²¹ He could have commented without copying the entire photograph.

²²A victory for copyright holders, the *Rogers* decision was not a blow for those attempting to appropriate within fair use. Koons may have used part of the



¹⁷ Simon, David. "Reasonable Perception and Parody in Copyright Law." *Utah Law Review*. 3. (2010): 779-858., at 830

¹⁸ *Ibid.*

¹⁹ *Rogers v. Koons*, 960 F.2d 301 (1992)

²⁰ *Ibid.*, quotes in original.

²¹ Netanel, Joshua Weinstock. "Making Sense of Fair Use." *Lewis & Clark Law Review*. 15. no. 3 (2011): 715-771., at 763

²² Image: Traub, James. The Design Observer Group, "Art Rogers vs. Jeff Koons: Observatory: Design Observer." Last modified January 21, 2008. Accessed November 6, 2011. <http://observatory.designobserver.com/entry.html?entry=6467>.

photograph, included the sculpture in a different collection, or simply asked Rogers's permission and been well within his right as an appropriator. The two images do seem so similar, the "copying was so deliberate as to suggest...the copies they produced bettered the price of the copied work by a thousand to one,"²³ rather than an obvious parody or social comment. Here the appropriation failed fair use's first factor, which is usually an indicator that a court will side against fair use. While the piece may have passed fourth factor, it failed three factors and therefore failed overall.

A mere six years later, the Ninth Circuit decided for parody in what is now the paragon for fair use cases involving photography. Paramount Pictures used a famous photograph of a pregnant Demi Moore as inspiration for the poster advertising the film *Naked Gun 33½: The Final Insult*. Annie Leibovitz sued for misappropriation of her *Vanity Fair* cover, but the courts staunchly denied on basis of obvious parody. In her defense, when Paramount sought attorney's



fees from Leibovitz in 2000, the court denied their request, "finding that Leibovitz's claim of copyright infringement had not been 'objectively unreasonable'."²⁴

²⁵Out of the four fair use factors the appropriation in *Leibovitz v. Paramount Pictures*²⁶

²³ Rogers v. Koons, 960 F.2d 301 (1992)

²⁴ International Foundation for Art Research, "Case Summary--Leibovitz v. Paramount Pictures Corp." Accessed November 7, 2011., quotes in original http://www.ifar.org/case_summary.php?docid=1252509424.

²⁵ Image: Wikipedia, "Leibovitz v. Paramount Pictures Corp.." Last modified October 21, 2011. Accessed November 8, 2011.

http://en.wikipedia.org/wiki/Leibovitz_v._Paramount_Pictures_Corp.

²⁶ Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (1998)

passed three. Here the new image, Leslie Neilson’s head on a pregnant woman’s body, generated revenue for Paramount, but in a substantially different market than the original photo, and was thus decided as fair use. Although the court noted, “the technique of digital computer enhancement took more of the Leibovitz photograph than was minimally necessary to conjure it up” this did “not necessarily tip the third factor against fair use,”²⁷ or any of the other factors.

The clearly laughable image, transformative in nature from the original, would not be taken seriously by a reasonable viewer—in this case, “the court used itself as the reasonable perceiver.”²⁸ Though this is a situation where prior question or notice to the photographer by Paramount could have solved the problem of litigation, neither was necessary due to clear fair use in terms of parody. The fact that the work “was a transformative parody obviated the need to weigh [the third] factor independently,”²⁹ leaving the court to rely almost exclusively on the first.

Here, and with other cases involving parody, the question of reasonable perception cannot be ignored. This adds yet more mud to the water that is fair use because not only are the rules vaguely defined, but those who would define them are also vague. While parodies do not exactly qualify for special legal protection, courts have “neither mentioned from whose perspective a court should evaluate whether a work could reasonably be perceived as a parody nor hinted at what characteristics the ‘perceiver’ might have.”³⁰ The *Leibovitz* court pointed out: “Although the statute does not specifically list ‘parodies’ among the categories of potentially ‘fair’ uses, we have long afforded such works some measure of protection under this doctrine.”³¹

It carefully explained that “Leibovitz is entitled to no protection for the appearance in her

²⁷ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (1998)

²⁸ Simon, David. "Reasonable Perception and Parody in Copyright Law." *Utah Law Review*. 3. (2010): 779-858., at 796

