TAKING USERS' RIGHTS TO THE NEXT LEVEL: A PRAGMATIST APPROACH TO FAIR USE♦

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Abstract

Exceptions and limitations to the rights of copyright owners aim to promote copyright goals in a rapidly changing world. Policymakers are often faced with the choice of either adopting an open-norm, such as fair use, to facilitate flexibility and adaptability, or opt for a strictly defined list of exceptions and limitations to facilitate more certainty and predictability. So far, this binary choice between bright-line rules and vague standards has created a deadlock.

This paper argues that in order to promote a reasoned implementation of fair use and serve both the purpose of copyright law and the rule of law, courts should subscribe to the doctrinal indeterminacy mandated by fair use, while at the same time encourage the implementation of concrete rules within that standard. Incorporating bottom-up norms, such as codes of fair use best practices, *in fair use analysis would enable courts to do just that.*

Codes of Fair Use Best Practices reflect a shared understanding as to the scope of permissible uses in particular fields of practice, where more specific norms of conduct are generated and implemented efficiently through bottom-up processes. Drawing on lessons learned from self-regulation, we propose a theoretical and doctrinal framework

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for implementing Fair Use Best Practices in legal analysis. We argue that norm building is a dynamic multi-faceted process, and that incorporating bottom-up norms in fair use analysis, would enhance the efficacy and legitimacy of copyright law.

We further identify several legal implications of Fair Use Best Practices: to inform the legal interpretation of fair use or prepare the ground for legislation; and to provide the court with a benchmark when determining liability for copyright infringement. Here we introduce a pragmatist approach *to fair use. This novel approach to fair use shifts the focal point of legal analysis from a fact-intensive inquiry, which seeks to determine whether the use was fair or not, to reasonable compliance, using Fair Use Best Practices as a benchmark. At the doctrinal level, we show how the Pragmatist Approach to fair use could be implemented under the current law, by limiting liability for copyright infringement under doctrines such as "innocent infringer" or "reasonable conduct."*

INTRODUCTION

Fair use is a double-edged sword. It defines an open-norm[1] for deciding permissible uses of copyrighted material based on a fairly ambiguous set of standards. The open-norm provides the flexibility that is necessary for achieving copyright goals in a rapidly changing world.[2] It enables the adjustment of exceptions in order to secure sufficient freedom for creativity and protect fundamental rights and freedoms in an ever-expanding copyright regime.[3]

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[1] An open norm, or a "standard," is characterized as a piece of legislation that is not specifying precise directions; therefore, it leaves the choices to be made by the subject, the enforcer or the interpreter. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Pierre Schlag, *Rules and Standards*, 22 UCLA L. Rev. 379 (1985); Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2005).

[2] As the general application of a standard "requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard." Kennedy, *supra* note 1, at 1688.

[3] *See, e.g.*, P. BERNT HUGENHOLTZ & MARTIN SENFTLEBEN, FAIR USE IN EUROPE: IN SEARCH OF FLEXIBILITIES (November 2011) (arguing that the current lack of flexibility in copyright law undermines the very fundamental freedoms, societal interests and economic goals that copyright law traditionally aims to promote).

Notwithstanding the growing recognition of the need for flexibility, fair use remains controversial.[4] This flexible legislative framework lacks specific guidance on how it should be implemented in particular contexts. It creates a high level of uncertainty, which undermines predictability. The absence of bright lines distinguishing between permissible and infringing activity may chill socially desirable behaviors, thus rendering fair use futile as a legal mechanism for achieving the goals of copyright law.[5]

Consider, for instance, the decision of a university professor to make a short excerpt in an electronic course reserve (e-reserve) available to her students. Typically, this might be considered fair use if the excerpt satisfies the fair use four-factor analysis. Yet, if the scope of copying, the nature of the work, or the potential harm to the publisher subsequently exceed the legitimate scope determined by the court, the professor would be held liable for copyright infringement. Consequently, in the absence of *ex ante* guidance, professors may be deterred from making any material available to their students, even though educational use is one of the primary goals sought to be promoted by the fair use doctrine.

Is it possible to maintain the flexibility of fair use without creating a chilling effect? Can we "eat the cake and keep it whole?" Codes of Fair Use Best Practices seek to do just that. They aim to lower the level of uncertainty associated with fair use while still retaining the flexibility of an open-norm. Fair use doctrine assumes that courts would apply the open-norm to particular cases, thereby constructing more concrete guidelines on permissible uses over time. Such formulations might be informed by Codes of Fair Use Best Practices, reflecting a shared understanding as to the scope of permissible uses in particular fields of practice, and where more specific norms of conduct are generated and implemented efficiently through bottom-up processes.

The term "Best Practices" refers generally to bottom-up processes, where parties voluntarily choose to undertake norms of behavior. In recent years, there has been a proliferation of Best Practices initiatives and a rise of the *Fair Use Best Practices Movement:* a grassroots movement focusing on crafting guidelines for the contextual

[4] The potential virtues and risks of flexibility make open-norms, such as fair use, highly controversial. *See, e.g.*, HUGENHOLTZ & SENFTLEBEN, *supra* note 3 (arguing that fair use in Europe is often regarded as taboo in classic authors' rights doctrine, even though there is a growing recognition of the need to introduce flexibility in the European copyright); Michael Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007).

[5] *See* WILLIAM W. FISHER III & WILLIAM MCGEVERAN, THE DIGITAL LEARNING CHALLENGE: OBSTACLES TO EDUCATIONAL USES OF COPYRIGHTED MATERIAL IN THE DIGITAL AGE (BERKMAN CENTER FOR INTERNET & SOCIETY, 2006) [hereinafter BERKMAN WHITE PAPER]; Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC'Y U.S.A. 337 (2009); HUGENHOLTZ & SENFTLEBEN, *supra* note 3.

implementation of fair use.

Fair Use Best Practices are located at the intersection of private ordering and copyright law, rules and standards, and law and social norms thus creating an interesting theoretical challenge. Codes of Fair Use Best Practices pose a particular challenge, as they reflect bottom-up norms, which implement a privilege defined as an open-norm in a property regime. What role might bottom-up norms play in filling gaps in a proprietary regime? Can private actors generate copyright law? What legal consequences should follow compliance with a Code of Fair Use Best Practices?

This paper argues that Fair Use Best Practices could be incorporated into fair use legal analysis, thereby enhancing the predictability of what constitutes permissible uses. We draw on lessons learned from self-regulation and co-regulation, in order to introduce a *pragmatist approach* to fair use. This novel approach to fair use shifts the focal point of legal analysis from a facts-intensive inquiry, which seeks to determine whether a particular use was fair or not, to a scrutiny of the implementation of fair use principles through Codes of Best Practices. This line of inquiry is asking whether the implementation of fair use principles in Best Practices, taken as a whole, is reasonable; and subsequently limiting the scope of liability by the range of remedies granted.

Legal Pragmatism offers an appropriate framework for developing fair use jurisprudence. It assumes that the substantive rules of fair use should be informed by experience and consequences. It further assumes that social and institutional details could make a difference in applying high-level abstract principles to practical guidelines, and therefore, individuals situated in these contexts may have an advantage in considering such consequences.[6]

The *pragmatist approach* to fair use, proposed in this Article, is based on three pillars: *theoretical* (deconstructing the rules/standard dichotomy), *normative* (arguing that bottom-up norms might be superior to regulation) and *doctrinal* (incorporating reasonableness in fair use analysis).

We make the following arguments: first, at the theoretical level,

[6] The legal pragmatism movement has generated a wide variety of scholarship grounded in classic American pragmatism associated with C. S. Peirce, William James, John Dewey, and more recently Richard Rorty. Legal Pragmatism does not have a single meaning but is generally skeptical of abstraction and emphasizes the need to inform law-making processes by practice and context. *See generally* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 405 (2003); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990). On legal pragmatism in intellectual property, *see* Thomas F. Cotter, *Legal Pragmatism and Intellectual Property Law*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 211 (Shyamkrishna Balganesh ed., 2011). A pragmatist approach was also suggested in other ethical contexts, *see, e.g.*, David C. Jacobs, *A Pragmatist Approach to Integrity in Business Ethics*, 13 JOURNAL OF MANAGEMENT INQUIRY 215 (2004).

we reject the binary choice between bright-line rules and vague standards, and suggest that courts adapt a continuum-based approach to fair use. In particular, we argue that in order to achieve the goals of fair use, courts should encourage the implementation of concrete rules within the open-ended fair use standard. Only such an approach, we argue, could promote a reasoned implementation of fair use and serve both the purpose of copyright law and the rule of law.

Second, at the normative level, we argue that bottom-up norms should play an important role in formulating fair use standards. Crafting rules by bottom-up norms may facilitate ongoing participation in lawmaking by relevant communities of users and authors, thus enhancing the efficacy of copyright and strengthening its legitimacy.

Finally, at the doctrinal level, we demonstrate how copyright policy could promote a guided approach to fair use, by shifting the focal point of legal analysis from a facts-intensive inquiry to reasonable compliance, using Fair Use Best Practices as a benchmark. Thus, in determining liability for copyright infringement, rather than asking whether fair use was implemented correctly in each particular case, courts should examine the reasonableness of implementing fair use principles in concrete fields of practice or whether Codes of Best Practices were relied on in good faith. In appropriate cases, compliance with Fair Use Best Practices should limit the scope of liability, even when the implementation of such best practices, in a particular instance, yielded an error. [7]

This paper proceeds as follows: Part I explores the fair use paradox, revisits the rules/standards dichotomy and discusses some implications for fair use analysis. Part II introduces the notion of Fair Use Best Practices and explores the supplementary role of bottom-up norms in fair use doctrine. Part III draws upon some lessons learned from self-regulation to propose legal policy towards Fair Use Best Practices, and offers a doctrinal framework for implementing Fair Use Best Practices in legal analysis.

I. THEORETICAL CHALLENGES: FLEXIBILITY AND PREDICTABILITY

A. *The Fair Use Paradox: Flexibility vs. Certainty*

The "rules versus standards" dichotomy, extensively discussed in legal theory scholarship,[8] stands at the heart of copyright policy controversy. Copyright law incorporates many standards, concerning its most critical doctrines, such as the originality standard and the

[7] *See infra* Part III.C.

[8] *See supra* note 1. *See also* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1993); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

idea/expression dichotomy, which define the protected subject matter,[9] the standard of substantial similarity in infringement analysis,[10] and finally, fair use, which defines the scope of exceptions and limitations to copyright.

Fair use is a mega standard, which permits the use of copyrighted works based on a four-factor analysis determined retroactively by the court: the purpose and character of the use, the nature of the used work, the amount taken, and the potential market harm.[11] Fair use assumes that some level of unlicensed use is permissible under copyright law and necessary in order to promote copyright goals. Copyright law is under constant pressure to adapt to new technologies and emerging economic needs. As copyright expands to cover new works and new uses, there is a growing need to adjust the privileges of users on an ongoing basis. A closed list of copyright exceptions and limitations, which is common in civil law countries, simply fails to adapt to rapidly changing technologies and new types of expressions and uses.[12] An open-norm leaves the door open to allowing new types of uses, which were not anticipated by the legislature, whenever it is necessary to achieve copyright intended purpose. The policy underlying the fair use doctrine is that standards would enable the law to accommodate to rapid social, economic, and technological developments; and that it is better to leave the final construction of the scope of copyright to courts, which would elaborate the norm.[13] Fair use, therefore, is an open-norm, allowing a great degree of flexibility in applying the legal principles to particular circumstances. Consequently, fair use suffers from a high level of uncertainty, and it is often unclear *ex-ante* whether a particular use would be considered fair. This uncertainty imposes a heavy cost on users seeking to determine the scope of permissible uses and creates an ongoing need to obtain legal advice.[14]

The unpredictability of fair use creates what is known as the "chilling effect", in which users avoid the risk of liability by refraining altogether from use of copyrighted works that the law seeks to promote.[15] In the alternative, risk-averse users may purchase an

[9] 17 U.S.C. § 102(a) (2014).

[10] MELLVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03.

[11] 17 U.S.C. § 107 (2014).

[12] *See, e.g.*, HUGENHOLTZ & SENFTLEBEN, *supra* note 3 (an open-norm accommodates the development of new products and services that rely on currently unforeseen use of protected material).

[13] *See* Timothy Endicott & Michael Spence, *Vagueness in the Scope of Copyright*, 121 LAW QUARTERLY REVIEW 657, 661–64 (2005).

[14] *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) (fair use is "the right to hire a lawyer").

[15] PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 17–19 (2004).

unwarranted license thereby feeding the *Clearance Culture*, where it is assumed that every use requires a license.[16]

Arguably, common law adjudication could reduce unpredictability of fair use over time. Adjudication in the common law system has two functions: to resolve disputes between parties, and to formulate rules, as a by-product of the dispute settlement process.[17] Therefore, the common law legal system provides a mechanism for filling in the gaps left by vague standards. Yet, the common law hope has failed in the case of fair use; not only is the rate of fair use litigation relatively low,[18] but when courts do apply fair use, they often anchor their decisions in fact-intensive analysis and refrain from drawing any paradigmatic lines.[19] Consequently, fair use case law focuses on dispute resolution and not on rule formulation through adjudication.[20] As a result, the flexible legislative framework, which tolerated some level of uncertainty, has generated a high level of unpredictability.

