IS A FAIR USE FOREVER FAIR?

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Courts cannot predict the future, but their decisions are binding precedent on future generations. Technological changes—that courts could have never predicted—break down this system of stare decisis. What made sense yesterday no longer makes sense today. Leveraging an understanding of technology, the rule of law, and stare decisis, this Note proposes a new approach to copyright fair use decisionmaking that involves utility-expanding technologies, or tools that radically change the use of and access to copyrighted works. When applying past precedent, courts should carefully contextualize prior decisions' analyses of the first and fourth fair use factors within the precedent's time and perform a similar analysis for the current case in the current era. The more that the factual circumstances diverge between the two cases, the less weight the court should give to the past precedent. Moreover, when generating precedent on utility-expanding transformative fair uses, courts should narrow their fair use decisions to the dispute before the court and only rule on the specific technology in question—helping ensure that the balance between advancing technological interests and protecting the rights of content creators does not become rooted in shortsighted thinking from a materially different past.

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This Note was published right after the Supreme Court decided *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, which considered "transformativeness" in the context of appropriation art. 143 S. Ct. 1258 (2023). While this Note addresses utility-expanding transformative fair uses, and not appropriation art, courts may apply *Warhol* in ways that affect their transformativeness analyses under the first fair use factor, without necessarily altering the outcomes this Note describes.

INTRODUCTION

In 1984, the Supreme Court declared in *Sony Corp. of America v. Universal City Studios, Inc.* that the early video casette player Betamax's "time-shifting," or the recording and later viewing of television programming, was a fair use and therefore not copyright infringement.[1] The Court assumed that people did not want to rewatch television but instead wanted to watch a show *once* after it had aired.[2] It found that the harm alleged by content producers was "speculative and, at best, minimal."[3] In 1984, Betamax was novel, offering new possibilities, and the Court could only speculate about its uses. But in 2023, the Court's decision seems questionable at best. Content creators have launched their own streaming platforms centered on the idea that customers want to rewatch their shows, as NBCUniversal did with its platform Peacock.[4] They not only derive

[1] 464 U.S. 417, 454–55 (1984). The Betamax is a consumer tape-based recording technology created by Sony in 1975, very similar to the Video Home System (VHS). *See generally* PAUL MCDONALD, VIDEO AND DVD INDUSTRIES 32–35 (2007) (describing the development and release of Betamax).

[2] *See Sony*, 464 U.S. at 451.

[3] *Id.* at 454 (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 467 (C.D. Cal. 1979)).

[4] For example, Peacock's marketing campaign capitalized on viewers' desire to rewatch *The Office*, a twenty-first century depiction of working in corporate America. *See* Julia Alexander, *How Much You Love The Office May Determine What Peacock Plan You Get, Apparently*, THE VERGE (Jan. 6, 2021, 10:59 AM), https://www.theverge.com/2021/1/6/

revenue from their own platforms' subscription fees, but also from licensing their content to external streaming services like Netflix and Hulu.[5] Today, technologies that record and play back content cause apparent harms to creators, reducing the amount of money they can generate from their creative works.

The *Sony* Court reached its decision in 1984, over two decades before YouTube and Amazon Unbox ushered in the streaming revolution.[6] One might be inclined to forgive the Court's inability to predict the Internet's radical transformation of content viewing. However, even in the golden age of streaming, courts continue to cite *Sony*'s rule that time-shifting is a fair use.[7] An analysis centered on the realities and knowledge of the 1980s should not continue to dictate the balance between technological innovation and copyright protection today.

From its origins, copyright law has evolved in response to a changing technological landscape.[8] The development of novel technologies that reduced the costs of distributing works of authorship—principally the printing press—spurred copyright protection into existence.[9] However, as demonstrated by *Sony*, copyright is not

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22216867/peacock-office-subscription-streaming-ad-free-premium-plus-netflix [https://perma.cc/7R5P-84UK] ("Chances are if you're looking into signing up for Peacock . . . it's because you're trying to watch *The Office*—and NBC knows it.").

[5] *E.g.*, Peter Kafka, *The Story Behind Netflix's $100 Million 'Friends' Deal*, Vox (Dec. 4, 2018, 9:02 PM), https://www.vox.com/2018/12/4/18126596/friends-netflix-warnermedia-att-hulu-apple-deal [https://perma.cc/25HR-HTE8] (describing Netflix's $100 million deal to get the exclusive rights to stream the sitcom *Friends* through 2019); Philiana Ng, *The CW Inks Five-Year Deal with Hulu*, Hollywood Rep. (Oct. 28, 2011, 12:14 PM), https://www.hollywoodreporter.com/tv/tv-news/cw-hulu-licensing-agreement-254743 [https://perma.cc/V45T-ZVVZ] (describing Hulu's licensing deal with CW on the heels of CW's deal with Netflix, which was speculated to be worth $1 billion).

[6] John Cloud, *The YouTube Gurus*, Time (Dec. 25, 2006), https://content.time.com/time/printout/0,8816,1570795,00.html [https://perma.cc/N9YJ-SC8V]; *Amazon Unbox Goes Live*, TechCrunch (Sept. 7, 2006, 4:16 PM), https://techcrunch.com/2006/09/07/amazon-unbox-goes-live [https://perma.cc/7BYX-5CGD].

