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6-1-2012

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Recommended Citation

Beebe, Barton, "Fair Use and Legal Futurism" (2012). *New York University Public Law and Legal Theory Working Papers*. Paper 334.
http://lsr.nellco.org/nyu_plltwp/334

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Fair Use and Legal Futurism**Barton Beebe[†]****Abstract**

Legal futurism is a mode of legal discourse that forecasts the future and law's role in it. The primary goal of legal futurist discourse is not, however, to formulate an accurate prediction of the future. Rather, its primary goal is to assert the continuing authority of law and the legal field of knowledge in the future, whatever form that future may eventually take. In copyright law discourse, and more specifically, in commentary and case law concerning the copyright law concept of fair use, the legal futurist mode typically takes the form of predictions of failure that are intended to be self-defeating. This brief essay argues that copyright discourse's persistent practice of engaging in self-defeating prophecy is ill-advised. Due to the circular nature of copyright commentary and doctrine, such prophecies risk becoming self-fulfilling.

Introduction

Consider two past predictions of the future of U.S. copyright law. First, the National Commission on New Technological Uses of Copyright Works (CONTU) speculated in its 1978 *Final Report* that the emergence of the electronic distribution of copyrighted materials might work to the benefit of copyright holders, since this new distribution technology would mitigate some of the deleterious effects of the technology then foremost on CONTU's mind: "[Electronic distribution] may ease the problem which has been caused by the wide availability of photocopying machines capable of producing copies quickly and relatively inexpensively. If the copyright owner possesses material in digital form on tapes or other storage devices and sells access to such material by contracts with users, the copyright owner may have more effective control over unauthorized use than over information distributed in printed form" (United States 1979: 78). Second and more notoriously, the *Report of the Working Group on Intellectual Property Rights of the U.S. Commerce Department's Information*

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Infrastructure Task Force (a report commonly known as the *White Paper*) suggested that with the emergence of internet technology, “it may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine” (United States 1995: 82).

Both of these moments in the history of the predicted future of U.S. copyright law show the perils of what might be termed “legal futurism.” By legal futurism, I mean a mode of legal discourse that forecasts the future and law’s role in it. This legal futurist mode may take many forms.² As its most ambitious, it may predict a very general, all-encompassing, macro-scale “image of the future” (Polack)—for example, a future dominated by science rather than law (Beebe), or by the increasing risk of ecological collapse (Falk; Kysar), or by the struggle between the proletariat and holders of capital (Pashukanis; Schwartz). In more modest forms, it may predict specific, micro-scale conditions—for example, an increase in crime and prison populations (Coates), or the development of “weather modification” technology (Wood), or, as above, the emergence of ever-more-sophisticated internet technology. In addition to varying along the dimension of scale, specific instances of the legal futurist mode also tend to vary between the poles of optimism—for example, the future “elimination of employment barriers based upon sex” (Jones 716)³—or, more commonly, of pessimism—for example, a return to “ancient doctrine” and feudalism in the aftermath of an “all-out atomic war” (Cribbet 678). Relatedly, specific instances tend to vary between presenting the predicted future as utterly inevitable, regardless of any legal or other intervention—“I think the United States will become authoritarian in the future, but will be able to stave off totalitarianism for some time” (Miller 749)—or, more commonly, as contingent upon the success or failure of some proposed legal reform—“We are aboard a train running down the rails out of control.... The challenge is obvious: Will it be met?” (Miller 751).

² For an early bibliography of legal futurist writing, see Funk.

³ Jones also speculated at the time that “[w]e may in the twenty-first century even become mature enough to deal fairly with the issue of sexual preference” (716).

The two government reports quoted above show the perils of legal futurism in that both appear to have gotten the future completely wrong. Though the Internet has not brought about the “death of copyright” (Lunney; Wagner; Depoorter 1832) as many predicted⁴ (and still predict),⁵ there is no question that internet technology has challenged the viability of copyright law to an extent that makes the threat of the photocopy machine seem trivial by comparison. Meanwhile, micro-licensing technology has not materialized to an extent that could reasonably be seen to impact the overall scope of fair use. Instead, with the recent rapid emergence of user-generated content, the application of the fair use doctrine has not receded, but rather has expanded enormously.⁶ The “Internet 2.0” has made fair use doctrine not less, but more, far more, important.