B. *Reconciling Flexibility with Predictability - Bottom-Up Codes of Practice*

Fair use doctrine reflects a delicate balance between the dynamic effect of flexibility and the chilling effect of unpredictability. Is there a way to maintain flexibility, formulated by standards, and at the same time enhance predictability?

This issue has been widely discussed in the "rules versus standards" literature.[21] This literature focuses on the choice confronted by courts and legislators between bright-line rules and open-ended standards. Yet, the open-ended nature of a legal standard does not necessarily prevent courts from developing rules for implementing a standard. In fact, standards are often converted into rules without giving up the open-ended nature of the norm. Elsewhere we argue that in order

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[16] James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 895–98 (2007).

[17] William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979).

[18] *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008).

[19] *See* Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275 (2002) (arguing that the reason for the judicial tendency to limit copyright decisions to fact-finding analysis is that these cases, especially when they relate to cyberspace, are highly sensitive to technological developments, which may affect the final outcome. Therefore, out of caution, courts adhere to very narrow conclusions, referring only to the exact facts at stake).

[20] The rule formulation function of the common law seems to be stagnating in copyright law for a variety of reasons, such as the rigid remedies framework. *See* Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 15 (2011).

[21] *See supra* notes 1 & 8. *See also* Hanoch Dagan, *Lawmaking for Legal Realists*, *in* THE THEORY AND PRACTICE OF LEGISLATION: REALIST CONCEPTIONS OF LEGISLATION 112, 119 (Pierre Brunet, Eric Millard, Patricia Mindus eds., 2013).

to avoid the chilling effect caused by lack of predictability, courts should develop subsidiary rules to facilitate the application of the fair use standard to particular creative contexts through a common law evolution of norms.[22] The generality of norms at the legislative level is a key for flexibility, while, at the same time, the courts are delegated with the authority to specify the norm in more concrete sub-notions.

But the process of implementing standards through concrete rules of practice also takes place outside of the court, where the general public must decide whether a particular use is fair or not. Standards are often translated into a guiding norm by their addressees, if they take a proactive approach, and "make for themselves the evaluative judgment that they require, and thus monitor and modify their behavior accordingly."[23] Such a proactive approach may promote predictability within a flexible legislative framework, and therefore negate the need to select one of two choices: either certain rules generating predictability or flexible standards generating total uncertainty.

This broad perspective of the formulation of legal norms recognizes the important role members of a society play in creating the meaning of norms. Open-ended standards could encourage desirable forms of private ordering to the extent they serve the objectives of law.[24]

The fair use doctrine falls squarely within this perception of legal standards, which may be deconstructed in relevant areas of practice into concrete guiding tools, while maintaining its legislative flexible framework. In this way, communities can generate some practical guidance for themselves, subject to legal oversight by courts. The flexibility is maintained by the fact that the communal process of unpacking the standard into its sub-rules is dynamic in nature, and also subject to refinement, approval or rejection by courts.

Bottom-up initiatives of fair use rule-making seek to lower the level of uncertainty and minimize the subsequent chilling effect. They do so by clarifying the abstract norm of fair use, and defining its boundaries and implementation in particular contexts of creation and use. Permissible uses, it is assumed, could be more easily identified in particular fields of practice, where it is easier to craft more specific rules.

The American copyright scene, as discussed in Part II, is currently witnessing a spring of bottom-up initiatives, in which the abstract

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[22] *See* Niva Elkin-Koren and Orit Fischman-Afori, *Rulifying Fair Use* (Working Paper).

[23] *See* Dagan, supra note 21, at 119.

[24] Endicott & Spence, *supra* note 13, at 664. However, Endicott and Spence propose contracts between copyright holders and users as the mode of private ordering which may best ease the consequences of the vague fair use norm, while such contracts are recognized as part of the failure of the chilling effect and not its cure. *See* Gibson, *supra* note 16.

standard of fair use is translated into a workable concept through the formulation of Fair Use Best Practices. These initiatives are raising some critical questions: *what* is the legal significance of such communal codes and *how* exactly can these codes promote predictability? These questions are discussed next in Part II.

C. Cambridge University Press v. Becker*: A Test Case of Bottom-Up Norms*

The recent decision in the case of *Cambridge University Press v. Becker*[25] demonstrates the multilayered process of applying fair use, and the important role of bottom-up codes of practice in reducing the chilling effect caused by fair use.

In this case, several major academic publishers filed a lawsuit against Georgia State University (GSU), claiming that the university was responsible for infringing upon their copyrighted books through GSU's electronic course reserve (e-reserve) system.[26] GSU relied on its 2009 Copyright Policy, which required each professor to complete a "fair use checklist," to determine whether each item included in the reading list was fair use. The lower court examined whether this policy contributed to infringements by the professors who had uploaded materials to the e-reserve system. In an opinion exceeding three-hundred pages, the lower court analyzed each of the sampled ninety-nine instances of infringement claimed by the plaintiffs and held that copied excerpts did not qualify as fair use in only five instances.[27] Indeed, the district court praised GSU for adopting a fair use policy, acknowledging that, "fair use principles are notoriously difficult to apply."[28] Nevertheless, the court held that fair use is fact-intensive and specific to each individual case, and subsequently found the Defendants liable for copyright infringement in five of the instances at issue. The court held that GSU Defendants were responsible for the 2009 copyright policy, which they created, implemented and approved.

The Court of Appeals for the Eleventh Circuit's decision, on

[25] Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd sub nom.* Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. Oct. 17, 2014).

[26] GSU operated two systems, which offered web access to course materials, including syllabi, class notes, sample exams, and scanned excerpts from books and journals. The systems were password-protected and accessible only to the students enrolled in a particular course and only for the duration of the course. The "electronic reserve system" ("E-Reserves" or "ERes") was managed by GSU's library staff while a "course management system" ("uLearn") allowed professors to upload digital copies of reading material directly to their course websites. *Becker*, 863 F. Supp. 2d 1190.

[27] Plaintiffs chose to pursue 99 claims, but during the trial dropped 25 claims (and added one). Out of the remaining 74 claims, in 26 instances no prima facie case of copyright infringement was proven. Out of the 48 allegedly infringing instances, 43 were found by the district court to be fair use, and only in 5 cases fair use was denied. *Patton*, 769 F.3d 1232.

[28] *Becker*, 863 F. Supp. 2d at 1363.

appeal, went even further in fostering the "no rules" approach.[29] The appellate court approved the lower court work-by-work approach, emphasizing that there is no arithmetic method for applying fair use, and that fair use analysis should be conducted case-by-case, weighing the four factors in each particular instance.[30] The appellate court further held that the lower court "erred in setting a 10 percent-or-one-chapter benchmark," since no fixed benchmark should be set.[31] The analysis should always be performed on a work-by-work basis, "taking into account whether the amount taken—qualitatively and quantitatively—was reasonable in light of the pedagogical purpose of the use and the threat of market substitution."[32] The court of appeal further held that "even if we accept that the 10 percent-or-one-chapter approach represents a general industry 'best practice' for electronic reserves, this is not relevant to an individualized fair use analysis."[33] Namely, the 11th Circuit Court adheres to a strict open standard approach, and rejects any attempt to deviate from a case-by-case adjudication of fair use.

The Cambridge University Press case demonstrates the significance of bottom up norms and offers some lessons on the appropriate framework of legal oversight. First, the case demonstrates the need for concert fair use rules of practice. Copyright Policy formulated by GSU reflected an actual need in offering more guidance in implementing fair use in real life routines. In the absence of guidelines, fair use may stifle the very creative activity it seeks to foster. University professors cannot be expected to undertake a sophisticated analysis of fair use for each particular item that is to be included in their reading materials. Librarians cannot apply the detailed analysis by the court, made over the course of hundreds of pages, to the thousands of reading items they are required to handle every semester. The only choice left for a university under this framework is either to acquire a license for uses that are actually fair (and therefore free) or compromise their educational mission by refraining from making any materials available to their students throughout the educational process. This decision demonstrates how the courts' reluctance to formulate any guidelines in fair use cases may fail to serve the goal of copyright law.

The case further offers an example of the potential harm of a "no rules" approach. Out of the seventy-four instances of alleged infringement, which were carefully selected by the plaintiffs, in about 30% of the instances (26 out of 74), there was no finding of

[29] *Patton*, 769 F.3d 1232.
[30] *Id.*
[31] *Id.* at 1283.
[32] *Id.*
[33] *Id.* at 1272.

infringement, either because they were considered *de minimis* or since ownership could not be established. Arguably, this percentage might be higher in instances not selected by the plaintiffs in litigation. This finding suggests that if the university cannot rely on fair use, a license might be purchased in a significant number of cases where there is no valid copyright claim, and where a license is, in fact, unnecessary.

Third, the case demonstrates the limits of a strict case-by-case approach to fair use, especially when applied to a wide and systematic use. At stake was the legality of GSU's 2009 Copyright Policy.[34] Under the 2009 Copyright Policy, a GSU professor may post an excerpt of a copyrighted work on the e-reserve without obtaining a permission from the copyright holder only if the professor first decides that doing so would be protected by the doctrine of fair use, determined in accordance with the criteria set forth in the checklist. This copyright policy reflected an attempt by GSU to implement fair use in a systematic manner for educational purposes.

The court did not question the legitimacy of a fair use policy, nor did it challenge the legality of using a checklist. Instead, the decision sought to assess whether the particular policy adopted by GSU complied with the fair use standard. The appellate court rejected the plaintiffs' claim that legal scrutiny should focus on the policy, explaining that the court "would have no principled method of determining whether a nebulous cloud of infringements purportedly caused by GSU's 'ongoing practices' should be excused by the defense of fair use."[35] Instead, the court opted for a case-by-case approach, where a representative sample of alleged infringements is analyzed, and the court compared the outcome of fair use analysis to the outcome achieved under the fair use checklists prescribed under the 2009 Copyright Policy.[36] This approach, however, fails to offer any guidance on how rules should be formulated. The end result provides very little guidance to professors and institutions engaging in educational use. This outcome is not only difficult to reconcile with general principles of liability,[37] but also creates a strong chilling effect on educators and institutions seeking to exercise fair use for educational purposes.

Finally, the court's rejection of a bottom-up proactive policy, created by the relevant community of users, reflects a rigid approach and neglects contemporary perceptions concerning the participation of communities in shaping the law. Consequently, the appellate court took a very narrow view of the e-Reserve, perceiving it as simply a matter of

[34] *Id.*
[35] *Id.* at 1259.
[36] *Id.* ("[P]erforming a work-by-work analysis which focused on whether the use of each individual work was fair use rather than on the broader context of ongoing practices at GSU.").
[37] *See supra* notes 21 & 23.

efficient delivery, with no significant advantage over course packs but for the saving of costs.[38] The court has overlooked the more profound transformation that is reflected in the shift to online reserve. The shift from paper to digital is not simply saving the cost of delivery; it may reflect a much deeper transformation of the pedagogy, a truly different approach to learning and knowledge, and different types of relationships between academic institutions, professors, and their students. Digital excerpts, which are made available to students, must be understood in the context of online environment where the default is availability, and materials could be often located online in many sites by various actors. The Copyright Policy adapted by GSU reflected these changes, and enabled professors to undertake a guidance role in selecting the reading materials. The Court of Appeals has overlooked these advantages and by neglecting this signaling of a failure to adapt the fair use analysis to the higher education online environment.

Overall, the approach of the appellate court amplifies the absurdity of the "no rule" policy and is taking the approach that fair use should be maintained as a purely open-ended standard to the extreme. According to the appellate court decision, any kind of concretization and individualization of fair use should be rejected, even in cases of typical or repetitive situations. Such a policy, in which the application of the law should always be maintained as a "guess," is not only difficult to reconcile with general principles of the rule of law,[39] but also creates a strong chilling effect on educators and institutions seeking to exercise fair use for educational purposes.

II. SUPPLEMENTING FAIR USE BY BEST PRACTICES

Fair use doctrine authorizes the courts to apply the four-factor analysis to particular cases, thereby constructing more concrete guidelines on permissible uses over time. How should courts formulate such norms? Moreover, what norms should govern practices on which courts have not yet ruled?

In this Part, we argue that bottom-up norms should play an important role in formulating fair use standards. Such formulations might be informed by Codes of Fair Use Best Practices, reflecting a communal code of conduct concerning permissible uses in particular fields of practice.

We begin with a brief introduction to Best Practices and the Best Practices Movement, and then outline some of the features of fair use

[38] *Patton*, 769 F.3d at 1287 ("The digital format is merely another way of displaying the same paginated materials as in a paper format and for the same underlying use. Electronic reproduction is faster, cheaper, and almost unlimited in its scope and duration, but there is no discernable difference in its use, purpose, and effect.").

[39] *See supra* notes 21 & 23.

Best Practices that make them essential for the construction of fair use by courts. Finally, we address the main objections to Best Practices. One line of argument focuses on the legal nature of such norms, questioning their legitimacy, while a second line of argument focuses on the property nature of copyright and the justification for defining the scope of copyright protection by relying on bottom-up norms.