[7] *See, e.g.*, Fox Broad. Co. v. Dish Network L.L.C., 474 F.3d 1060, 1068 (9th Cir. 2014); Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177–78 (2d Cir. 2018); *In re* AutoHop Litig., No. 12 Civ. 4155(LTS)(KNF), 2013 WL 5477495, at *8 (S.D.N.Y. Oct. 1, 2013); Arista Recs. LLC v. Myxer Inc., No. CV 08-03935 GAF (JCx), 2011 WL 11660773, at *38 (C.D. Cal. Apr. 1, 2011).

[8] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) ("From its beginning, the law of copyright has developed in response to significant changes in technology."); *see also* Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. Pitt. L. Rev. 17, 21–27 (2016) (detailing the expanding scope of copyright protection over time); Michael P. Goodyear, *Synchronizing Copyright and Technology: A New Paradigm for Sync Rights*, 87 Mo. L. Rev. 95, 103–09 (2022) (reviewing the various legislative and judicial changes in response to technological innovation over the course of nineteenth, twentieth, and twenty-first centuries).

[9] William C. Warren, *Foreward* to Benjamin Kaplan, An Unhurried View of Copyright, at vii (1967).

anathema to technological innovation and pioneering methods of distributing protected works. One of the most important ways in which copyright law allows for technological innovation is through fair use or a legally permissible use of a copyrighted work. Fair use helps balance the right of the public to access copyrighted works against the copyright holder's monopoly rights.[10] In evaluating whether a use is fair, judges consider four nonexclusive factors enumerated in the Copyright Act.[11] For the purposes of analyzing technological change and fair use, the first factor (purpose and character of the use) and fourth factor ("the potential market for or value of" the copyrighted work)[12] are most important.[13] Ultimately, if a fair use is found, there is no copyright infringement.[14]

While that analysis decides whether a use is fair, is a fair use forever fair? Do technologies that are deemed fair uses in the past necessarily constitute fair uses in the present? Courts, enmeshed in "rapidly changing technological, economic, and business-related circumstances,"[15] cannot predict the future, but their decisions of whether a use is fair are binding precedent on future generations. This dynamic upsets the careful balance in copyright law between the rights of content creators and access to copyrighted works by the public. To explore this tension, this Note considers what Judge Pierre Leval clas-

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[10] *See* Stewart v. Abend, 495 U.S. 207, 209 (1990) ("Congress has created a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

[11] 17 U.S.C. § 107 (including "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work"); *see infra* notes 25–32 and accompanying text.

[12] 17 U.S.C. § 107(4).

[13] *See infra* notes 28–32 and accompanying text.

[14] *Id.* Scholars and practitioners still debate whether fair use should be considered an affirmative defense or a limit to the copyright owner's exclusive rights. *See, e.g.*, Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 674–77 (2019).

[15] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021). In *Google*, the Supreme Court considered whether Google's use of Java's declaring code APIs in its Android Operating system constituted fair use. *Id.* at 1209. Although it was the Court's latest fair use case, the Court strongly emphasized that it did not upset prior fair use decisions. *Id.* at 1208 ("We do not overturn or modify our earlier cases involving fair use."). This Note does not center *Google* in its analysis because *Google* was about declaring code APIs and not primarily a means to distribute information. Instead, this Note focuses on utility-expanding fair uses, which can be informed by the state of the market and technology when a decision is rendered. That said, *Google*'s limiting the holding to the particular technology at issue reflects this Note's proposal for *generating* precedent. *See infra* Section III.A–B.

sified as "utility-expanding transformative fair uses,"[16] or technologies that have the capability to deliver copyrighted content in particularly efficient or novel ways.

Because of the speed at which legal precedent about technology ages, a new approach for evaluating these utility-expanding transformative fair uses is needed. When applying past precedent, courts should carefully contextualize prior decisions' analyses of the first and fourth fair use factors within the precedent's time and perform a similar analysis for the current case in the current era. The more that the factual circumstances diverge between the two cases, the less weight the court should give to the past precedent. Moreover, when generating precedent, courts should narrow their fair use decisions to the dispute before the court and only rule on the specific technology in question. Taken together, these recommendations lessen the effect of stare decisis for fair uses involving utility-expanding technologies—helping ensure that the balance between advancing technological interests and protecting the rights of content creators does not become rooted in shortsighted thinking from a materially different past.

Part I begins by analyzing the purpose and theories underlying copyright law, the specifics of fair use doctrine, and how legal precedent is generated through a system of stare decisis. Because fair use is an equitable doctrine that is flexibly applied,[17] it is important to understand the values of copyright law and stare decisis before considering specific lines of jurisprudence.

Part II analyzes two contrasting lines of jurisprudence related to distribution technologies, which courts might consider utility-expanding transformative fair uses. In the first line, relating to television distribution, courts have favored the advancement of technology over the rights of content creators by finding technologies that incorporate time-shifting to be fair uses. Conversely, in the second line of cases, which involve music distribution, courts have generally favored content creators' rights over new technologies and are less inclined to find fair uses. The end of this Part speculates why these cases have diverged.

Part III moves beyond current case law to consider how the law should operate for utility-expanding transformative fair uses. Using the examples of television and music distribution as case studies, it analyzes how courts should consider the balance between advancing technology and protecting rights holders. Central to this calculus are

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[16] Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 661 (2d Cir. 2018).