But it would be wrong to assess legal futurist discourse only, if at all, by whether its auguries have proven correct, for such discourse is typically not primarily concerned with accurately predicting the future. In this brief and speculative essay, I consider what motivates legal commentators to adopt the legal futurist mode. I do so by focusing on copyright law discourse and, more specifically, on commentary and case law concerning the copyright law concept of fair use. I argue that legal commentators adopt the legal futurist mode in an effort above all to assert the continued authority of law and the legal field of knowledge and practice in the future, whatever that future might eventually be. As fair use discourse evidences, present-day legal speakers typically assert this authority over and against what they perceive to be the primary challenger to legal authority in the future: the

⁴ See, for example, Pareles, who quotes David Bowie as stating that “I’m fully confident that copyright, for instance, will no longer exist in 10 years, and authorship and intellectual property is in for such a bashing” (ctd. in Menell 190). See also Moglen.

⁵ See, for example, Meyer.

⁶ See, for example, Gard 102, who quotes Blake Mogabag as stating that “[a]s the landscape of personal entertainment changes and more individuals benefit from ‘user generated content’ that borrows from copyrighted material, we will see a general shift in society’s perception of ‘borrowing’ and ‘fair use’ of that copyrighted material. This change in society’s perception should, in turn, affect courts’ ‘fair use’ analysis.”

field of scientific and technological knowledge and practice. Strangely, this assertion of authority typically takes the form of predictions that are intended to be self-defeating. The fair use commentator will state, for example, that he “forecast[s] an increasingly troubled future, if not the demise of the doctrine of fair use” (Leaffer 849), and will do so precisely in an effort to resuscitate fair use and preserve its continued relevance. This essay proposes (albeit paradoxically) that copyright discourse’s persistent practice of engaging in self-defeating prophecy with respect to fair use and other areas of copyright doctrine is ill-advised. Due to the circular nature of copyright commentary and doctrine, such prophecies risk becoming self-fulfilling.

I. Legal Futurism and Intellectual Property Law

The early modern period’s recognition of human history and historical change formed the foundation for the modern era’s distinctive interest in the future—distinctive because this future has been imagined primarily as man-made rather than god-given. This interest has expressed itself most notably under the rubric of “progress” (Iggers). From the eighteenth century through to the first decade of the twentieth century, the dominant philosophical and literary images of the future were generally optimistic (Clarke; Halpern). Our sense of the future—and of the metanarrative of progress—has since become considerably more complicated. Adding to this complexity is the emergence in the postwar period of the academic discipline of “futurology,” which reached the height of its influence in academia and government in the 1960s and eventually found popular expression in best-selling works such as Alvin Toffler’s *Future Shock* (1970) and John Naisbitt’s *Megatrends* (1982), if not also in the Club of Rome’s controversial and exceptionally pessimistic *The Limits to Growth* (1972) (Meadows).⁷

By comparison, it is unclear what a general history of the future of U.S. law might show—perhaps great optimism among legal commentators in the early national period followed by a

⁷ On futurology, see Gardner, Strathern, and Orrell. More recently, “prediction markets” have developed as a means to anticipate future events. See Abramowicz.

kaleidoscope of competing images of the future of the law up to the present. In recent decades, however, it is clear that one of the main motivations of legal futurist discourse is to assert that the law and legal knowledge will continue to be relevant in the future. Of course, utopian writers have long imagined ideal societies that have no law because they have no need of it (Goodwin 110-15; Goodwin & Taylor 108-12). In *Looking Backward: 2000-1887*, Edward Bellamy's Doctor Leete explained: "We have no such thing as law schools.... The law as a special science is obsolete.... [O]nly a few of the plainest and simplest legal maxims have any application to the existing state of the world." (284). But these anarchical visions have never posed a serious threat to the authority of legal knowledge. In the post-war period, by contrast, and particularly since the late-1950s, lawyers have perceived the extraordinary power and rapid advance of scientific and technological knowledge as a challenge to their continuing authority. The "space law" moment in the history of U.S. law is now largely forgotten, but in the years following Sputnik, lawyers had a very real fear that science would supersede law as the ordering force in an increasingly technocratic society (Beebe). More recently, lawyers have suggested that "West Coast Code" (i.e., software) would supplant "East Coast Code" (i.e., law) (Lessig 53). Meanwhile, the ascendancy of the economic and now the empirical approach to law has lent great credence to Holmes' prediction that "the man of the future is the man of statistics and the master of economics." (Holmes 469).