²⁹ *Ibid.*, at 826

³⁰ *Ibid.*, at 784

³¹ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (1998), quotes in original

photograph of the body of a nude, pregnant female. Only the photographer's particular expression of such a body is entitled to protection.”³²

Outside of strict parody, appropriation of photographs tends to be considered fair when substantially transformative. Much like *Rogers*, a Federal Circuit Court found a photograph of a sculpture “only to have a different expressive character”³³ from the original in *Gaylord v. United States*. This 2010 case involved a photograph of a government-commissioned sculpture by Gaylord used by the United States Postal Service as a stamp also honoring Korean War veterans.³⁴ Although the Court of Claims ruled the use was “transformative because it had a very different expressive character than the original,”³⁵ this decision was based off the three-dimensionality of a sculpture versus a surreal two-dimensional character of a photograph.



³⁶The Federal Circuit got to the heart of copyright law and reversed the lower court’s decision based solely on the first factor of fair use. Despite one branch of U.S. government

using a work commissioned by another, Gaylord retained the copyright to his sculpture. The postage stamp embodied “a very different expressive character and, arguably, a very different aesthetic aim”³⁷ from the sculpture but that, failing the other three factors, did not ultimately constitute fair use. However, it is important to note that Gaylord’s case was brought against the

³² *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (1998)

³³ Netanel, Joshua Weinstock. "Making Sense of Fair Use." *Lewis & Clark Law Review*. 15. no. 3 (2011): 715-771., at 767

³⁴ *Gaylord v. United States*, 595 F.3d 1364 (2010)

³⁵ Netanel, at 767

³⁶ Image: Friedman, Peter. *Ruling Imagination: Law and Creativity*, "Gaylord v. U.S.." Last modified February 25, 2010. Accessed November 8, 2011.

<http://blogs.geniocity.com/friedman/tag/gaylord-v-u-s/>.

³⁷ Netanel, at 767

United States Postal Service, the agency that sought to run the photograph of his work, rather than the photographer selling work for that purpose. This is the only photography fair use case where the photographer was not involved in suit.

To contrast the *Rogers* decision, use of whole images was not considered copyright infringement in *Kelly v. Arriba-Soft Corp.*³⁸ This case, decided in 2003, brought copyright law “[in]to the vast world of the internet and internet search engines,”³⁹ and paved the way for features like Google Image Search to which Internet users are now so accustomed. In summary judgment, the Ninth Circuit Court upheld that a search engine “operator's use of [Kelly]'s images as "thumbnails" in its search engine was fair use.”⁴⁰

Upon discovering photographs from his website available on an image-only search engine run by Arriba-Soft Corporation, Kelly filed for copyright infringement. Notably, “Kelly had established a prima facie case of copyright infringement based on Arriba's unauthorized reproduction and display of Kelly's works, but this reproduction and display constituted a non-infringing ‘fair use’”⁴¹ because, in part, users were redirected from the search engine to Kelly’s website. Here the court acknowledged that under factor three, Arriba’s use of the images did infringe, but their appropriation passed the three other factors and was thus considered fair. The court decided “although the defendant used the entire work...it took no more than was needed,” and did “no market harm because the small, thumbnail images were of such low resolution.”⁴²

Thus Arriba-Soft’s use of the photographs, though essentially exact copies, served an entirely different function than the originals and referred Internet users back to Kelly’s website.

³⁸ *Kelly v. Arriba Soft Corp*, 336 F.3d 811 (2003)

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² both quotes: *Ibid.*

The difference between *Kelly* and *Rogers* then becomes both the intent of the appropriators; access versus commentary, and the product; search results versus gallery art. Applications of fair use here are not arbitrary as some scholars believe, but a balanced use of all four factors in each circumstance.

Recently, photographers most closely watched for the outcome of *Cariou v. Prince*, a District Court case in southern New York which received summary judgment in March 2011.

While some call the denial of fair use by Prince “quite a victory for photographers,”⁴³ the outcome is not surprising for those well versed on fair use. Richard Prince appropriated twenty-eight of photographer Patrick Cariou’s images for a show at the Gagosian gallery. Cariou sued and rightfully won as several of Prince’s gallery pieces were displayed barely changed from the original.⁴⁴



Prince’s appropriated gallery works failed all of the fair use factors. The court found that “Prince’s Paintings are transformative only to the extent that they comment on the Photos; to the extent they merely recast, transform, or adapt the Photos, Prince’s Paintings are instead infringing derivative works,”⁴⁵ thus failing the first and most important factor.