[17] *See Google*, 141 S. Ct. at 1197 (describing how the background and current use of fair use doctrine make clear that the "concept is flexible").

economic and rule-of-law considerations that undergird a system of stare decisis and how such concerns should be evaluated against a continually changing technological landscape.

I
Values Underlying Copyright Law and Stare Decisis

Copyright law serves the dueling purposes of protecting content creators' rights and ensuring the public's access to works. This tension plays out centrally in the doctrine of fair use and how judges work through the four statutorily dictated factors to find a fair use. In addition to the statute,[18] judges also consider the reasoning of past judges within a system of stare decisis. Stare decisis claims the benefits of fairness, predictability, stability, the rule of law, economic investment, and decisionmaking efficiency. Walking through the purpose of copyright law, fair use doctrine, and the rationales for stare decisis will position the television and music distribution cases in Part II and will inform Part III's recommendation about the application and generation of legal precedent relating to utility-expanding transformative fair uses.

A. Purpose of Copyright Law

The Constitution provides grounding for U.S. copyright law, stating that Congress has the right to craft legislation "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[19] As the Supreme Court has articulated, copyright gives artists and creators monopoly rights over their works to incentivize them to generate more creative works. The goal is not to reward authors, but to ensure "the general benefits derived by the public from the labors of authors."[20] But in order for the public to derive

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[18] 17 U.S.C. § 107.

[19] U.S. Const. art. I, § 8, cl. 8.

[20] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)); *see also* Stewart v. Abend, 495 U.S. 207, 228 (1990) ("[D]issemination of creative works is a goal of the Copyright Act . . . . [T]he limited monopoly . . . 'is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . .'" (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)); 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.03[A] (2022).

benefit from copyrighted works, they must have access to the works, causing friction with the copyright holder's monopoly rights.[21]

Fair use operates within this framework to help adjust the balance to honor the right of the public to enjoy and utilize copyrighted works.[22] It emerged with *Folsom v. Marsh*[23] as judicially created doctrine to flexibly weigh copyright law's competing aims.[24] Section 107 of the Copyright Act codified previous case law and enumerates the four nonexclusive factors that judges must consider when deciding if a use of a copyrighted work is fair: (1) the "purpose and character of the use," including if the use is commercial in nature; (2) the "nature of the copyrighted work" (i.e., whether the work is something creative like a movie or song, or something factual like a news article); (3) the "amount and substantiality" of the part of the copyrighted work used compared to the entire copyrighted work; and (4) the "effect of the use upon the potential market for or value of the copyrighted work."[25] Because of the lack of specificity in the fair use statute,[26] previous court decisions and precedent are critical to understanding the doctrine.[27]

This Note focuses on the first and fourth factors, as they are the most predictive of courts' decisionmaking.[28] Both in terms of empirical analysis and courts' commentary, the second factor is not considered important to a case's ultimate outcome.[29] Regarding the third

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[21] *Stewart*, 495 U.S. at 209 ("Congress has created a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works.").

[22] *See* Leval, *supra* note 10, at 1110 ("The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective.").

[23] 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (adjudicating the copying of letters from a past biography by a more recent biography).

[24] Michael P. Goodyear, *Culture and Fair Use*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 334, 358–63 (2022).

[25] 17 U.S.C. § 107(1)–(4).

[26] *Id.* (failing to define key terms and using general language).

[27] *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 551–54 (2008) (describing the broad language of the statute and the importance of leading cases to determining what is a fair use).

[28] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 4 (2020).

[29] *Id.* at 30 ("Fair use opinions continue routinely to denigrate factor two as unimportant to the overall fair use analysis, and the updated data support the view that the factor typically has a relatively minimal impact."); *see, e.g.*, Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 178 (2d Cir. 2018) (finding the nature of the copyrighted work to play "no significant role"); Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 430 (S.D.N.Y. 2018) (noting that the second factor is "rarely found to be determinative" (quoting On Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001))). *Google*, a recent Supreme Court case, centrally involved the second factor, but this case should be considered an outlier. *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1201–02 (2021). *Google* involved the fair use of APIs, an at-best minimally copyrightable work

factor, courts are more inclined to find fair use when less of a copyrighted work is used.[30] However, as was the case in *Sony*, this factor is not relevant when a use is considered "transformative" under the first factor.[31] Because this Note focuses on utility-expanding transformative fair uses, largely technologies that reproduce the entirety of copyrighted works and that are debatably transformative,[32] the third factor is subsumed by the first factor.

1. "Purpose and Character of the Use" Factor

The first factor concentrates on the allegedly infringing *use* of a copyrighted work. It largely involves two subfactors: (1) whether the use is commercial and (2) whether the use is transformative.[33] For the first subfactor, if the use is considered commercial, or to make a profit, that weighs against finding fair use.[34] Conversely, if the use is not intended to make money, for example teaching or scholarship, then that weighs in favor of fair use.[35] The second subfactor involving transformativeness is more opaque. In his seminal article on transformative use, Judge Leval instructs that, in order to be transformative, a use must be "productive" and use the copyrighted material "in a different manner or for a different purpose from the original."[36] The Supreme Court wrote this idea into law with *Campbell v. Acuff-Rose Music, Inc*.[37] Since then, courts have placed a high degree of importance on transformativeness, perhaps the most important consideration.[38]

Leval, unfortunately, does not define the term "productive." The Oxford English Dictionary supplies a potentially helpful definition: "Having the quality of producing something, typically through effort

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whose nature strongly leaned in favor of a finding of fair use. This Note instead focuses on whether technologies that help disseminate traditional copyrightable materials (e.g., music, movies) are fair uses. In the jurisprudence of both television and music distribution, the nature of the copyrighted material is not at issue.