If lawyers have thus felt compelled to protest in a variety of contexts that "a future role remains for the law" (Murphy 781), intellectual property lawyers have been especially well-positioned to make this assertion. Intellectual property law is itself intensely futurist in orientation. It's constitutionally-prescribed mandate to "promote the progress of science and useful arts" (U.S. Const. art. I, §8, cl. 8), casts the law as a driver of scientific and technological progress. Indeed, intellectual property law propounds the orthodoxy that but for the economic incentives provided by intellectual property protection, such progress in the future would not occur. At the same time, the law justifies exclusive rights in non-rival intellectual goods on the ground of dynamic efficiency, that is, on the ground that the present-day costs of such rights will be outweighed by the future gains to the public domain once

the terms of such rights expire (Maskus 28-33). The essentially futurist orientation of intellectual property law may explain why so much intellectual property law commentary adopts the legal futurist mode (Fisher; Hugenholtz & Guibault; Boyle; Geist; Ginsburg; Perlmutter; Vaidhyanathan). Perhaps the best example of this is found in the work of Larry Lessig, who begins the prefaces to both *Code* and *The Future of Ideas* by considering various scenarios of the future of the internet—and who concludes the latter of these books with a quite explicit prediction of the dystopian future of technological and intellectual innovation (Lessig 2002: 266-68; see also Zittrain).

Intellectual property lawyers are especially prone to engage in legal futurism when they speak of copyright fair use (see, e.g., Madison). This should not be surprising. As many commentators have observed, fair use has long enabled copyright law to accommodate new and unforeseen reproduction and distribution technology (Samuelson 2602). At its best, it facilitates technological innovation (Von Lohmann), such as the basic architecture of the internet, and expressive innovation, such as, at least until recently,⁸ the hip-hop and industrial styles of appropriationist music. Furthermore, the technical doctrine of fair use explicitly calls for prospective thinking. The fourth factor of Section 107's multifactor balancing test requires courts to consider, among other things, the impact of the defendant's conduct on the "future market" for the plaintiff's work.⁹

II. The Recent History of the Future of Fair Use

The history of fair use over the past four or five decades has been marked by a shift from a reasonably optimistic—or, in any case, hopeful—sense of the future of the doctrine to a deeply

⁸ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (finding unauthorized digital sampling of copyrighted music to be infringement and instructing authors to "[g]et a license or do not sample").

⁹ See, e.g., *Lish v. Harper's Magazine Foundation*, 807 F. Supp. 1090, 1104 (S.D.N.Y. 1992) (finding no proof that the defendant's publication of the plaintiff's letter "had any significant effect on the potential future market for the Letter").

pessimistic, even fatalistic belief that fair use is doomed. This shift is apparent in how commentators have come to judge the notorious vagueness of fair use doctrine. In the 1960s and '70s, the drafters of Section 107 anticipated that the flexibility and open-endedness of fair use would be the source of its strength in the decades to come. Now the fear is that copyright owners are exploiting this flexibility to narrow to nothing the scope of the doctrine.

The drafting history of Section 107 of the Copyright Act of 1976 suggests that the framers of the section were reasonably sanguine about its future prospects. Two main questions dominated negotiations over the wording of the section: first, whether it should address in detail the practice of photocopying in the educational context, and second, whether it should contain factors to determine fair use or otherwise present a simple, “bare bones” (Am. Bar. Assoc. 51-52) statement of the doctrine—essentially in the form of a statement that fair use exists: “Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright” (United States 1963: 5). Advocates of the factors approach eventually won out, and the final version of Section 107 contained in its preamble a brief reference, in the form of a parenthetical, to “multiple copies for classroom use” (17 U.S.C. §107). Nevertheless, Section 107 as passed was—and remains—sufficiently open-ended to allow fair use doctrine to evolve, particularly in response to new technology. Commentators of the time considered this to be a great virtue of the doctrine (See, e.g., Leval).¹⁰ While fair use commentary of the 1970s and '80s tended of course to be critical of and seek improvements in the development of the doctrine, it was not nearly as pessimistic as the typical fair use article today¹¹—indeed, it could be profoundly idealistic (Fisher 1988: 1744-94).