A. *The Rise of Fair Use Best Practice*

The term "Best Practices" refers generally to bottom-up processes, where parties voluntarily choose to undertake norms of behavior. Statements of Fair Use Best Practices offer some practical guidance as to whether a particular use of copyrighted materials falls under fair use.[40] By translating general principles into actual rules of practice, such statements seek to reduce the chilling effect caused by the high level of uncertainty of fair use and encourage legitimate uses. Recent years have seen a proliferation of Best Practices initiatives and the rise of the Fair Use Best Practices Movement. This grassroots movement has evolved in response to a lack of clarity regarding the scope of permissible uses, which has been seen as an obstacle to access and use of copyrighted materials.[41] The shared goal of such initiatives is to enhance certainty regarding what fair use means in particular contexts.

Codes of Fair Use Best Practices began as independent initiatives, led by Peter Jaszi and Pat Aufderheide of the Center for Social Media at American University. The purpose of these initiatives was to draft and implement fair use practices for particular communities. The process of drafting these pioneering Codes of Fair Use Best Practices, sought to identify a representative number of the relevant stakeholders in a particular industry, and map their needs and common practices based on questionnaires and interviews.[42] The next step was to identify common grounds to be coded as Best Practices, while incorporating normative factors to shape the appropriate "rule of conduct" at stake.[43]

The first[44] industry-specific Best Practices statement was the

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[40] *See* Leonhard Dobusch & Sigrid Quack, *Transnational Copyright: Misalignments Between Regulation, Business Models and User Practice*, 8 OSGOODE HALL LAW SCHOOL RESEARCH PAPER SERIES at 11 (2012) *available at* http://ssrn.com/abstract=2116334.

[41] *See* AUFDERHEIDE & JASZI, *supra* note 15, at 13, 73–75; BERKMAN WHITE PAPER, *supra* note 5.

[42] *See* AUFDERHEIDE & JASZI, *supra* note 15.

[43] *Id.*

[44] An earlier attempt to draft a Fair Use Code of Best Practice was made by the "Conference on Fair Use," known as CONFU, which was active between 1994 and 1998. In this project, various stakeholders, including both academic institutions and right owners, gathered in order to reach an understanding regarding the scope of permissible uses. This project had, however, very limited impact. *See* THE CONFU REPORT: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE (Sept. 1997), *available at* http://www.uspto.gov/web/offices/dcom/olia/confu/conclu1.html.

Documentary Filmmakers' Statement of Best Practices (2005) facilitated by The Center of Social Media.[45] The Statement sought to reflect the community norm of documentary filmmakers regarding "fair use", in order to clarify what "falls under" the legal doctrine of fair use and help filmmakers use it with confidence.[46]

The adoption of the filmmakers' code was accompanied with a high level of skepticism, but nevertheless, it was quickly endorsed by a broad array of stakeholders. The most significant endorsement was given by major U.S. errors and omissions (E&O) insurance companies, such as AIG, MediaPro, ChubbPro, and OneBeacon.[47] This enabled filmmakers to rely on the Filmmakers' Best Practices when insuring their movies against infringing copyrights lawsuits, thus strengthening the legitimacy of the code as a communal social norm. The Filmmakers' Best Practices also made a global impact when in 2008 the Italian Documentaries Association (Doc IT) and the International Documentaries Association (IDA) joined forces to create an EU-based Best Practices Statement for its EU Filmmakers.[48] Canada has also adopted this method and created its own guidelines for documentary filmmakers.[49]

Following the success of the Filmmakers' Best Practices, the Center of Social Media & Social Impact initiated additional statements in other fields, such as Online Videos (2008),[50] Media Literacy Education,[51] Open Courseware (2009),[52] Scholarly Research in

[45] *See* DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005*), available at* http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf; AUFDERHEIDE & JASZI, *supra* note 15, at 6.

[46] *See* DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE, *supra* note 45.

[47] *See What has Happened Since the Documentary Filmmakers' Statement of Best Practices in Fair Use was Released on November 18, 2005?*, CENTER FOR MEDIA & SOC. IMPACT, http://www.centerforsocialmedia.org/sites/default/files/documents/pages/success_of_the_statement.pdf.

[48] Sarah Sklar-Heyn, Note, *Battling Clearance Culture Shock: Comparing U.S. Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film*, 20 CARDOZO J. INT'L & COMP. L. 233, 236 (2011).

[49] *See* DOCUMENTARY ORGANIZATION OF CANADA, COPYRIGHT AND FAIR DEALING: GUIDELINES FOR DOCUMENTARY FILMMAKERS (May 2010), http://www.cmpa.ca/sites/all/themes/cmpa/content/ind-publications/Copyright-and-Fair%20Dealing-Guidelines-for-Documentary-Filmmakers.pdf.

[50] THE CENTER FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (June 2008), http://www.cmsimpact.org/sites/default/files/online_best_practices_in_fair_use.pdf.

[51] *See* CENTER OF MEDIA & SOC. IMPACT, THE CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION, http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education. The Code of Best Practices in Media Literacy was inspired by a report released in 2007, THE COST OF COPYRIGHT CONFUSION FOR MEDIA LITERACY. Teachers recognized the need for more flexibility and freedom when using copyrighted materials in order to perform their educational mission, and therefore decided to act as a group to achieve this goal.

[52] The Open Course Ware (OCW) movement was launched in 2002, with the decision of the Massachusetts Institute of Technology to make its course materials freely available online. The

Communication (2010),[53] Poetry (2011),[54] Academic Research Libraries (2012),[55] and, most recently, in the field of the Visual Arts (2015).[56] Other organizations have followed suit, and adopted the model to develop similar codes.[57] Fair use Best Practices have also extended outside the United States, to countries such as Israel, which adopted a fair use regime in 2007. An ad-hoc coalition of higher education institutions crafted a Code of Best Practices for the Use of Works in Research and Teaching (2009).[58]

Despite some differences, these Best Practices share several assumptions: fair use may be implemented by concrete practical rules; the implementation of fair use should be contextual; and contextual norms can be generated by actors in a particular area of practice through bottom-up processes. These assumptions make these initiatives a challenging case for legal inquiry.

Code of Fair Use Best Practices for the use of copyright material in OCW was published in 2009. CENTER OF MEDIA & SOC. IMPACT, CODE OF BEST PRACTICES IN FAIR USE FOR OPENCOURSEWARE (Oct. 2009), http://www.centerforsocialmedia.org/sites/default/files/10-305-OCW-Oct29.pdf.

53 INTERNATIONAL COMMUNICATION ASSOCIATION, CODE OF BEST PRACTICES IN FAIR USE FOR SCHOLARLY RESEARCH IN COMMUNICATION (June 2010), http://www.centerforsocialmedia.org/sites/default/files/WEB_ICA_CODE.pdf.

54 CENTER OF MEDIA & SOC. IMPACT, CODE OF BEST PRACTICES IN FAIR USE FOR POETRY (Jan. 2011), http://www.poetryfoundation.org/downloads/FairUsePoetryBooklet_singlepg_2.pdf.

55 ASSOCIATION OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (Jan. 2012), http://www.cmsimpact.org/sites/default/files/documents/code_of_best_practices_in_fair_use_for_arl_final.pdf.

56 COLLEGE ART ASSOCIATION, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS (Jan. 2015), http://www.cmsimpact.org/sites/default/files/best_practice_rfnl.pdf.

57 For example, The Society for Cinema and Media Studies created a Code of Best Practices for Teaching for Film and Media Educators (2006). *See* Univ. of Tex. Press, *The Society for Cinema and Media Studies' Statement of Best Practices for Fair Use in Teaching for Film and Media Educators*, 47 CINEMA J. 155 (2008), *available at* http://www.cmstudies.org/resource/resmgr/fair_use_documents/scms_teaching_statement.pdf. For Media Studies Publishing (2010), *see* Univ. of Tex. Press, *Society for Cinema and Media Studies Statement of Fair Use Best Practices for Media Studies Publishing*, 49 CINEMA J. 179 (2010), *available at* http://www.cmstudies.org/resource/resmgr/fair_use_documents/scms_publishing_statement.pdf.
The Dance Heritage Coalition created its own statement regarding dance-related materials (2009), focusing on five areas: preservation, exhibition, teaching, scholarships and the use of materials on collection websites. *See Statement of Best Practices in Fair Use of Dance-Related Materials*, DANCE HERITAGE COALITION (2009), *available at* http://www.centerforsocialmedia.org/sites/default/files/documents/pages/DHC_fair_use_statement.pdf.
The Society of American Archivist created a statement for orphan works (2009). *See Orphan Works: Statement of Best Practices*, SOC'Y OF AMERICAN ARCHIVISTS (June 17, 2009), *available at* http://www.archivists.org/standards/OWBP-V4.pdf. The Electronic Frontier Foundation created a statement for User Generated Video Content. *See Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUNDATION, *available at* https://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf.

58 Amira Dotan, Niva Elkin-Koren, Orit Fischman-Afori, Ronit Haramati-Alpern, *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, 57 J. COPYRIGHT SOC'Y U.S.A. 447 (2010). The authors serve as the directors of the Israeli Forum for Accessible Education, which has drafted a code of Fair Use Best Practices for the higher education setting in Israel.

B. *The Virtues of Bottom-Up Norms*

Fair Use Codes of Best Practices are grassroots initiatives, of a bottom-up nature, reflecting the contextual implementation of an abstract standard in the practices and norms of a particular community of creators and users.[59] These initiatives extend the loci of crafting fair use guidelines from traditional institutional settings (legislature and courts) to new fora (creative communities). This shift raises an institutional challenge. Even if one agrees that increased certainty should be inserted into the fair use standard by introducing more concrete guidelines, it is still necessary to determine how such rules should be crafted and by whom. Indeed, fair use could be supplemented by rules created by legislation or implemented in specific regulation. Yet, in some cases, bottom-up norms could offer, at least, additional guidance as to the implementation of fair use standards.

In essence, Codes of Best Practices is a form of private ordering that may increase efficiency and enhance the legitimacy of fair use and copyright law altogether. Within limits, private ordering may enjoy some level of autonomy and in some respects would be insulated from state intervention. This is grounded in a wide range of theoretical frameworks, from political theory to law and economics. From a political perspective, private ordering is often seen as a manifestation of fundamental values such as self-governance, autonomy and freedom. The economic approach generally presumes that private ordering regimes are efficient and therefore holds them legitimate.[60]

From an efficiency perspective, bottom-up processes are likely to generate rules that reflect concrete needs in particular areas of practice identified by the relevant stakeholders. Practitioners are likely to be better informed than central governments of the special needs and interests of the various stakeholders.[61] Identifying the types of uses, which are necessary for creative practices to flourish in a particular area, may help courts to define the appropriate limits on the scope of copyright within the fair use framework.

Adopting Fair Use Best Practices is also likely to raise awareness and educate users regarding the scope of their rights and copyright in general, thus improving the overall enforceability of copyright law. Contextual implementation of fair use may facilitate the internalization of copyright norms by creators, users and institutional gatekeepers, thus lowering the cost of copyright enforcement through users' self restraint.

Moreover, Statements of Best Practices provide a framework for

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[59] *See* Falzone & Urban, *supra* note 5, at 346.

[60] *See* Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002).

[61] For instance, a community of documentary filmmakers is likely to be more informed of its needs than legislators. For the imperfections of the legislative process in copyright, *see* JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

the incremental development of users' rights. Users, who have better knowledge about their rights, are more likely to assert their rights and privileges. A concrete framework for implementing fair use in a particular area of practice may also help articulate the rights of users and facilitate their development. By enhancing certainty regarding the boundaries of permissible use, Fair Use Best Practices not only encourage uses that the law seeks to promote, but also draw free paths and encourage users to explore innovative uses within the fair use framework. These free paths signal uses that are clearly fair, and, therefore, not subject to any licensing requirement. In this sense, these initiatives use strategies similar to other open access initiatives, which signal areas not protected by IP.[62]

Fair Use Best Practices may also facilitate the emergence of useful social institutions, as they become a community-building tool. The process of drafting the code may help identify the stakeholders and define the community boundaries: who is included and who is not, and what are the shared interests and values of the community members. The process of drafting may also create a forum for deliberating on fair use and developing the norm to address new challenges.[63] Within a broader context, which examines the way norms are crafted, rulemaking processes can be perceived as the outcome of a communicative process between all the stakeholders. These "regulatory conversations" or "regulatory discourses," described by Julia Black, further the building of a shared language to be spoken by the community members, and are designed to achieve a persuasive end.[64]

Agreeing on the shared implementation of fair use may facilitate collaboration among community members (*e.g*, documentary film makers) and develop trust, confidence and shared expectations. These, in turn, may further other activities, such as providing defenses against legal suits, promoting legal reform initiatives and influencing public opinion.[65]

Providing a framework for social activism may assist communities in becoming organized and developing counter practices within the fair use boundaries.[66] When practices become widely shared they may also

[62] For instance, The Patent Lens by CAMBIA is an online patent search facility and knowledge resource, which aims to help inventors identify the scope of the patent monopoly so that they can *invent* around it. *See About the Lens*, THE LENS, *available at* http://www.lens.org/about/.

[63] *See* Dotan, Elkin-Koren, Fischman-Afori, Haramati-Alpern, *supra* note 58, at 468–69.

[64] These insights are applicable to self-regulation as well as to the drafting of Codes of Best Practices. *See* Julia Black, *Regulation Conversations*, 29 J. L. & SOC'Y 163, 164–65 (2002).