[30] *E.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); Wright v. Warner Books, Inc., 953 F.2d 731, 738 (2d Cir. 1991); Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir. 1987), *opinion supplemented on denial of reh'g*, 818 F.2d 252 (2d Cir. 1987).

[31] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984).

[32] For example, the Betamax player at issue in *Sony* reproduced the entire movie or television show. In other fair use contexts, only *part* of the copyrighted work is copied. *See, e.g.*, Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1271–72 (11th Cir. 2014) (discussing the percentage of books that a university had photocopied).

[33] Beebe, *supra* note 28, at 23–30; *see also* Goodyear, *supra* note 24, at 372.

[34] *Campbell*, 510 U.S. at 585.

[35] *See* Leval, *supra* note 10, at 1111 (1990).

[36] *Id.*

[37] *Campbell*, 510 U.S. at 579 (considering whether 2 Live Crew's parody of Roy Orbison's song "Oh, Pretty Woman" was fair use).

[38] Beebe, *supra* note 28, at 25–28.

or work; that produces, [especially] some significant amount or result; creative, generative."[39] Read in the context of Leval's requirement for a "different purpose," a productive use might be a use that adds something new to an existing work that did not exist before. For example, in *A.V. ex rel. Vanderhye v. iParadigms, LLC*, the Fourth Circuit affirmed the district court finding that a software's archiving of academic work to detect plagiarism was transformative because it focused on a different purpose than the student's essays, which were written for an academic course.[40]

Courts have continued to search for the boundaries of "transformativeness" in later decisions.[41] This analysis is highly fact-specific and varies by the copyrighted work at issue.[42] Moreover, if a use is found transformative, then the court will consider the market analysis under the fourth factor differently: The court will be less likely to find that the transformative use has negatively affected the market for the copyrighted work.[43]

This Note does not consider all fair uses, but instead a subset of fair use decisionmaking related to potentially transformative, utility-expanding technologies. Judge Dennis Jacobs's summary of *Sony* in light of the transformative use doctrine provides a helpful restatement of the law on novel technologies as fair use: "[A] secondary use may be a fair use if it utilizes technology to achieve the transformative purpose of improving the efficiency of delivering content without unreasonably encroaching on the commercial entitlements of the rights holder."[44] These utility-expanding uses do not comment on or cre-

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[39] *Productive*, OXFORD ENGLISH DICTIONARY (2021), https://www.oed.com/view/Entry/151998 [https://perma.cc/YZX7-RPDP].

[40] 562 F.3d 630, 638–39 (4th Cir. 2009).

[41] Goodyear, *supra* note 24, at 373–78 (explaining the intricacies of the transformativeness inquiry and recent case law).

[42] *Compare* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006) (finding fair use for the use of Grateful Dead posters in a history book) *with* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1209 (2021) (finding fair use of of Java's APIs in the Android mobile phone operating system).

[43] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) ("[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."); *see also* Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015) ("*Campbell* stressed the close linkage between the first and fourth factors, in that the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original." (citing *Campbell*, 510 U.S. at 591)).

[44] Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177 (2d Cir. 2018). The father of "transformative use" doctrine, Judge Leval cites Judge Jacobs for a restatement of the law in *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 661 (2d Cir. 2018). *See also* Leval, *supra* note 10, at 1111; *Campbell*, 510 U.S. at 579 (incorporating Judge Leval's views of "transformative use" into the fair use doctrine).

atively repurpose a copyrighted work,[45] but instead radically change how a copyrighted work is distributed and made available to the public.[46] Therefore, the central question in this line of cases is about distribution technologies for copyrighted works. How exactly the balance between efficiency and commercial entitlements plays out will be a focus of the television and music distribution cases in Part II and considered directly in Part III.[47]

2. *"Effect of the Use Upon the Potential Market or Value" Factor*

The fourth fair use factor, the impact of the use on the "potential market for or value of the copyrighted work,"[48] is also considered an important factor.[49] While often consequential in courts' decisionmaking, critical questions remain: How potential or actual does the market need to be, and does the market need to exist concurrently with the infringing use?[50] Courts undertake this analysis, in theory, on a case-by-case basis, looking into the facts of each case.[51] As seen below, courts critically undertake this analysis at a fixed point in time. Moreover, they generate precedent that, in practice, is largely followed by future courts.[52]

B. Considering Stare Decisis

The legal system has attempted to translate these purposes of copyright and utility-expanding transformative fair uses into law. While the Copyright Act governs fair use,[53] it is a notoriously vague

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[45] *E.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 51 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022) (holding that screen prints of Goldsmith's copyrighted photograph made in Warhol's signature style were not a fair use).

[46] *See generally* Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887 (2021) (describing utility-expanding fair uses and arguing that instead of granting fair uses for technologies that increase access, Congress should create a compulsory licensing system).

[47] *See infra* Section III.A.

[48] 17 U.S.C. § 107(4).