¹⁰ See, e.g., Leval, who asks whether “imprecision—the absence of a clear standard—in the fair use doctrine is a strength or a weakness,” and concludes that “[w]e should not adopt a bright-line standard [to determine fair use] unless it were a good one—and we do not have a good one” (1135).

¹¹ See, e.g., Fried, who argued that Section 107 is a “step forward from the judicial doctrine of fair use” and leaves “the door open for courts to take a reasonable approach in more difficult fair use cases” (509-10).

Sentiment has changed considerably in the past two decades. The very malleability that was once a virtue of fair use doctrine now leaves it exposed to powerful efforts to constrict its scope, so that some commentators now speak of the “death of fair use” (Sag 1662-63). One prominent commentator’s recent diagnosis is more restrained, but representative nevertheless: “Fair use is not dead, but it is ill” (Gordon 915). The more pessimistic among fair use commentators tend to engage in what they presumably hope to be self-defeating prediction. For example, another prominent commentator sees “little practical future” for fair use “as traditionally defined” (Leaffer 865). A recent Note predicts that “the current trends in fair use will eventually eliminate fair use for schools, colleges, and universities” (Silberberg 618). Others speak of a “nightmare future” (Okerson 83) for the doctrine.¹²

The malleability of fair use presents a problem, however, for what are intended to be self-defeating predictions. It has long been recognized that one significant danger of self-defeating prediction is that those exposed to the prediction may adjust their expectations and actions in such a way as to bring about precisely what the predictor seeks to avoid. This is an especially valid concern in the intellectual property law context and, more specifically, in the fair use context. While attention tends to focus on the degree to which changes in technology may affect the fair use calculus, it is important to recognize as well that because fair use is such an amorphous body of doctrine and its outcomes so unpredictable, it is also highly susceptible to shifts in conventional wisdom and in custom. Meanwhile, fair use commentators may be tempted to overstate just how bad things have gotten in an effort to shock the reader into action—or, to adapt from a common complaint about “modern futurist hypochondria” (Strathern 209), in an effort simply to argue for the importance of their commentary. For example, if commentators repeatedly assert that a particular form of conduct found by a particular court not to be fair use would no longer be recognized by other courts as fair use, then these other courts may come to believe that this possibly overly alarmist description of the law is

¹² But see Bell, who argues that the public will benefit from a widespread regime of automated rights management.

accurate, and rule accordingly.¹³ Just as there is thus a danger to the present of self-fulfilling *descriptions*,¹⁴ so there is a similar danger to the future of unintentionally self-fulfilling *predictions*.

III. Conclusion

This brief essay has sought to engage the question of what the actual effect of legal futurist writing about fair use might have on the doctrine itself in the future. If fair use commentary is largely epiphenomenal, then we need not be concerned about any risk of the self-fulfilling prediction. But we are then left with the question of whether the doomsday predictions so common among fair use commentators today may actually be accurate—and that the conditions predicted are unpreventable. But if fair use commentary does have an effect on fair use doctrine, then we are still left to contemplate the possibility that doomsday predictions may help to bring about the conditions predicted. This peculiar double bind—on the one side, Cassandra, on the other, Oedipus—is a feature of all futurist writing, but is especially problematic in relation to a body of doctrine as underdetermined as fair use.

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¹³ Consider W.I. Thomas's "Thomas Theorem" that "[i]f men define situations as real, they are real in their consequences." (Thomas & Thomas 572). See also Merton.

¹⁴ Of course, this process can work the other way. Optimistic interpretations may influence fair use doctrine positively. See Gard, who quotes Prof. Peter Jaszi as discussing the possibility of a "virtuous circle" in which custom moves towards "greater openness" in fair use adjudication (41).

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