[65] *Id.* at 165, (stressing that, generally speaking, the process of norm creation serves a "coordinating" goal, since "it produces shared meanings as to regulatory norms and social practices which then form the basis of action; for example, the formation of regulatory interpretive communities").

[66] Michael Madison, *Madisonian Fair Use*, 30 CARDOZO ARTS & ENT. L.J. 39 (2012).

influence judicial outcomes.[67] For instance, Fair Use Best Practices may offer an alternative, counter culture, to the Clearance Culture[68] by encouraging users to exercise their privileges under fair use.

Another major advantage of bottom-up norms is creating legitimacy. Codes of Best Practices reflect a robust shared understanding, and not an individual interpretation of the law. Consequently, they could offer an authoritative source of guidance not only to community members, but also to outsiders.[69] The lack of consensus among members of the community about the appropriate boundaries of fair use in a particular area of practice is one of the main obstacles to using copyrighted materials.[70] The acceptance of guidance by a community may not only encourage the exercise of fair use, but can also accord constructive legitimacy to a particular application of fair use.

Legitimacy among community members arises from the bottom-up process that engages users in establishing the fair use norm. This type of engagement gives users a voice in shaping the evolving fair use norm.[71] Giving users a voice in the social negotiation over the scope of rights is not only essential for signaling the needs and shared values of users, but is also important for creating fora for participation in the shaping of norms; thus, this process strengthens the legitimacy of copyright law among participating communities.

For all these reasons, Fair Use Best Practices offer an important source of norms that may become useful in informing the construction of fair use by courts. This facilitates ongoing participation by relevant communities of users and authors in rule making, thus enhancing the efficacy of copyright law and strengthening its legitimacy.

At the same time, these potential legal implications may raise some concerns. Codes adopted by communities represent (at best) consensus among users who share similar needs; they do not reflect a compromise between divergent interests. Other issues relate to the interface with public law, as voluntary measures often lack sufficient safeguards for securing rights protected under the law.[72] Can communities unilaterally make their own copyright law? In order to determine what legal status should be accorded to Best Practices, it is

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67 *See* BERKMAN WHITE PAPER, *supra* note 5, at 104.

68 *See supra* notes 13 & 14 and accompanying text.

69 *See* BERKMAN WHITE PAPER, *supra* note 5, at 103–06.

70 *Id.*

71 *See* AUFDERHEIDE & JASZI, *supra* note 15.

72 In the case of copyright enforcement by ISP, for instance, the use of voluntary measures calls into question the underlying rationale of the immunity regime and its effectiveness in securing users' civil liberties. *See* Niva Elkin-Koren**,** *After Twenty Years: Revisiting the Copyright Liability of Online Intermediaries*, *in* THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE (Susy Frankel & Daniel J Gervais eds., 2014).

necessary to further understand what it is they stand for. This question is discussed next.

C. *Fair Use Best Practices: What They Are and What They Are Not*

The term "Best Practices" lacks a clear legal definition, and it is often used in reference to different types of voluntary measures, such as: private ordering, self-regulation, co-regulation, self-governance, soft law, and even ethical codes of conduct.[73] All these notions share a common feature of voluntary adoption, yet they may differ significantly in some respects.

Fair Use Best Practices present a special type of private ordering. Communities often generate and administer rules that apply to their members, and private actors may also generate norms that apply to themselves via contracts. The notion of "private ordering" has several meanings. It refers to the way in which norms are being created and enforced outside the legal regime, namely, to extralegal systems in which rules are followed despite the absence of any legal obligation to do so.[74] "Private ordering" may also refer to the origin of norms, namely, to the decentralized processes by which norms are formulated and subsequently enforced by the legal system.[75] Fair Use Best Practices refer to the latter processes.

Best Practices also share some features with self-regulation. There is no single definition of self-regulation.[76] Self-regulation can be defined as the practice of industry taking the initiative to formulate codes of conduct and enforce them, with or without limited government involvement.[77] Another approach emphasizes the collectivity and mutual agreement characteristic of self-regulation. [78] Many definitions, or rather descriptions, refer to self-regulation as generated by a group of persons or organizations, thus according it a "collective" or multilateral, rather than bilateral, character.[79]

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[73] *See* Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 423-424 (2011).

[74] *See generally* Niva Elkin-Koren, *Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks*, in GOVERNANCE, REGULATIONS, AND POWERS ON THE INTERNET (E. Brousseau et. al. eds., 2009); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Jonathan R. Macey, *Public And Private Ordering And The Production Of Legitimate And Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1126-1127 (1997).

[75] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 74; Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1 (2001).

[76] The lack of consensus relating to the terminology reflects a deeper disagreement regarding the taxonomy. *See* Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World*, 54 CURRENT LEGAL PROBS. 103, 116 (2001).

[77] *See id*. Black refers to the OECD definition of self-regulation as the "process by which an organized group regulates the behavior of its members." *Id.* at n.41.

[78] *See id.*

[79] *See id.*

Black, who challenged the theoretical concept of "self-regulation," concluded that it is a "normatively loaded term," since it may denote either positive or negative views.[80] For some, self-regulation denotes a kind of regulation which is "responsive, flexible, informed, targeted which promotes greater compliance, and which at once stimulates and draws on the internal morality of the sector or organization being regulated;"[81] while for others, it denotes "self-serving" or "self-interested" regulation.[82]

Fair Use Best Practices may raise similar concerns. Several scholars have challenged the normative grounds of Fair Use Best Practices, invoking rhetorical arguments similar to those raised by opponents of self-regulation.[83]

The main argument raised against Fair Use Best Practices is that they should be perceived as a type of custom, which purports to incorporate "unrepresentative customary practices"[84] into the law. Incorporating custom into the law, so goes the argument, is circular: "Custom influences the law, the law reinforces the custom, and the custom then becomes further entrenched."[85] Such rulemaking does not necessarily reflect a just result and the concern is that unjust, or non-efficient, customs will be perpetuated.[86]

The main problem with this argument is that Fair Use Best Practices *are not a custom*. They do not proclaim a custom and should not be treated as such.[87] They do not reflect how users actually behave. Instead, Fair Use Best Practices reflect a *normative stance*, how people ought to behave. These norms reflect a shared understanding regarding the appropriate scope of fair use within a particular community regarding a particular area of practice. As such, Fair Use Best Practices may, in fact, change the customary practice and adapt it to the normative standard. The mere fact that drafting Best Practices is followed by a thorough analysis of the customary practices does not mean that the final code adopts such customary practices as its

[80] *Id.* at 115. *See* Omarova, *supra* note 73.

[81] Black, *supra* note 76, at 115.

[82] *Id.*

[83] *See* Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 371 (2010) [hereinafter Rothman, *Best Intentions*]; Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1946–80 (2007) [hereinafter Rothman, *Use of Custom*]; Ira P. Robbins, *Best Practices on "Best Practices": Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 289 (2009); Jay Rosenthal, *Best Practices*, 57 J. COPYRIGHT SOC'Y U.S.A. 389 (2010).

[84] *See* Rothman, *Best Intentions*, *supra* note 83, at 372.

[85] Rothman, *Use of Custom*, *supra* note 83, at 1946.

[86] *See id.*

[87] Rothman herself contends that Fair Use Best Practices statements do not document the actual practices of the relevant communities. *See* Rothman, *Best Intentions*, *supra* note 83, at 381.

benchmark.[88] The facts survey process is used as a basis for further elaboration, seeking to identify failures in the implementation of the law.

A second argument against Fair Use Best Practices challenges its normative stand.[89] The main problem, it is argued, is that Codes of Best Practices do not objectively state the principles of fair use, but instead state what the drafters wish fair use was. Robbins, for instance, criticizes the Code of Best Practices in Fair Use for Online Video, prepared by the Center for Social Media at American University, as failing to meet any qualitative requirements, since the baseline principles for how the Best Practice was developed are not explained.[90] In Robbins' view, such Best Practice "may serve as suggestions, at worst, or guidelines, at best, but without objectively measurable verification."[91] By the same token, Rothman claims that such Best Practices, at best, reflect wishful thinking and not the *de-facto* industry custom, and at worst, create reality but do not describe it.[92]

The problem with this argument, that Best Practices do not objectively state the principles of fair use, is that it assumes that fair use principles can be "objectively stated."[93] Yet, fair use principles cannot be "objectively stated" so easily.[94] Clearly, only the courts are authorized by law to determine the meaning of fair use and define its scope in any particular instance in a legally binding way. The question is, however, how should the courts reach such a decision and who should participate in the ongoing legal conversation which is shaping these norms? The argument advanced here is that bottom-up guidelines developed by the community are a relevant factor that court should take into account when determining the scope of fair use. One should also bear in mind that despite the fact that Best Practices are not aimed at

88 *See* AUFDERHEIDE & JASZI, *supra* note 43 and accompanying text.
89 *See* Rothman, *Use of Custom*, *supra* note 83, at 1947.
90 *See* Robbins, *supra* note 83, at 282.
91 *Id.* at 289.
92 *See* Rothman, *Best Intentions*, *supra* note 83.
93 *Id.* at 377–78.
94 The role of the "transformative use" in the fair use four-factor analysis demonstrates the difficulties in objectively evaluating the fair use standard. Rothman argues that Fair Use Best Practices emphasizes the transformative nature of the uses at stake. Yet in her view "transformativeness is often viewed narrowly and courts have frequently concluded that simply putting a copyrighted work in a new context is not sufficiently transformative to merit a finding of fair use." *See* Rothman, *Best Intentions*, *supra* note 83, at 377. Rothman relies on Beebe's empirical study, which shows that the evaluation of market harm is most predictive of the outcome. *See* Beebe, *supra* note 18. Yet, Beebes' findings were actually refuted by Netanel's study, which shows the significance of transformative use. *See* Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011). Moreover, the court's decision in the case of *The Authors Guild, Inc., v. Google Inc*., 770 F. Supp. 2d 666 (2011), adopts a broad transformativeness concept—according to which putting a copyrighted work in a new context, which creates a new meaningful vehicle (Google Book Project), is highly transformative and therefore merits a fair use defense.

describing reality but rather taking a normative stand, they nevertheless may eventually turn into practice. Once practices are unified and conceptualized within the fair use framework, they could be adopted by the court as the fair use accepted (therefore objective) standard.[95]

A third argument against the use of Best Practices as a legitimate consideration in fair use analysis, is that they are not necessarily produced by an "inclusive" process, but rather generated by a homogenous interest group, and serve those one sided interests only.[96] Yet, since norms crafted by communities are confined to the fair use multi-factor analysis defined by law, they correspond to the objective criteria set by law. In fact, adapting Fair Use Best Practices may often serve to improve the level of compliance with copyright law by providing practical guidance on the implementation of fair use, thus raising awareness of the limits of permissible unlicensed use, bridging the gap between the law and everyday practices, and generally strengthening the legitimacy of copyright law. Since Best Practices engage users in the implementation of law, they often recruit users as effective gatekeepers of copyright enforcement.[97]

Overall, the arguments raised by opponents of Best Practices stem from a narrow perception of the legal role and function of Best Practices. Best Practices do not express the one and only objective way of implementing fair use, and accordingly they do not possess an objectively verifiable nature. It is arguable, therefore, that Fair Use Best Practices have no legal implications as they simply reflect the views of users regarding the scope of permissible use. Best Practices could be viewed as nothing more than an *opinion*, and therefore without any legal consequences. Yet, it could also be argued that within the framework of an open norm, an attempt to make the norms more workable through guidelines, developed in a bottom-up manner, should not be totally disregarded. The questions, then, are what legal status should be accorded to norms established by such voluntary measures? Should courts defer to such norms in their fair use analysis? And if so, under what circumstances?

The social and legal mechanism of Best Practices in a copyright

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[95] The Israeli experience demonstrates this process: as described above, an ad-hoc coalition of higher education institutions adapted a Code of Best Practices for Use of Works in Research and Teaching. *See supra* note 58 and accompanying text. Two Israeli publishers challenged the use of copyrighted works for teaching purposes by filing a lawsuit against the Hebrew University. In November 2013, the parties reached a settlement agreement, which adopts the principles of the Israeli Code of Best Practices. According to the settlement agreement (and the Israeli Code of Best Practices) a use of up to 20% of a book by way of "e-reserves", as well as printed course packs, is permitted. The agreement was approved by court, and therefore is likely to serve as a benchmark for the entire community of higher education, *available at* http://weblaw.haifa.ac.il/he/AcademyInCommunity/ClinicList/tech/projects/Pages/FairUse.aspx.

[96] *See* Robbins, *supra* note 83, at 289; Rothman, *Best Intentions*, *supra* note 83.

[97] *See* AUFDERHEIDE & JASZI, *supra* note 15.

context are similar to those which apply in other legal fields. Indeed, Best Practices may not comprise the exact optimal rule (as if such a rule exists); its crystallization may not be achieved through comprehensive inclusion of all relevant sectors (as if such perfect democratic processes exist); and Best Practices may perpetuate relations and block legal mobility (are mandatory regulations different?). Nevertheless, Best Practices reflect soft law, capable of informing established legal doctrines, and operate under the courts' close scrutiny. In contrast to mandatory regulations, Best Practices serve only as an aid within structured legal frameworks. As further suggested in Part V, Best Practices could be considered as informing the legal analysis of established legal notions such as good faith, reasonableness and fair use. Such open standards leave the courts broad discretion, allowing them to instill various meanings into the legal melting pot. .