[49] *See* Beebe, *supra* note 28, at 33–36 (describing how scholars debate if the first or the fourth factor is the most determinative of fair use decisionmaking).

[50] The danger of circularity inherent in these questions is acknowledged by courts and commentators. "[I]t is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar." Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1207 (2021) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (2021)).

[51] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994) (explaining that courts must "work [their] way through the relevant factors" and "judge[] case by case").

[52] *See infra* Part II.

[53] 17 U.S.C. § 107.

and open standard.[54] The law on fair use is largely constituted by an amalgamation of judicial decisions—a system of precedent, or stare decisis.[55] Before recommending changes to how judges operate within this system, it is important to understand the values and benefits that stare decisis purports to advance, which largely involve considerations of predictability, stability, the rule of law, economic investment, fairness, and decisionmaking efficiency.

Proponents of stare decisis claim it adds predictability and stability to the law.[56] When people and businesses can assume that future law depends in part on past judicial decisions, they are better able to plan their future affairs.[57] At a macro level, this greater, albeit imperfect, predictability contributes to what is called the "rule of law," or the idea that the government's power should be exercised within a legal framework that enables accountability for government actors and does not allow them to rule arbitrarily.[58] Moreover, it dictates that laws should be the same for everyone, "accessible to the people in a clear, public, stable, and prospective form," and administered through proper procedures.[59] This political ideal is seen as good in and

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[54] *See, e.g.*, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) (describing how "little guidance" the four-factor test provides); Leval, *supra* note 10, at 1105–06 ("These formulations, however, furnish little guidance on how to recognize fair use."); Goodyear, *supra* note 24, at 368 ("The holistic four-factor test has not, however, lent itself to neatly delineated categories of what qualifies as fair use.").

[55] *See* Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMMS. TECH. L. REV. 381, 434 (2005) (arguing that Congress "left the judiciary to apply a vague and open-ended standard").

[56] Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9 (2012) ("By commanding that judges follow previous decisions, stare decisis is supposed to make it easier for people facing a new situation to predict how the courts will deal with it: they will deal with it in the way that they have dealt with similar situations in the past . . . .").

[57] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (arguing that in the case of abortion rights, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on" legal precedent). However, as is evident with *Dobbs*'s overruling of *Casey*, stare decisis offers only imperfect reliance, and courts may disagree about the degree to which reliance interests are engaged. *See Dobbs*, 142 S. Ct. at 2242–43.

[58] Waldron, *supra* note 56, at 24–29. Adherence to the ideals of the rule of law are often strongly contested. *Compare Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. . . . That is what the Constitution and the rule of law demand."), *with Dobbs*, 142 S. Ct. at 2319 (Breyer, J., dissenting) ("*Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion.").

[59] Waldron, *supra* note 56, at 3–4.

of itself because it respects the autonomy of individual actors and promotes an orderly society.[60]

On a less-abstract level, stare decisis can help people and businesses make better-informed economic investments in new technologies. When actors within the legal system know that they can rely on the continued legality of a particular judicial holding, they have greater reason to invest in a product that builds off that holding. Commentators cite *Sony* as an example for this proposition that legal precedent bolsters economic investment.[61] Gary Shapiro, an industry advocate, for example, noted that *Sony* "gave technology companies the incentive and confidence to invest in research and new technology."[62]

Another justification for stare decisis is that fairness demands that courts "treat like cases alike."[63] Stare decisis constrains judges to examine current cases like courts have treated similar cases in the past.[64] To do otherwise would be unfair to the current parties before the court and to past parties alike.[65]

Finally, stare decisis may help with the efficiency of judicial decisionmaking. If judges are able to rely on past decisions to inform their current cases, they may have fewer issues to consider anew.[66] This, in turn, may help them resolve disputes faster—freeing up judicial resources, reducing the costs of lawsuits, and helping parties come to resolutions sooner.[67]

In application, stare decisis is mired with complexities about how to determine if a case is relevantly similar or should be distinguished based on dissimilar facts.[68] There are also issues with interpreting past precedent and possibly overruling it.[69] However, if stare decisis carries

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[60] *See* LON L. FULLER, THE MORALITY OF LAW 162–63, 91–93 (rev. ed. 1969) (arguing that lack of clarity and stability in the law may lead to retroactivity and disparate enforcement, which generate unequal results and sow disregard for decisional autonomy).

[61] *See generally* RIMMER, *infra* note 136, at 93–130 (describing the rise of Napster).

[62] *Protecting Copyright and Innovation in a Post-*Grokster *World: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 129 (2005) (statement of Gary Shapiro, CEO, Consumer Electronics Association).

[63] Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595 (1987); *see also* June Med. Servs. v. Russo, 140 S. Ct. 2103, 2134 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) ("The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike.").

[64] *See* Waldron, *supra* note 56, at 3–4 (considering common reasons advanced to justify stare decisis).

[65] *See id.*

[66] *See* Schauer, *supra* note 63, at 599.

[67] *See* Waldron, *supra* note 56, at 3.

[68] *See* Schauer, *supra* note 63, at 576–79.