While Leibovitz’s Demi Moore portrait was afforded little protection, Cariou’s photographs were deemed “creative expression for public dissemination.”⁴⁶ The difference lies in *Vanity Fair* running Leibovitz’s photo as a cover versus Cariou collecting photographs in one

⁴³ Haggart, Rob. A Photo Editor, "Richard Prince Loses Fair Use Argument." Last modified March 19, 2011. Accessed October 21, 2011. <http://www.aphotoeditor.com/2011/03/19/richard-prince-loses-fair-use-argument/>.

⁴⁴ Image: Ibid.

⁴⁵ *Cariou v. Prince*, 08 Civ. 11327 (2011)

⁴⁶ Ibid.

book, not licensing or selling them otherwise. The difference in intent and use makes this aspect of fair use clear; Prince violated the second factor, while Paramount did not.

Prince also failed the third fair use factor by using the entirety of Cariou's images to merely paint over or to add onto. Paramount Pictures re-photographed a pregnant woman in an identical pose to Demi Moore, thereby only using the idea and likeness, but not the actual photograph. In the handful of pieces where Prince did not use an entire photograph, he "appropriated the central figures" which are "of overwhelming quality and importance to Cariou's Photos, going to the very heart of his work."⁴⁷

More important than the second and third factors is the fourth, which Prince's work clearly failed. Prince's argument that Cariou should have "marketed his Photos more aggressively,"⁴⁸ so that the market loss was Cariou's fault and not his, was not successful. Potential market value is protected above actual market value by copyright law, thus Prince's gallery works infringed upon the marketing in which Cariou had not engaged. This appropriation failed all four fair use factors, though the gallery work would probably have been considered copyright infringement by failing only factors one and four (character of use and market effect).

While courts disproportionately balance the first and fourth fair use factors as more important than the others, copyright law does not dictate that all factors should be considered equally. The first, purpose, reaches the heart of innovation and copyright itself by ensuring that the appropriation continues to further the progress of science and arts. Market potential, the fourth factor, speaks to the importance of a capitalist economics system that best nurtures

⁴⁷ both quotes: Ibid.

⁴⁸ Ibid.

innovation through monetary gain.⁴⁹ These two factors alone speak to the inherent self-worth Americans feel, the notion that ideas and income must be protected before one feels safe sharing an innovation. The second and third factors, nature and scope of work, only serve to back up the other factors.

Controversy may arise when readers project themselves into cases. It is easy to view copyright case law through the eyes of the copyright holder, the original creator, as many people consider themselves as creators and originators of thought. However, societies are built on those before them and, in the Postmodern view, no creation is truly original. Since copyright law now extends beyond its originally intended means, fair use singularly holds the legal venue people have for building upon others' work. Paramount's *Naked Gun* poster would neither exist nor find success was it not for the preceding notoriety of Leibovitz's *Vanity Fair* cover.

Each case above may have been assuaged if the appropriator had simply obtained permission from the copyright holder before use. But permission and notice are noticeably absent from the fair use doctrine. Courts do not weigh "whether the copyright holder would have reasonably consented to the use, but whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created."⁵⁰ Thus, a staunch denial of permission from a copyright holder would not necessarily affect a fair use defense.

However, a failure to contact the copyright holder when the appropriator is clearly able to do so demonstrates bad faith, and it can tip the odds against them. In *Cariou*, the photographer sent Prince a cease-and-desist notice before suit. Although the gallery "Defendants were aware

⁴⁹ von Lohmann, Frank. "Fair Use as Innovation Policy." *Berkeley Technology Law Journal*. 23. no. 829 (2008): 829-865.

⁵⁰ Netanel, Joshua Weinstock. "Making Sense of Fair Use." *Lewis & Clark Law Review*. 15. no. 3 (2011): 715-771., at 768

that Prince is an habitual user of other artists' copyrighted work,"⁵¹ the gallery show went ahead as scheduled. Such rudeness and bad faith factored into the judge's decision to deny the first factor of fair use. Societal niceties are not required or expected by the law, but they are certainly important in understanding how and why a work is appropriated.