D. *Can Users Define The Scope of Copyright?*

Codes of Fair Use Best Practices pose another type of theoretical challenge, as this type of private ordering purports to unilaterally craft norms in the context of a property regime. Private ordering is commonly applied by right-holders to exercise rights defined by law, only this time, Best Practices reflect a collective action by users of copyrighted materials. Unlike contracts, rules designed by Codes of Best Practices may apply not only to those freely choosing to adopt them; they may also affect the interests of third parties. Can communities of users unilaterally generate norms that affect the legal scope of copyright?

Copyright creates rights against the world (*in rem*), whereas contracts apply only to the contracting parties (*in personam*). The law generally assumes the right of the parties to freely craft contracts unless certain market imperfections exist or serious third-party harm is implicated. This is because it is assumed that parties who freely enter into a contract and voluntarily undertake obligations would reach an efficient bargain. Indeed, contracts and licenses are commonly used in copyright contexts, enabling owners to exercise the rights assigned to them by law.[98] Over the past two decades private ordering has become a dominant source of norms governing access to creative works. With more opportunities to contract online, right-holders often use voluntary measures to set restrictions on the use of copyrighted works through End-User License Agreements (EULA), along with self-help means

[98] From an economic perspective, the role of law is limited to providing two legal fundamentals of the market—assigning property rights to owners and facilitating an efficient exchange system by contract law. *See* Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953 (2005).

such as technological protection measures.[99]

Best Practices reflect yet another type of private ordering. Unlike contracts, a Code of Best Practices is undertaken unilaterally and voluntarily by the individuals or organizations that choose to adopt it. It does not reflect a bargaining with right-holders. The question raised is whether such Best Practices could possibly affect the rights of copyright owners. The proprietary context gives rise to several arguments challenging the incorporation of bottom-up norms in the copyright arena. One issue arises from the fact that copyright law defines entitlements, namely, rights against the world. Consequently, while a right-holder may use a license to exercise rights established by law, users arguably have the legal power to limit the scope of such entitlement, by simply claiming a right to freely use the resource.

However convincing this argument may appear, it fails to recognize the contingent nature of the proprietary claim. Copyright owners are entitled to exclusively exercise the bundle of rights defined by copyright law subject to limitations and exceptions, which are also defined by law, including fair use. Therefore, the limited scope of the proprietary interest originates in law and not in the voluntary action of private actors. Copyright law sets limits on the scope of copyright to serve the purpose of law, by securing some level of freedom to use copyrighted materials. Such limits have been left open intentionally for the courts to develop.[100] Consequently, Fair Use Best Practices should be understood as an attempt by users to exercise their rights in a legal space that has been intentionally left undetermined. At a minimum, they reflect a shared understanding by a community regarding the scope of their users' rights. Just as copyright right-holders cannot purport to unilaterally impose duties on licensees beyond the scope of their exclusive rights,[101] so too users cannot unilaterally detract from the rights of copyright owners by claiming users' rights beyond fair use. Yet, like licensing strategies that are taken into account when deciding fair use cases, Fair Use Best Practices can also inform the standard setting process. When determining fair use, courts may consider these shared interpretations as defining the boundaries of permissible uses.[102] This does not mean, of course, that every practice by a community of

[99] One of the most acute manifestations of such concern is the common practice whereby right owners impose contracts that restrict various uses that would otherwise be permitted by copyright law. Such practice is common, for instance, in relation to licenses acquired by libraries for the use of digital resources. *See* Orit Fischman Afori, *The Battle over Public E-Libraries: Taking Stock and Moving Ahead*, 44 INT'L REV. INTELL. PROP. & COMPETITION. L. 392 (2013).

[100] *See supra* notes 11–14 and accompanying text.

[101] *See* NIVA ELKIN-KOREN & ELI M. SALZBERGER, THE LAW AND ECONOMIC OF INTELLECTUAL PROPERTY IN THE DIGITAL AGE: THE LIMITS OF ANALYSIS, 151–55 (2012).

[102] *See* Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81, 106–108 (2010).

users would equally affect the scope of copyright; Fair Use Best Practices can only inform courts with respect to the grey areas created by open standards where courts are entrusted to fill-in the gaps.[103]

Another concern arising from incorporating private ordering when defining the scope of proprietary rights is the issue of transaction costs. Regarding property, the law generally does not enforce self-created rights beyond those defined by law. Unlike contracts, which involve privity, a proprietary regime imposes duties on a wide range of strangers, and therefore generally cannot subject them to additional duties beyond those defined by law.[104] Therefore, law will usually strictly define the rights and the corresponding duties imposed by copyright on third parties.[105] Merrill and Smith explain that "classical" property rights communicate a standard bundle of rights relating to an asset, thereby reducing transaction costs involved in determining the type of rights and obligations that are associated with that asset.[106] When we allow right-holders to create property-like rights (*i.e.*, rights of exclusion, which are automatically imposed against everyone who uses the resource), we substantially increase the information cost of potential users. These are the costs incurred by third parties, *e.g.*, non-owners and end-users of creative works, who simply seek to avoid inadvertent interference with copyright, and would be required to investigate which of the many applicable license restrictions applies to their particular use. These costs of avoidance may undesirably increase barriers to access to creative works. [107]

Fair Use Best Practices avoids this challenge. Here, the scope of exclusive rights and users' fair use privileges, are informed by the practices of the intended users of the works. Incorporating Fair Use Best Practices into the legal standard may actually lower the cost of avoidance by adjusting the abstract standard to fit the particular context of use and practices of particular communities of users. Fair Use Best Practices, in that regard, could serve as a complementary device in terms of designing the property right (copyright), thus ultimately enabling it to function as a vehicle for reducing transaction costs and enhancing efficiency.

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[103] For further discussion of judicial reliance on Fair Use Best Practices, *see infra* notes 117–125 and accompanying text.

[104] *See* ELKIN-KOREN & SALZBERGER, *supra* note 101. *See also* Lehavi, *supra* note 102, at 94 (arguing that "the use of initially vague norms poses special challenges in property—a dynamic legal field that nevertheless relies on broad-based coordination. . . ." He therefore concludes, "property standards should adhere to distinctive institutional mechanisms.")

[105] *See* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clauses Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

[106] Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

[107] *See* ELKIN-KOREN & SALZBERGER, *supra* note 101.

III. BEST PRACTICES AND COPYRIGHT POLICY: LESSONS FROM SELF-REGULATION

Voluntary measures may serve important non-legal goals, such as pleasing business clientele, creating a marketing advantage, or standardizing professional skills and modes of operation. Yet, undertaking voluntary measures may also carry some legal implications. The legal implications of Fair Use Best Practices proposed here may be classified roughly into two categories. One is making use of the signal generated by Best Practices, to inform the legal interpretation of fair use or provide the grounds for legislating particular rules. A second function of Best Practices is to provide the court with a benchmark when determining liability for copyright infringement. In this context, we propose a *pragmatist approach* to fair use, which would enable the court to encourage a deliberative implementation of fair use. This novel approach to fair use shifts the focal point of legal analysis from a fact-intensive inquiry to a scrutiny of the reasonable implementation of fair use principles by Codes of Best Practices. This approach, we argue, could promote predictability in copyright law within the flexible regime of fair use. At the doctrinal level, we show how the pragmatist approach to fair use could be implemented under the current law, by limiting liability for copyright infringement under doctrines such as "innocent infringer" or "reasonable conduct."[108]

The following discussion in sections A and B elaborate on each of the two legal functions of Best Practices, while section C delves into the pragmatist approach to fair use.

A. *Informing Courts and Lawmakers*

1. Interpreting Open-Ended Standards

Voluntary measures may create a guiding norm for the court in cases of legal gaps (lacuna) or where there is a need to interpret open standards.[109] In both cases, it is assumed that the industry, which develops its own practice, is well qualified to assess the needs,

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[108] *See infra* Sections IV.B.1– 2.

[109] Voluntary measures referring to a non-legal norm often intend to achieve non-legal objectives, such as marketing or other strategic business advantages (*i.e.* benchmarking). Since such purposes promote the prosperity of the members of the collective industry, they may be accompanied by enforcement powers given to the self-regulatory organization. *See, e.g.*, INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA, http://www.iiroc.ca/about/Pages/default.aspx (stating that the organization's mandate is to "set and enforce high quality regulatory and investment industry standards, protect investors and strengthen market integrity while maintaining efficient and competitive capital markets."). In that sense, voluntary measures *imposed* by self–regulatory organization may be viewed as the modern phase of the traditional *merchant law*, developed and enforced by the guilds. *See* Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994).

implications, and costs of a certain professional niche.[110] In the absence of a legal norm or where a vague norm is challenged in court, the community's code of practice may play a significant role in constructing the court's interpretive reasoning as to the substance of the norm (or lack of norm).

For example, in the area of finance, private ordering plays an important role and is considered to be particularly effective.[111] Government regulation is unable to adapt to the rapid changes in the financial market because of bureaucracy and slow administrative processes.[112] Private ordering measures, by contrast, often have the flexibility to adapt to financial innovation. The vagueness of norms (or lack of norms) in this area, especially referring to accounting standards, has led to the emergence of various self-regulatory private organizations, such as the Financial Accounting Standards Board ("FASB") and the Financial Industry Regulatory Authority, Inc. ("FINRA"), which seek to generate shared interpretations that serve as a professional base-line followed by the relevant industry.[113] These self-regulatory rules in the financial sector have been increasingly relied upon by courts in judicial decisions,[114] and are even referred to as the binding practice by the Securities and Exchange Commission ("SEC").[115] Though the SEC reliance on private sector ordering was at the core of the outcry during the financial crises of the past decade,[116] it nevertheless demonstrates the potential function of private ordering measures in informing courts and governmental agencies with respect to the formulation of vague norms.

Along these lines, Fair Use Best Practices could be used to fill-in gaps and inform the interpretation of fair use by the courts. As discussed above, the fair use doctrine is an open-ended standard, based on a multifactor analysis.[117] The question, then, is which measures should inform the courts' decision when determining the scope of fair use and

110 *See* Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures?* 6 J. TELECOMM. & HIGH TECH. L. 41, 68 (2007).

111 *See* Schwarcz, *supra* note 60.

112 *Id.*

113 *See* FINANCIAL ACCOUNTING STANDARDS BOARD, http://www.fasb.org/home. *See also* FINANCIAL INDUSTRY REGULATORY AUTHORITY, http://www.finra.org/.

114 *See* Omar Ochoa, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*, 15 TEX. REV. L. & POL. 489, 504 (2011); Omar Ochoa, *Filling the "GAAP": Why Generally Accepted Accounting Principles Should Inform U.C.C. Article 9 Decisions*, 89 TEX L. REV. 207 (2010).

115 The SEC is required to establish accounting requirements for public companies under § 19 of the Securities Act. 15 U.S.C. § 77s. The agency determined that it would rely on a private sector standard. *See* William W. Bratton, *Private Standards, Public Government: A New Look at The Financial Accounting Standards Board*, 48 B.C. L. REV. 5, 7 (2007).

116 *See, e.g.*, George J. Benston, *The Regulation of Accountants and Public Accounting Before and After Enron*, 52 EMORY L.J. 1325 (2003).

117 *See supra* notes 11–14 and accompanying text.

weighing the various factors? Obviously, there is no single answer. Highly developed literature addresses the complexity of fair use.[118] The view introduced here is that Fair Use Best Practices should inform the legal analysis of fair use, by offering the courts several indicators for applying the multifactor analysis.[119] They signal concrete needs of unlicensed use of copyrighted works in particular creative contexts; they inform the courts of what might be considered normative conduct under the circumstances; and finally, they may describe the customary conduct in a particular field of practice, thus influencing, though not dictating, the reasonable benchmark at stake.[120]

Overall, just as right-holders' interpretation of the scope of the copyright is often considered by the courts through industry standards and licensing practices,[121] so too might users' understanding of their privileges under copyright be acknowledged in fair use analysis. Users could be viewed as participants in shaping copyright norms, alongside copyright owners. This may acknowledge the role of users as not simply consumers of copyrighted materials, but also as equal participants in the creative process, who contribute to the promotion of copyright goals by actively using works, giving them meaning, and generating transformative uses.[122]

Best Practices are not crafted in accordance with a one-size-fits-all principle. Similar to other soft law frameworks, they make the legal system more attentive to different social, economic and cultural signals.[123] Such signals may be introduced by various vehicles, with different qualities and legal force. For example, the process by which a Best Practice is created, and the identity of the parties participating in its formation, may affect its power to inform established legal doctrines and the weight it is given by courts.[124] Moreover, where Best Practices

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118 *See, e.g.*, WILLIAM PATRY, PATRY ON FAIR USE (2013 ed.).

119 *See* AUFDERHEIDE & JASZI, *supra* note 15.

120 *See supra* notes 84–88 and accompanying text (referring to the impact of an industry custom on conclusions about its fairness). For instance, the drafters of the Documentary Filmmakers' Statement of Best Practices hoped that in time these practices would help guide the courts to determine what fair use was in that specific field. *See* BERKMAN WHITE PAPER, *supra* note 5.

121 *See, e.g.*, American Geophysical Union v. Texaco Inc., 60 F.3d 913, (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).

122 *See supra* notes 63–71 and accompanying text.