[69] For example, in *Dobbs v. Jackson Women's Health Organization*, the Court recently made clear that stare decisis does not "compel unending adherence" to a previous case's

any weight, then it theoretically fosters greater predictability, stability, the rule of law, economic investment, fairness, and judicial efficiency.[70]

In addition to the backward-looking nature of precedent, judges must consider how their decisions will impact decisionmaking in the future. Fred Schauer eloquently frames this dynamic:

> An argument from precedent seems at first to look backward. The traditional perspective on precedent . . . focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.[71]

In essence, Schauer first identifies the backward-looking feature of precedent, where rules made by past judges are applied to present cases. He goes beyond this traditional view of precedent to explain the forward-looking effect of precedent where rules created in the present case will, in theory, bind parties in future cases—situations that may greatly diverge from the present case.

II
Comparing Television and Music Distribution Technologies

Cases about television and music distribution offer contrasting approaches to finding when distribution technologies are fair uses.[72]

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reasoning, even if the past case had been affirmed by another Supreme Court decision. *See* 142 S. Ct. 2228, 2242–43 (2022) (overturning the precedents of both *Casey* and *Roe*). *See also* Waldron, *supra* note 56, at 26–29 (drawing a distinction between refraining from overruling precedent and generally following the principle of an earlier decision). In a time before *Dobbs*, *Casey* offered widely cited factors to determine when and if a precedent should be overruled. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992), *overruled by Dobbs*, 142 S. Ct. 2228. However, *Dobbs* supplanted these factors, instead focusing on the nature of the previous court's "error," the quality of the previous court's reasoning, the "'workability' of the rules" imposed by the previous court, the previous decision's "disruptive effect on other areas of the law," and the "absence of concrete reliance." *Dobbs*, 142 S. Ct. at 2265. *See infra* Section III.D.

70 Part III further considers critiques of stare decisis's purported benefits.

71 Schauer, *supra* note 63, at 572–73.

72 This research relies on courts' fair use decisions made from 1982 to the present. These cases were chosen by using the U.S. Copyright Office's Fair Use Index, which catalogs and summarizes court opinions relating to fair use, as a starting point. *U.S. Copyright Office Fair Use Index*, U.S. Copyright Off. (Dec. 2022), https://www.copyright.gov/fair-use [https://perma.cc/2YZ8-Q4CC] (filtered for "format shifting/space shifting" cases). Cases were selected if they involved technologies that could possibly

With television, as exemplified in *Fox Broadcasting Co. v. Dish Network L.L.C.*,[73] courts have generally followed *Sony* in permitting television distribution technologies as fair uses, in spite of the harm to content creators' market for licensing content. However, with music, courts struck down arguably revolutionary technologies, finding that novel and efficient methods of distributing copyrighted music were not fair uses. In *Infinity Broadcasting Corp. v. Kirkwood*[74] and *A&M Records, Inc. v. Napster, Inc.*,[75] courts were more inclined to project the potential future markets for creators' work, tipping the balance in favor of creators over technology. In *Capitol Records, LLC v. ReDigi, Inc.*,[76] an overly formalistic reading of the Copyright Act and misunderstandings of technology led the Second Circuit to strike down a novel software platform to resell legally acquired digital music. After discussing these two lines of cases, this Part concludes by explaining why they diverge.

A. Television Distribution: CATV to Betamax to Streaming

Even before *Sony*, the Supreme Court showed a willingness to grant greater leeway to television distribution technologies, albeit through an interpretation of the Copyright Act of 1909's "public performance" right.[77] In a pair of opinions, the Supreme Court addressed the permissible use of community antenna television (CATV) systems. CATV systems solved the problem of unequal coverage of broadcast television signals across the United States by, in essence, creating a large antenna to rebroadcast weak signals.[78] In *Fortnightly Corp. v. United Artists Television, Inc.*, the Court held that Fortnightly's CATV system's rebroadcasting of content did not violate copyright owners' public performance right.[79] The Court reaffirmed this holding and increased the permissible range of television rebroadcasts a few years

be considered utility-expanding or greatly increased access to the public. The label "utility-expanding transformative fair uses" emerged in the late 2010s, postdating many of the cases. *See infra* note 169 and accompanying text. Therefore, cases were selected because of their theoretical potential to be considered a "utility-expanding transformative fair use."

[73] 747 F.3d 1060 (9th Cir. 2014).

[74] 150 F.3d 104 (2d Cir. 1998).

[75] 239 F.3d 1004 (9th Cir. 2001).

[76] 910 F.3d 649 (2d Cir. 2018).

[77] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 § 1(e), *superseded by* Copyright Act of 1976, 17 U.S.C. § 101.

[78] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 391–93 (1968); *see also* Megan Larkin, *The Demise of the Copyright Act in the Digital Realm: Re-Engineering Digital Delivery Models to Circumvent Copyright Liability After* Aereo, 37 COLUM. J.L. & ARTS 405, 410 (2014) (describing CATV and its utility).

[79] *Fortnightly*, 392 U.S. at 397–402.

later in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[80] Although these interpretations were superseded by the transmit clause of the Copyright Act of 1976,[81] they offer an important introduction to the Supreme Court's approach to novel technologies affecting television distribution.