The main problem with fair use, then, is not the doctrine itself as some may argue, but the understandably vague definition of 'transformative.' The Supreme Court has not heard a photography fair use case, and understandably so. If they handed down a concrete ruling on any of the four factors, especially the first, then appropriations that may have been considered fair under a looser definition would suddenly lose defensible merit. Although the Supreme Court has heard fair use cases, most involve the fourth factor with devices such as Sony's Betamax recorder.⁵²

The only adverse effect of what may seem to potential appropriators as arbitrary application of fair use is potential chilling on the part of those who would engage in use, were fair use certainty and litigation a financial option.⁵³ Though the true effect of chilling cannot be known, this "inability to ascertain a chilling magnifies its seriousness."⁵⁴ When a copyright holder sues an appropriator, many remove their work in the face of "a high financial cost on the fair user to gather evidence and persuade a fact-finder of its correct interpretation."⁵⁵ While Paramount rightly chose to litigate Leibovitz's case against them, a Photoshop-savvy blogger creating a similar work to Paramount's, for example, will "often [be] deterred from engaging in

⁵¹ *Cariou v. Prince*, 08 Civ. 11327 (2011)

⁵² *Netanel*, at 721; *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

⁵³ Snow, Ned. "Proving Fair Use: Burden of Proof as Burden of Speech." *Cardozo Law Review*. 31. no. 5 (2010): 1781-1822.

⁵⁴ *Ibid.*, at 1799

⁵⁵ Snow, at 1806

conduct that likely would fall within the gambit of fair use, due in part to concerns over incurring attorney's fees and in part to the uncertainty and unpredictability of the fair use doctrine itself."⁵⁶

The hypothetical blogger above faces a small chance that their work will go 'viral' or even attract the attention of the original copyright holder. Understandably, many would-be fair users are not willing to take this risk. However, the chilling effect model presumes that all copyright holders possess the financial means to litigate their work, which is untrue. Today, most photographers find freelance employment rather than steady staff work. Depending on whether the photographer or publication holds the image's copyright, it is perhaps equally unlikely that a single photographer would be willing to sue one appropriator. Photographers are urged professionally to retain their copyright⁵⁷, making them more powerful but financially less likely to afford litigation. Although the chilling effect may rest more heavily on fair users, it certainly exists on both sides of copyright law litigation.

A loosening of "virtually any measures designed to increase users' ability to appropriate the social surplus of their uses"⁵⁸ would alleviate the fair use conundrum to a degree. A change in any law would certainly benefit some and stymie others, a principle to which copyright and fair use are not immune. Currently the rules governing these principles are balanced as best as they can be, and can only reach improved by reinstating the initial copyright terms. As all IP, methods of retrieval and viewing, and appropriations certainly differ, the guiding law must be in some sense vague in order to have universal application. Much as courts consider and decide libel and obscenity on a case-by-case basis, so this works for fair use as well.

⁵⁶ Cotter, Thomas. "Fair Use and Copyright Overenforcement." *Iowa Law Review*. 93. (2008): 1271-1319., at 1271

⁵⁷ National Press Photographers Association, "Copyright Questions & Answers." Accessed October 21, 2011. http://www.nppa.org/professional_development/self-training_resources/legacy_report/questions.html.

⁵⁸ Cotter, at. 1292

The main obstacles to copyright over-enforcement are pure self-entitlement from copyright holders and lack of legal knowledge on both sides. American “society should invest more in educating users about their fair use rights,”⁵⁹ which will simultaneously educate copyright holders of legal, if unwanted, use of their works.

Fair use is neither broken nor unbalanced in respect to photography, though the doctrine could certainly gain more understanding from the American public. Lower court rulings on specific cases are clear and well justified in their decisions. As photographs and uses vary in each circumstance, so too do court decisions, and the rules of fair use rightfully reflect that. Calls for fair use and copyright reform show only self-interest on the parts of those who wish to create or appropriate. Despite an unknown chilling effect based on misunderstanding and economic disparity, the application and enforcement of copyright law is overwhelmingly fair. With a greater societal understanding of copyright and fair use regulations, photographers and artists will appreciate the current court rulings as reflective of each situation.

⁵⁹ Cotter, at 1292