123 Julia Black has pointed out that the term "self-regulation" creates a dangerous assumption according to which "the 'self' is autonomous in that it constructs the reasons for its actions, and that what is at issue is simply the *will* to influence oneself." In reality, however, the development of self-regulation is much more complex, since "[c]ollectives are clearly not monoliths, but neither are organizations—they are complex, disaggregated, fragmented, with multiple identities and multiple sub-units, with multiple selves…", *see* Black, *supra* note 77, at 123–24.

124 For example, a Code of Best Practices, developed by representatives of *all* Higher Education Institutions (HEI) in a certain country, though without any representation of commercial publishers, should be given significant weight, because HEI are agents of society mandated to promote the value of dissemination of information and knowledge, underlying any democratic community. *See* Dotan, Elkin-Koren, Fischman-Afori, Haramati-Alpern, *supra* note 58.

aim to fill-in legal gaps or provide a basis for legislative reform, they provide a social signal, one of the many factors involved in the process of rulemaking.[125]

2. Preparing the Ground for Legislation

Voluntary measures could be used to inform top-down regulation and prepare the ground for legal reform. Bottom-up processes often signal authentic concerns held by particular communities regarding practice, designing rules of practice, and setting the stage for a new binding central regulation.

An example that demonstrates this function of a Code of Best Practices is the SEDONA Guidelines, which are Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, dated 2005.[126] These guidelines address the "management of electronic information in organizations in view of business, statutory, regulatory and legal needs."[127] In its preamble, the SEDONA Guidelines expresses its vision, which is "to bring together some of the nation's finest lawyers, consultants, academics and jurists to address current problems in the areas of antitrust law, complex litigation and intellectual property rights that are either ripe for solution or in need of a 'boost' to advance law and policy."[128] The SEDONA Conference anticipates that the output of its working groups will evolve into authoritative statements of law and policy, both as they are and as they ought to be.[129]

Another example of using Best Practices as part of the legislative process may be found in environmental law.[130] When Best Practices are applied as a substitute for administrative regulation, their main

125 Lehavi explores a similar question in the context of property law, arguing that employing bottom-up norms to address incompleteness in property law depends on *established institutional authority* and *ongoing group homogeneity. See* Lehavi, *supra* note 102, at 121. *See also* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008), for the role of soft law in the process of rulemaking. It should be noted that Gersen & Posner define soft law narrowly, as referring only to a rule issued by a lawmaking authority. *Id.* at 579. Nonetheless, the analogy to best practices issued by other agencies is sound. *See also* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

126 *Available at* https://thesedonaconference.org//publication/Managing%20Information%20%2526%20Records.

127 *Id.* at iii.

128 *Id.*

129 These guidelines are also frequently mentioned in court decisions, thus demonstrating the interpretive role of Best Practices as well. For example, in *Lake v. City of Phoenix*, 207 P.3d 725 (Ariz. Ct. App. 2009), the dissenting judge relied primarily on purpose and policy arguments to counter the majority's textual attack on the definition of "public records;" this reasoning was based on *The Sedona Guidelines*.

130 *See* Darren Sinclair, *Self-Regulation Versus Command and Control? Beyond False Dichotomies*, 19 LAW & POL'Y 529 (1997), on the flourishing of self regulations in environmental law.

advantage lies in facilitating harmonization of practices.[131] Once harmonization is achieved, the way is paved for commanding administrative regulation, with lower costs of implementation and enforcement.

Back to copyright, one should bear in mind that codification of Fair Use Best Practices is not without risk. An example of self-regulation that almost evolved into a binding law is the "classroom guidelines" for use of copyrighted works, which Congress included in its House of Representatives Report accompanying the Copyright Act of 1976.[132] These guidelines were voluntarily adopted by large publishers and a few author organizations. They were erroneously treated by educational institutions as law under §107 fair use analysis and sometimes inadvertently characterized as setting maximum limits on permissible copying.[133] This way of strictly applying the guidelines as a ceiling was not necessarily intended by the framers.[134]

B. *Setting a Benchmark*

One of the major functions of voluntary measures is to create a referential basis for recommended behavior, with the anticipation of limiting liability. Thus, the introduction of a voluntary guiding norm into the relevant industry often serves a legal function that goes beyond mere guidance, namely, to equip the relevant parties with legal immunity. This function of voluntary measures is not aimed at instilling a set of *decisive* indicators or principles within the norm, *i.e.*, to deconstruct the standard with substantive rules; rather its purpose is to cope with the potential negative consequences of the vague standards (*i.e.*, the creation of a chilling effect and compromising the rule of law).[135] Limiting liability in cases of compliance with a communal code of conduct may lower the negative effects created by the vague standards, while at the same time maintaining its flexibility. Often, such legal immunities, or safe-harbors, are not officially acknowledged by law, but rather implemented through open-ended norms, which stream voluntary codes into the formal legal discourse. Different measurements of tort law, which are based on behavioral or mental factors, such as the "good faith" and "reasonableness" standards, may serve as doctrinal conduits, namely legal mechanisms which are used by court in order to promote just and efficient results. Such doctrinal conduits may enable the courts to promote a pragmatic approach to fair use, where

131 *See* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 299 (2006).

132 H.R. Rep. No. 94-1476, at 67–68 (1976).

133 *See* Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001); David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453 (2010).

134 *See* Crews, *supra* note 121 at 643.

135 *See supra* notes 17–20 and accompanying text.

compliance with Fair Use Best Practices would limit users' liability. This approach would foster the goals of fair use by promoting permissible uses, while at the same time keeping fair use flexible and adaptive to changing needs.

A better understanding of the mechanisms by which voluntary codes of conduct may affect the construction of legal standards such as "good faith" and "reasonableness" is of great importance for copyright cases. This is because the infringement of copyright is classified as a tortious act;[136] and therefore, general tort principles and doctrines are applicable in copyright law.[137] Some scholars stress the need to emphasize the conceptual link between copyright and tort law,[138] while others take a more cautious approach in light of the possible consequences stemming from such a legal move.[139] Nevertheless, the standards of "good faith" and "reasonableness" function as general principles in tort law, and may therefore be implemented in the copyright niche as long as courts are being attentive to the specific framework of copyright law.

1. Innocent Infringement

Voluntary measures could affect liability where a defendant's state of mind is involved. In some cases, the law exempts tortfeasors from liability if the injurious act was performed unintentionally, not willfully, or in "good faith." Since subjective mental elements are difficult to prove, circumstantial facts are often considered. Compliance with self-

136 NIMMER & NIMMER, *supra* note 10 at § 12A.18 [A] ("The Copyright Act defines copyright infringement and the remedies flowing from that tort in Chapter 5 of Title 17"); § 15.01 at n. 45 ("In fact, the Department of Justice contrasts criminal copyright actions with civil copyright infringement by noting that the latter remains a strict liability tort") H.R. REP. No. 105-339, 105th Cong., 1st Sess. 10 (1997). *See also* Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, THEORETICAL INQUIRIES IN LAW (2010), *available at* http://ssrn.com/abstract=1599440.

137 For example, civil remedies, principles of personal jurisdiction in tort law, territorial application in tort law, general tort doctrines such as contributory liability or joint tortfeasors liability are all applicable in copyright law. *See* NIMMER & NIMMER, *supra* note 10, at §§ 12A.18, 12.01, 12.03, 12.04[3], 14.04, 17.02, 17.03. *See also* Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 996 (2007) (arguing that principles of tort law shaped copyright liability).

138 *See, e.g.*, Dorfman & Jacob, *supra* note 136; Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1574–75 (2009) (arguing that since the underlying constitutional and traditional motivations for acknowledging copyright are provided through *incentives*, a measurement of foreseeability should be employed when imposing liability in order to tailor the cause of action to the incentives).

139 Wendy Gordon, notably, contributed to this discussion by providing an important analysis of why copyright law should abandon the strict liability model of real-property trespass. *See* Wendy J. Gordon, *Trespass–Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62 (2009). Moreover, Gordon stresses the limits of the legal analogies between negligence and copyright. *See* Wendy J. Gordon, *Copyright as Tort Law's Mirror Image*: *"Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003); Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411, 2424 (2009).

regulation may reflect the defendant's honest attempt to meet the legal standards, and therefore, it is more likely to be considered as meeting the good faith test.

The defendant's state of mind may also be relevant to remedies. Damages, for instance, could be increased or decreased according to the existence or absence of intentional infringement. Once again, defendants may rely on their compliance with self-adopted measures as a shield, justifying reduced damages.[140]

A classic example of using voluntary measures to assess the determination of "good faith" by courts is self-regulation in corporate governance. Corporate Governance Regulations seek to promote transparency and accountability in corporate management.[141] Corporate governance self-regulation also aims to achieve various legal advantages, one of which is accommodating the high standards of liability in order to reduce uncertainties along with market failures.[142] Corporate law imposes extensive duties, including a fiduciary duty, on functionaries such as directors. Within the fiduciary duty, directors must act in good faith in order to promote the company's best interests.[143] Corporate governance self-regulations' aim, *inter alia*, to clarify functionaries' duties as well as provide guidance to directors on how to comply with their fiduciary duty to act in good faith.[144] Compliance with corporate self-regulations is an important factor that has been adopted by the courts when determining whether the directors have acted in good faith.[145]

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140 *See* Rothman, *Use of Custom*, *supra* note 83, at 1924.

141 The importance of such self-regulations is expressed by the Sarbanes-Oxley Act (2002), 15 U.S.C. § 7261–66 (2002), which obliges public companies to disclose whether they have adopted a recommended ethical code enactment. It should be noted that this model rebuts the perception that self-regulation and government regulation are mutually exclusive options, and it gains some clear advantages of flexibility along with the promotion of legal obedience. *See also* Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance Worldwide: What is the Trigger?*, 25 ORG. STUDIES 415, 417–18 & 421–22 (2004) (the role of corporate best practices is to enhance efficiency and effectiveness of rules).

142 *See infra* Part IV.B.2. *See also* Karessa Cain, *New Efforts to Strengthen Corporate Governance: Why Use SRO Listing Standards?* 2003 COLUM. BUS. L. REV. 619 (2003).

143 *See, e.g.*, DEL. CODE ANN. tit. 8, DELAWARE GENERAL CORPORATION LAW, § 141(a) (2014).

144 *See* Aguilera & Cuervo-Cazurra, *supra* note 141; Ruth V. Aguilera & Alvaro Cuervo-Cazurra, Codes of Good Governance, 17 CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 376 (2009). For the lack of sufficient guidance as to directors' duty to act in good faith, *see* Damjan Despotovic, *Fiduciary Duties and the Business Judgment Rule (with the Emphasis on the Citigroup Case)*, 22–38 (2010) (Master Thesis, University of Tilburg), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639338.

145 The implications of a director's failure to comply with corporate Best Practices were discussed in *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. 2005). In that case, the president of Disney was dismissed after only fourteen months of employment, receiving 130 million dollars in severance pay. The shareholders filed a lawsuit against Disney's board of directors, based on breach of fiduciary duty to act in good faith. The claim was dismissed. In ruling against the shareholder plaintiffs, the Delaware court provided guidance on the meaning of

Can such insights be applied to copyright law? Liability for copyright infringement is generally strict and independent of the mental state of the infringer.[146] Nevertheless, there are several important exceptions. Take for instance, the statutory damages scheme that grants courts discretion to assess damages, which takes into account the infringer's willful infringement.[147] Copyright law does not define the term "innocent infringer." This limitation of liability could apply in cases where an infringer mistakenly believes that the copying constitutes fair use. Compliance with Fair Use Best Practices could provide an indication of good faith, and thus exempt an "innocent infringer" from liability for statutory damages.[148]

Following Fair Use Best Practices may reflect an attempt to address the legal uncertainty arising from fair use and comply with self-restraining sets of guidelines. In such cases, the courts will not necessarily approve the voluntary measures as expressing the appropriate interpretation of the law. Instead, they will consider the defendant's choice to follow self-adopted measures in determining whether he lacked the willfulness required by law.

Good faith reliance on Fair Use Best Practices may also benefit right-holders. For instance, the notice-and-takedown procedures under the Digital Millennium Copyright Act ("DMCA") set a *good faith* standard, where compliance with Fair Use Best Practices could make a difference.[149] According to Section 512(c) of the DMCA, an ISP is not monetarily liable for infringing material stored "at the direction of a user" on its system as long as, among other things, the ISP expeditiously removes the allegedly infringing material upon receiving

a director's duty to act in good faith. According to the *Disney* decision, *good faith* is identified with a subjective intent to further the best interests of the corporation. Indeed, the court found that the conduct of Disney's directors "fell significantly short of the best practices of ideal corporate governance." *Id.* at 697. Nevertheless, the court concluded that the board of directors was not liable for a lack of good faith, and that its conduct amounted to negligence at worst. In the court's view, it would be misplaced to apply twenty-first century notions of Best Practices when analyzing whether decisions taken ten years ago were actionable. *Id.* at 697. The court's understanding of fiduciary duties could evolve; the court "strongly encourages directors and officers to employ best practices, as those practices are understood at the time a corporate decision is taken." *Id.* at 697. *See also* Wendy J. Powell, *Corporate Governance and Fiduciary Duty: The "Micky Mouse Rule" or Legal Consistency, Protection of Shareholder Expectations, and Balanced Director Autonomy*, 14 GEO. MASON L. REV. 799 (2007).