Justice Abe Fortas, in his *Fortnightly* dissent, concisely pinpointed the issues courts face when considering new technologies. He concluded that "[t]he novelty of [CATV], incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools—the words of the Act, legislative history, and precedent—to the facts of the case is like trying to repair a television set with a mallet."[82] Justice Fortas's statement underscores the difficulty of applying precedent and statutes generated in a very different past to circumstances in a future, changed world. In other words, there are considerable issues with applying precedent in a backward-looking manner. He further suggested that the typical approach of analogical reasoning may not be appropriate with technologies that may only superficially correspond to past precedent.[83]

1. Sony v. Universal City Studios

Fortnightly and *Teleprompter* set the scene for *Sony* and later *Fox Broadcasting Co. v. Dish Network L.L.C.*[84] In *Sony*, the Supreme Court evaluated the legality of the Betamax player, a device which allowed people to record live television broadcasts on physical tapes that could be viewed later.[85] While the Betamax player, and the very similar Video Home System (VHS), may seem antiquated to readers, they were considered revolutionary at the time.[86] The *Sony* plaintiffs—major content creators Universal Studios, Inc. and Walt Disney Productions—did not disagree, but were wary of the device's huge potential for copyright infringement. They argued that use of the Betamax constituted copyright infringement and that Sony was

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[80] 415 U.S. 394, 412–15 (1974).

[81] 17 U.S.C. § 101 ("To perform or display a work 'publicly' means . . . (2) to transmit or otherwise communicate a performance or display of the work to a place [open to the public] or to the public, by means of any device or process . . . ."); *see also* Nicole Webster, *Copyright Takeover: Balancing Art and Technology After* Aereo, 57 SANTA CLARA L. REV. 161, 184–87 (2017) (discussing judicial interpretation of "public performance" after the transmit clause amendment); Goodyear, *supra* note 8, at 106.

[82] *Fortnightly*, 392 U.S. at 403 (Fortas, J., dissenting).

[83] *See id.* at 405–08.

[84] Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060 (9th Cir. 2014).

[85] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 422–23 (1984).

[86] Tony Long, *June 7, 1975: Before Digital, Before VHS . . . There Was Betamax*, WIRED (June 7, 2007, 12:00 PM), https://www.wired.com/2007/06/dayintech-0607 [https://perma.cc/JA4V-FWJS].

directly, contributorily, or vicariously liable for such infringement by producing and selling the Betamax.[87]

Central to the determination of Sony's liability was whether the practice of time-shifting, or recording a live television program to watch at a later time, constituted a fair use of the copyrighted program.[88] The Supreme Court found that it was.[89] To reach its conclusion, the Court walked through the four fair use factors. For the first factor of the fair use analysis, the purpose and character of the use, the Court held that time-shifting was a "noncommercial, nonprofit activity" that weighed in favor of fair use.[90] Moving to the second factor, the Court favorably noted that time-shifting allowed the viewer to watch something later that they could have seen for free in real time.[91] The Court then dismissed the fact that the entire work was reproduced under the third factor.[92] Most strikingly, for the fourth factor relating to time-shifting's impact on the "potential market for or value of" Universal and Disney's works, the Court also found in favor of Sony.[93]

The Supreme Court affirmed the district court's dismissal of arguments that time-shifting (1) negatively affected ratings by reducing the size of the live audience during the telecast; (2) decreased viewership for other live shows, as people were viewing Betamax tapes instead; (3) shrunk the audience for televised reruns as the consumers already had a recorded copy; and (4) depressed revenue from later theatrical exhibition and film rentals for the same reason.[94]

In retrospect, the Supreme Court's wholesale dismissal of these arguments was ill-advised. The Court was correct to dismiss the first claim, that rights holders would suffer ratings losses due to consumers viewing Betamax recordings, as the district court noted that Nielsen ratings could account for Betamax viewings.[95] However, the district

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87 Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 432 (C.D. Cal. 1979), *aff'd in part*, *rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

88 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447–48 (1984).

89 *Id.* at 454–56.

90 *Id.* at 448–49.

91 *Id.* at 449, 450 n.33.

92 *See id.* at 449–50 (suggesting that the use of the Betamax for time-shifting meant that the third factor did not carry its weight against fair use where an entire work was used).

93 *See id.* at 450–55 (agreeing with the district court's finding that plaintiffs failed to show the existence of "*some* meaningful likelihood of future harm" to the potential market because of private time-shifting).

94 *Id.* at 452–54.

95 Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 466 (C.D. Cal. 1979), *aff'd in part*, *rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984). At the time of the case, Nielsen utilized four methods to measure audience viewings and translate them into a rating, where "one rating point is one percent of all homes owning television sets in the relevant market." *Id.* at 441.

court's dismissal (and the Supreme Court's subsequent affirmation) of the harm caused to telecast reruns and theatrical and film viewings was likely shortsighted, as it was based on soon-antiquated assumptions. The district court carefully delineated appropriate time-shifting, recording programming on a single tape and recording over previous recordings, as distinct from inappropriate "librarying," or amassing multiple tapes and not recording over past recordings.[96] Based on the then-expensive cost of a Betamax tape and the parties' surveys, the district court declared that librarying was unlikely,[97] despite evidence that people had already started librarying.[98] However, following *Sony*, storage cost decreased exponentially in a very short time.[99] Therefore, while the court's reliance on the price of Betamax tapes and surveys may have been correct at the time, that data quickly became outdated. Shortly thereafter, with the decreased media costs, librarying was not only possible, but may have been more likely. Correspondingly, time-shifting's harm to reruns, later theatrical viewings, and film rentals no longer appeared "speculative" or "minimal," as the Court initially thought.[100]

The nature of technology is that it continues to evolve in ways that cannot be predicted.[101] Nonetheless, yesterday's court-made pre-

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[96] *See id.* at 467–68.