146 *See* Jacqueline D. Lipton, Cyberspace, Exceptionalism, and Innocent Copyright Infringement, 13 VAND. J. ENT. & TECH. 767 (2011).

147 § 17 U.S.C, § 504(c)(2)–(3) (2010).

148 Section 504(c)(2) of the Copyright Act lowers the floor for statutory damages where an "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2) (2010). Yet, so far, courts have proved reluctant to recognize this defense *See, e.g.*, Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1544–45 (S.D.N.Y. 1991).

149 *See* Benjamin Wilson, *Notice, Takedown, and the Good-Faith Standard: How to Protect Internet Users From Bad-Faith Removal of Web Content,* 29 ST. LOUIS U. PUB. L. REV. 613 (2010).

a notice.[150] The notice required under Section 512 must state that the "complaining party" has a "good faith belief" that "use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."[151] Parties who filed a notice without a good faith belief that the posted material is infringing are subject to liability under Section 512(f). Any person who "knowingly materially misrepresents" to an ISP that material or activity is infringing is liable for damages incurred by the alleged infringer.[152] Similarly, liability for damages would apply to a user who, in a counter notice to restore the materials, misrepresents that the materials are non-infringing.[153] Several courts have concluded that in order to meet this legal standard, the copyright owner must consider fair use before sending a takedown notification.[154] Reliance on Fair Use Best Practices in order to determine whether a notice should be filed could be considered by courts as an indication of acting in *good faith*, thereby exempting a copyright right-holder from liability for damages.

Even though copyright liability does not require any mental element, knowledge is required in order to establish indirect liability. Indirect liability covers several different doctrines under which a party may be held liable for copyright infringements committed by others.[155] One such doctrine is contributory liability, based on a tort principle where a person "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'"[156] Knowledge may also be relevant for eligibility for "safe-harbors" under Section 512 of the DMCA.[157] According to Section 512(c), an ISP would enjoy the safe-harbor provided by the statute if it "does not have actual knowledge that the material or an activity using the material on the system or network is infringing," or, alternatively, if it is not "aware of facts or circumstances from which infringing activity is apparent."[158] Accordingly, to qualify for safe-harbor, some degree of state-of-mind must be established by an online service provider.[159] Since the mental

150 § 17 U.S.C, 512(c)(1)(C) (1998).
151 § 17 U.S.C, 512(c)(3)(A)(v) (1998).
152 17 U.S.C, § 512(f) (1998).
153 *Id.*
154 *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1153 (N.D. Cal. 2008) (holding that the copyright holder must consider fair use before sending a takedown notification); Rossi v. Motion Picture Ass'n of Am., Inc., 391 F.3d 1000 (9th Cir. 2004) (requiring only subjective good faith belief).
155 NIMMER & NIMMER, *supra* note 10, at § 12.04.
156 NIMMER & NIMMER, *supra* note 10, at § 12.04 [3] [a]; Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).
157 The DMCA codifies "shelters" or "safe-harbors" for both direct and indirect liability in the digital environment. NIMMER & NIMMER, *supra* note 10, at § 12B[C].
158 17 U.S.C. § 512 (c)(1)(A) (1998).
159 The question of what amounts to "actual knowledge" and when "awareness" occurs, stands at

state of a potential infringer is involved, Best Practices may become relevant. For instance, good faith reliance on Best Practices (and only reliance in good faith), might negate liability due to lack of actual knowledge of the contributory infringer.[160] Best Practices were proposed as an adequate regulatory mechanism in other contexts pertaining to intermediaries' liability. The OECD[161] report on Internet intermediaries stressed that imposing broad liabilities on market-based service providers would be contrary to public policy objectives, and further stressed the role of in-house Codes of Best Practices or self-regulation instruments as the appropriate vehicles for advancing an overall balanced legal régime.[162] The report states that one of the prominent advantages stemming from adoption of a Best Practices measure is "compliance with competition law statutes, by means of sufficient approval and transparency built into the scheme. This is necessary to demonstrate to third parties, industry members' commitment to non-collusive behavior."[163]

2. Reasonable Conduct

Another instance where voluntary measures may inform legal analysis is the reasonable conduct standard. The reasonable conduct standard is usually associated with liability for negligence. Liability applies in any event of deviation from an objective standard of reasonable behavior. According to the Restatement of Torts:

> [W]here an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what

the heart of the *Viacom v. YouTube* litigation, challenging YouTube's liability for infringing videos uploaded by end-users. The dispute focused on the nature and degree of the state of mind needed to establish liability under the specific circumstances. Viacom, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010). *See also* NIMMER & NIMMER, *supra* note 10, at § 12B.04 [A]. The lower court refused to impose indirect liability because YouTube lacked actual knowledge of the direct infringing acts. *See Viacom*, 718 F. Supp. 2d 514. On appeal, the Second Circuit narrowed the lower court's approach as to the level of knowledge needed. The question was whether YouTube had shown "willful blindness", which enabled the imposition of liability. The case was returned to the lower court to re-evaluate the level of knowledge. *See* Viacom, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012). In April 2013, the lower court held, once again, that there was no level of knowledge that could justify liability. *See* Viacom, Inc. v. YouTube, Inc., 07 Civ. 2103 (S.D.N.Y. 2013). This last decision is under appeal.

160 By the same token, Nimmer interprets the mental state needed in Section 512 (c)(1)(A) as containing both subjective and objective elements. *See* NIMMER & NIMMER, *supra* note 10, at § 12B.04 [A] [1] [b] [iii].

161 The Organisation for Economic Co-operation and Development (OECD), http://www.oecd.org/.

162 *See* THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES, Forging partnerships for advancing policy objectives for the Internet economy, Part II, DSTI/ICCP (2010)11/FINAL, at 25–30.

163 *Id.* at 29.

> the law regards as the utility of the act or of the particular manner in which it is done.[164]

Reasonable conduct may also be used as an independent legal standard, outside the negligence framework, delineating the limits of liability. The question of what amounts to a reasonable standard of behavior is legal and not factual. Courts may consider various legal and factual factors when determining what counts as reasonable conduct in particular contexts.[165] Based on common law principles, such decisions, adopting concrete definitions of reasonableness also conceptualizes a norm, namely, what ought to be perceived as reasonable in similar cases. Reasonableness covers a wide range of possibilities. Since the basis of liability for negligence is the question of whether "a reasonable man would recognize as involving a risk of harm to another,"[166] and whether a reasonable man would have taken the decision to act despite the risk,[167] then, generally speaking, a conduct which is following in-house adopted regulations can hardly be perceived as hasty or reckless, and therefore is likely to fall within the range of reasonableness.[168] Following a Code of Best Practices, in other words, may indicate that reasonable measures have been undertaken, which, in turn, should limit the scope of liability. By the same logic, according to the Restatement, "[I]n determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."[169] Namely, a reasonable man is expected not to automatically follow customs or previously acknowledged behavior, yet such already existing guidance is a highly relevant factor. After all, the threshold of "reasonable conduct" is also determined by parameters affected by past experience, such as perception, memory and knowledge.[170] Therefore, reliance on a communal shared past

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164 RESTATEMENT (SECOND) OF TORTS, § 291 - UNREASONABLENESS; HOW DETERMINED; MAGNITUDE OF RISK AND UTILITY OF CONDUCT.

165 *See* id. ("The law attaches utility to general types or classes of acts as appropriate to the advancement of certain interests rather than to the purpose for which a particular act is done, except in the case in which the purpose is of itself of such public utility as to justify an otherwise impermissible risk.").

166 RESTATEMENT (SECOND) OF TORTS, *supra* note 164.

167 *See id.* ("In determining whether the actor should realize the unreasonable character of a known or recognizable risk, the judgment of the actor, unless he be a child, must conform to the standard of a reasonable man, neither more nor less.").

168 *See* Rothman, *Use of Custom*, *supra* note 83.

169 RESTATEMENT (SECOND) OF TORTS § 295A - CUSTOM**.**

170 *See* RESTATEMENT (SECOND) OF TORTS § 289 - RECOGNIZING EXISTENCE OF RISK ("The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising: (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and (b) such superior attention, perception, memory, knowledge,

experience should foster legal evaluation of it as an approved conduct. The draft of the Restatement (Third) of Torts, which is discussing the issue of excused violations—namely exemptions from liability, further states that:

> [I]f a statute is so vague or ambiguous that even the person aware of the statute would need to guess as to its requirements, the person who makes a reasonable guess is excused from negligence *per se* even if a later judicial resolution of the ambiguity reaches a different result.[171]

What should be regarded as a "reasonable guess?" The argument advanced here is that in the fair use context an act that complies with Fair Use Best Practices guidelines should be considered as being a "reasonable guess."

Australian copyright law demonstrates such a strategy, in which, following a code of practice is assumed to be reasonable conduct that generates a kind of legal immunity. The Australian Copyright Act sets out various factors that should be considered by the court when determining whether a person should be held liable for "authorizing" an infringing act (*i.e.* a type of indirect liability).[172] One such consideration is whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.[173] In other words, taking reasonable steps *means* following an industry code of practice, which may help the defendant avoid liability. The principles underpinning this rule are clear: observing the law should not be construed as a "gamble", and in cases of vague and uncertain norms, procedural safe-harbors should be provided in order to facilitate an activity desired by society.[174]

The legal link between the reasonable conduct standard and codes of practice is not new. In various legal disciplines, in which activities are governed by negligence liability, the question of what amounts to reasonable behaviour that negates liability is the subject of considerable discussion. In particular, Best Practices grew as a measure for enhancing certainty within the framework of highly flexible norms, according to which, following codes of practice even if only in relation

intelligence, and judgment as the actor himself has.").

171 Draft, RESTATEMENT (THIRD) OF TORTS§ 15 - EXCUSED VIOLATIONS.

172 *Copyright Act 1968 s 36(2) (c)* (Austl.).

173 *Id.*

174 This was exactly the rationale under the DMCA's safe-harbor mechanism, designed to enable the operation of Internet service providers, which are perceived as vital players in current digital environments. The OECD report stressed the very same argument. *See supra* note 162, at 29. The Australian approach took a somewhat different path from its American counterpart, by establishing a more general type of safe-harbor, via the standard of "reasonableness."

to procedural aspects, would signal *ex-post* that the reasonable conduct threshold had been met. Two major examples demonstrate this trend: Corporate Governance Best Practices and Medical Best Practices. In these two legal disciplines, courts have accepted the position that Best Practices could inform the *reasonable standard of conduct* in order to reduce over-defensive conduct by the relevant players, thereby promoting more efficiency.[175] According to corporate laws, directors must perform their professional duties with "due care," and gross deviations from reasonable professional skills are viewed as failing to meet this standard.[176] In order to reduce directors' risks, along with the consequences of risk averse conduct, courts have developed the well-known "Business Judgment Rule," according to which directors may gain some kind of immunity if they have performed their duties in accordance with some basic guidelines.[177] This Business Judgment Rule focuses on procedural aspects of decision-making and not on the final outcome,[178] and has been further developed by voluntary and semi-mandatory self-regulations,[179] which strengthen its function as a safe-harbor.[180] The entire range of guidelines conceptualizes the notion of reasonable care or conduct in the corporate context; and since it is informed by various bottom-up soft law instruments evolving in light of corporate law settings, the outcome is a unique adaptive liability

175 *See* Aguilera & Cuervo-Cazurra, *supra* note 141.

176 *See* Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and the Business Judgment Rule*, 96 NW. U. L. REV. 675 (2002).

177 *See* Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. 1974); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Grobow v. Perot, 539 A.2d 180 (Del. 1988). At the heart of these court-made guidelines are three main requirements: acting in good faith in the best interests of the corporation; acting on an informed basis (*i.e.* seeking the relevant information and asking the relevant questions); and avoiding conflict of interests. *See Grobow*, 539 A.2d 180.

178 *See* Stout, *supra* note 176; Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004). *See also* William W. Bratton, *Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law*, 61 GEO. WASH. L. REV. 1084 (1993).

179 The Sarbanes-Oxley Act (2002), 15 U.S.C. §§ 7261–66 (2002), obliges public companies to disclose whether they have adopted a recommended ethical code. *See also* Z. Jill Barclift, *Codes of Ethics and State Fiduciary Duties: Where is the Line*? 1 J. BUS. ENTREPRENEURSHIP & L. 237 (2008).

180 *See* Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1155–92 (2004); Lyman P.Q. Johnson & Robert V. Ricca, (*Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663 (2007); Barclift, *supra* note 155. In this regard, the Federal United States Sentencing Commission, Sentencing Guidelines Manual, 8B2.1(A)(2004), which aims to introduce ethical standards into organizations and corporate bodies, should also be noted. By offering incentives, these guidelines encourage organizations to reduce and eradicate criminal behavior. The program provides a model from which an organization may self-police its own lawful and ethical conduct. Compliance with the proposed scheme of self-policing accords the organization some safe-harbors in cases where an offence is nonetheless committed. *See* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002); Dove Izraeli & Mark S. Schwartz, *What Can We Learn From the U.S. Federal Sentencing Guidelines for Organizational Ethics*?, 17 J. BUS. ETHICS 1045 (1998).

regime.[181]

Medical malpractice also demonstrates the basic function of voluntary measures within a liability scheme. Medical Best Practices and Clinical Practice Guidelines have been used in the healthcare industry for decades.[182] These voluntary measures are introduced as evidence of the prevailing standard of care in medical malpractice litigation. Since courts are not obliged to accept and apply the voluntary guidelines when determining the standard of care, and in light of the clear advantages of such voluntary measures in reducing uncertainty and preventing physicians from engaging in defensive conduct, some states have adopted legislation which refers to Clinical Practice Guidelines as a major factor when determining the *ex-post* standard of care.[183]

The Business Judgment Rule and the Clinical Practice Guidelines demonstrate how Best Practices can be employed to explicate an abstract standard of care in practical guidelines. Several insights can be drawn from these examples for copyright. In cases where the industry is governed by an open-ended norm, characterized by uncertainty that leads to unwarranted risk-averse behavior (*i.e.*, a chilling effect), Best Practices can provide a tool that might indicate whether applying the norm in a particular context is reasonable. Obedience to law will no longer be a "shot in the dark." This legal policy would encourage more reasonable behavior and facilitate the development of fair use jurisprudence. It would encourage actors to engage in translating open-ended and flexible norms into more concrete rules of action. It would also reduce the risk involved in applying open-ended norms and raise it to a more optimal level. That is particularly important in areas where under-reliance on open-ended norms might be socially costly. [184]

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[181] *See* Stout, *supra* note 176.

[182] *See* CLINICAL PRACTICE GUIDELINES: DIRECTIONS FOR A NEW PROGRAM, INST. OF MEDICINE (Marilyn J. Field & Kathleen N. Lohr eds., 1990) (The Institute of Medicine published, in 1990, a survey of clinical practice guidelines, which were described as "systematically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances.").

[183] *See* Ronen Avraham, *Clinical Practice Guidelines: The Warped Incentives in the U.S. Healthcare System*, 37 AM. J. L. & MED. 7 (2011); John Tucker, *A Novel Approach to Determining Best Medical Practices: Looking at the Evidence*, 10 HOUS. J. HEALTH L. & POL'Y 147 (2009); James F. Blumstein, *Medical Malpractice Standard-Setting: Developing Malpractice "Safe Harbors" as a New Role for QIOs*? 59 VAND. L. REV. 1017 (2006).

[184] Another interesting example of the use of the reasonableness standard in copyright law may be found in the Orphan Works Bill 2006, which proposes amending the Copyright Act by limiting, in certain circumstances, the liability of unauthorized users of orphan works. In order to meet the Bill's proposed safe-harbors, an unauthorized user would have to perform a good faith "reasonably diligent" search of the copyright owner at stake. The Bill does not define the requirements of a "reasonably diligent" search, yet it specifies conditions that such a search must meet, including specifying the "best practices for documenting a reasonably diligent search." *See* U.S. COPYRIGHT OFFICE REP. ON ORPHAN WORKS 32 (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf. at 110.

The implementation of this *reasonable standard of conduct* in copyright law, and its elaboration into an overall pragmatic approach to fair use, is discussed in the next part.

C. *A Pragmatist Approach to Fair Use*

Legal policy should seek to minimize risk-averse behavior in copyright law and avoid turning fair use into a legal trap that hinders copyright goals. This would entail providing incentives for deliberate behavior that is grounded in some guidelines. Fair Use Best Practices can be developed into a tool to aid the *ex-ante reasonable operation* of the fair use norm. Developing a second-tier measure, one that would translate the four-factor analysis into a workable concept, could facilitate this goal.

What would be the practical consequences of complying with Fair Use Best Practices? Following the Fair Use Best Practices as second-tier measure does not necessarily mean that its outcome in each concrete case would yield the "right" legal outcome. Instead, it indicates that a user who engages in unlicensed use, in compliance with Codes of Fair Use Best Practices, acts in a reasonable manner. In appropriate cases, users relying on such codes should not be held liable since the operation of the fair-use analysis falls within the range of reasonable possibilities. The user, in such a case, is not reckless; the operation of the fair use analysis is made in accordance with a "due care" procedure, and even if the court subsequently concludes that a particular use is not fair, an "error" under the circumstances should be considered reasonable. In essence, an unlicensed user acting in compliance with Codes of Fair Use Best Practices is within a safe harbor of fair use. The practical consequences of such a conclusion might concern, for instance, the range of remedies granted: reasonable "error" may justify the grant of injunctive relief, in order to prevent future similar uses, without any monetary remedies compensating for past uses which have been determined in retrospect not to be fair. This legal outcome (*i.e.*, limiting liability to past uses, in light of the user's "appropriate" conduct) could be reached within the doctrinal frameworks of "good faith" and "innocent infringer" discussed above.

This pragmatist approach to fair use suggests that in appropriate cases, courts may rely on the actor having undertaken measures to comply with the fair use standard, without engaging in the substantive fair use analysis. The mere fact that an actor conducts his operations with the aid of a reasonable legal measure should shift the onus to the plaintiff to show that the particular code is arbitrary or resides outside the scope of fair use, or it was unreasonable to follow the code in the particular circumstances. Therefore, a pragmatist approach to fair use may focus on assessing the reasonableness of reliance on Fair Use Best

Practices, as an aid, without approving its four-factor analysis in each and every case. The elaboration of this pragmatist approach may be achieved through adjudication that would develop standards for judicial review of Codes of Fair Use Best Practices to address issues concerning the legitimacy of codes and reasonable reliance on it. For example, courts should develop a sense of what are the building blocks of an *accountable* Code of Best Practices, and what would be regarded as an acceptable procedure for its drafting according to basic values of transparency and non-arbitrariness. Moreover, courts should develop a sense of the cases in which legal scrutiny should focus on procedural matters concerning the creation of the Code of Best Practices, such as representation, in contrast to a substantive examination of the four-factor analysis as implemented in the code. Namely, a pragmatist approach would seek to promote legal tools concerning the significance of Code of Best Practices guidelines within the fair use scheme, which would turn the fair use open-norm into a workable framework for every-day uses.

The decision in the case of *Cambridge University Press v. Becker*[185] demonstrates the *potential* use of Fair Use Best Practices as a reasonable device for implementing the fair use standard. In that case, as discussed above, a number of academic publishers filed a lawsuit against several officials and the President of Georgia State University (GSU), claiming that the officials, personally, as well as the university were responsible for the systematic, widespread infringing copying of the academic publishers' copyrighted materials in the GSU electronic course reserve (e-reserve) system.

GSU argued that the copying fell under fair use.[186] Among other things, the plaintiffs argued that GSU was vicariously liable for copyright infringement and that it was a contributory infringer. Contributory infringement requires the defendant to knowingly induce, cause, or materially contribute to the infringing conduct of another.[187] GSU claimed that it had discouraged copyright infringements by faculty members by adopting a copyright policy. In a preliminary decision, the court relied on GSU's copyright policy (which was updated in 2009 after the lawsuit was filed), requiring employees to provide a fair use analysis before scanning or posting material.[188]

The lower court found that "[t]he 2009 Copyright Policy on its face does not demonstrate an intent by Defendants to encourage copyright infringement; in fact, it appears to be a positive step to stop

185 Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd sub nom.* Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. Oct. 17, 2014).
186 *Becker*, 863 F. Supp. 2d at 1190–99.
187 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
188 Cambridge Univ. Press v. Becker (Order, Sept. 30, 2010); *appeal* (11th Cir. Oct. 17, 2014).

copyright infringement."[189] The lower court was unwilling, however, to grant a summary judgment based on mere adherence to voluntary measures, and sought to determine liability based on these standards' compliance with fair use analysis.

In its final opinion, however, the first instance District Court minimized the significance of a fair use policy: "Defendants, in adopting the 2009 policy, tried to comply with the Copyright Act. The truth is that fair use principles are notoriously difficult to apply. Nonetheless, in the final analysis Defendants' intent is not relevant to a determination whether infringements occurred."[190]

Eventually, out of the ninety-nine alleged infringements that plaintiffs had maintained at the trial, the lower court found infringement in only five instances. Nevertheless, the lower court held that GSU policy did not provide "sufficient guidance in determining the 'actual or potential effect on the market or the value of the copyrighted work,' a task which would likely be futile when engaging in determinations in advance of litigation."[191]

The outcome of the GSU case is difficult to reconcile with general tort law principles. How can anyone be responsible for a 5% error in a policy that targets an open-norm, which the court itself admits is impossible to predict? The policy was designed to address hundreds of thousands of items in reading lists facilitated by the university, whereas the court took 350 pages to analyze a small sample of claims, relating to only ninety-nine copied items. The court's application of such a rigid liability standard would indeed encourage users to avoid fair use altogether, fearing the risks of liability. Such a judicial approach reinforces the chilling effect, and therefore, undermines copyright law goals.

This case demonstrates the benefits that may be gained from relying on Fair Use Best Practices as a measurement of reasonable behavior that could exempt a party from liability. In order to fully benefit from the flexibility offered by fair use, it is necessary to shift from a legal regime which requires strict compliance with standards determined only in retrospect and zero tolerance for fair use errors, to a legal regime where liability is based on undertaking reasonable measures.

As noted earlier, the proposed understanding of the Fair Use Best Practices should work for the benefit of right-holders as well. Take, for

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189 *Id.* at 29, n.7 (The court went on to hold that "The Court acknowledges that it would be virtually impossible to produce a copyright policy for the benefit of instructors which would anticipate every possible fact combination which might be relevant to a fair use determination . . . . However, overall the Current Policy cannot be said to be an intentional effort to encourage infringement.").

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

191 *Id.*

instance, the notice and takedown scheme discussed above, according to which a notice given by a right-holder must meet a legal threshold of good faith, since any person who "knowingly materially misrepresents" to an ISP that material or activity is infringing is liable for damages incurred by the alleged infringer.[192] Thus, as long as the question at stake is whether the activity is permitted under the fair use doctrine, in these cases right-holders would experience difficulties when assessing the legal risks stemming from their acts. Right-holders, therefore, may rely as well on a Code of Fair Use Best Practices in their decision-making process, and claim that liability should not be imposed in cases of reasonable errors.

The pragmatist approach to Fair Use expands the rule/standard dichotomy by proposing to view it as a continuum. Adhering to the vague fair use standard is unavoidable in order to guarantee flexibility, yet the codified standard serves as the front-gate for a continuing path of legal norms formulated by the courts and the communities of authors and users. Norm building is a dynamic multi-faceted process. The bottom-up segment of such a process generates communal codes of conduct—Fair Use Best Practices—that may percolate up-stream into adjudication or even legislation. But such a future outcome may not provide sufficient assurances for risk-averse users who wish to exercise their users' rights. In order to achieve the goals of copyright law, and promote permissible uses, it is necessary to minimize the risk for uses. The pragmatist approach seeks to encourage reasonable implementation of fair use, and promote a deliberative course of action. Reasonable compliance with Fair Use Best Practices should therefore provide a safe-harbor, limiting users' liability. This would free users of the fair use deadlock. It would also open up fair use for contextual experimentation and allow the norm to evolve. Thus, the pragmatist approach to fair use would indeed take users' rights to the next level.

CONCLUSION

One of Plato's most famous ideas was that the ideal ruler should be the "king philosopher," since he would possess both the power to set rules and the knowledge and specialty concerning the appropriate substance of the rules to be set.[193] In modern terms, this ideal resolves the basic obstacle to norm formulation that must accommodate the ever-evolving reality that it regulates.[194] This obstacle is particularly evident in copyright law, which should be highly attentive to rapid social, economic, and technological developments. The solution chosen by

192 17 U.S.C, § 512(f) (1998).

193 *See* PLATO, THE REPUBLIC, Book V.

194 This idea was expressed by Fleckner. S*ee* Andreas M. Fleckner, *FASB and IASB: Dependence Despite Independence*, 3 VA. L. & BUS. REV. 275, 276 (2008).

Congress was to codify the fair use doctrine, which operates as an open standard allowing permissible uses of copyrighted materials to be determined retroactively by courts. This solution guarantees flexibility, albeit it generates severe failures that stem from the uncertainties concerning permissible uses. In Plato's terms, the fair use norm lacks the "philosopher's" input concerning knowledge and specialty with respect to practice.[195]

Acknowledging that there is no ideal rule, this article introduces a novel pragmatic approach to fair use. This approach may supplement fair use with the necessary practical information, and thereby achieve a more comprehensive norm, combining both the "king" and the "philosopher" contributions to the formulation of fair use, in Plato's allegory. The practical information would be generated by the community of users, who could craft a Code of Fair Use Best Practices, which would reflect the community's stance as to the permissible uses in a specific niche. Fair Use Best Practices may serve to provide an accountable benchmark. Compliance with or reliance upon such a benchmark might be perceived as *reasonable conduct* that justifies providing the users with certain safeguards. Accordingly, even if the court determines that a use constitutes an infringement, the fact that it reasonably complies with a Code of Fair Use Best Practices would justify imposing limited liability, expressed by granting a reduced range of remedies. The knowledge provided by the community, therefore, may create a kind of "safe-harbor," located between a flexible standard generating uncertainty and a concrete rule negating flexibility. Such a legal move would recognize that norm building is a dynamic multi-faceted process, and that specifically in the copyright field, in order to resolve the regulatory obstacle, some combination of top-down and bottom-up norm formulation should be adopted. This pragmatic approach to fair use would enable the promotion of a better copyright law, even if not an ideal one.

195 See *id*.