[97] *Id.* at 438–40, 467.

[98] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 423 n.3 (1984) ("When Griffiths bought his Betamax, he intended not only to time-shift (record, playback and then erase) but also to build a library of cassettes." (quoting Universal City Studios, Inc., v. Sony Corp. of Am., 480 F. Supp. at 436–37 (district court's summary of Mr. Griffiths's testimony))).

[99] *See* David S. H. Rosenthal, Daniel C. Rosenthal, Ethan L. Miller, Ian F. Adams, Mark W. Storer & Erez Zadok, *The Economics of Long-Term Digital Storage*, *in* THE MEMORY OF THE WORLD IN THE DIGITAL AGE: DIGITIZATION AND PRIVATIZATION, UNESCO 513, 513, 526 (Luciana Duranti & Elizabeth Shaffer eds., 2013), https://unesdoc.unesco.org/ark:/48223/pf0000373728/PDF/373728eng.pdf.multi [https://perma.cc/8HEK-9KPG] (describing Mark Kryder's successful prediction of exponentially decreasing storage prices but acknowledging costs had leveled off). As Mark Kryder has shown, where memory technology could only hold 2,000 bits of information in a square inch, it could hold 100 billion bits in 2005—a fifty-million fold increase. Chip Walter, *Kryder's Law*, SCI. AM. (Aug. 1, 2005), https://www.scientificamerican.com/article/kryders-law [https://perma.cc/NA77-HEN9].

[100] *Sony*, 464 U.S. at 454 (quoting and agreeing with the district court's analysis).

[101] *See, e.g.*, Scott Stein, *The Metaverse's Biggest Unknown: Where We Go from Here*, ZDNET (Nov. 10, 2022), https://www.zdnet.com/article/the-metaverses-biggest-unknown-where-we-go-from-here [https://perma.cc/SE7V-9RBZ] (arguing that the metaverse will develop in unpredictable ways). In unpacking the *Sony* decision and its factual assumptions, this Note does not seek to call into question the Court's ability to understand technology, which others have done. *See, e.g.*, Joe Silver, *Supreme Court Struggles with E-mail But Will Shape Technology's Future*, ARS TECHNICA (May 6, 2014, 3:44 PM), https://arstechnica.com/tech-policy/2014/05/supreme-court-struggles-with-e-mail-but-will-shape-

cedent remains binding law amidst technological evolution and radical changes to the market for copyrighted works.

2. Fox Broadcasting Co. v. Dish Network

Decided thirty years after *Sony*, *Fox Broadcasting Co. v. Dish Network L.L.C.*[102] arose in a very different television and entertainment distribution world. People no longer relied solely on broadcast distribution, theatrical distribution, and video rentals.[103] Instead, people accessed content through increasingly available broadband Internet.[104] Starting with the video streaming service YouTube in 2005—and accelerated by the launch of Amazon Unbox in 2006, Netflix's streaming service in 2007, Hulu in 2008, and Prime Video in 2011[105]—the utility of the Betamax tape, the VHS, and their successor, the DVD, dwindled to nothing.[106] However, the precedent about time-shifted recordings remained the law, even as the world was changing.

Fox Broadcasting centered on a Dish Network technology called PrimeTime Anytime that allowed users to record broadcast television and watch it later, skipping the commercials via Dish Network's AutoHop feature.[107] Fox sued Dish Network for copyright infringement.[108] Central to the court's analysis was whether Dish Network's PrimeTime Anytime and AutoHop constituted a fair use of Fox's copyrighted programming.[109] Affirming the district court's analysis, the Ninth Circuit held that, per *Sony*, the first three factors of the fair use analysis—noncommercial use, nature of copyrighted work, and amount of work used—all favored Dish Network.[110]

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technologys-future [https://perma.cc/74MP-5FJX] (quoting Justice Kagan's own admission that the Supreme Court is not "technologically sophisticated").

102 747 F.3d 1060 (9th Cir. 2014).

103 *See generally* David Waterman, Ryland Sherman & Sung Wook Ji, *The Economics of Online Television: Industry Development, Aggregation, and "TV Everywhere*," 37 TELECOMMS. POL'Y 725, 725–26 (2013) (providing a history of the rise of the online television industry).

104 *Id.*

105 *Id.*

106 *See* Gabriel Rosenberg, *So Long, VCR. We Hardly Knew You (Were Still Around)*, NPR (July 21, 2016, 1:24 PM), https://www.npr.org/sections/alltechconsidered/2016/07/21/486889433/so-long-vcr-we-hardly-knew-you-were-still-around [https://perma.cc/9UP6-YVW6].

107 *Fox Broad. Co.*, 747 F.3d at 1065.

108 *Id.* at 1066.

109 *Id.* at 1068–70.

110 *Id.* at 1069.

While recognizing the importance of the fourth factor, the effect on the market,[111] the court acknowledged, but ultimately skimmed over the changes to the entertainment and television distribution markets since *Sony*. The court relied heavily on the fact that Fox did not charge Dish Network and other cable and satellite providers a licensing fee to offer video on demand, conditioned on the providers disabling fast-forwarding.[112] The court went on to say that "commercial-skipping" was not a protected copyright interest, and therefore there was no market harm.[113]

One might question whether Fox would have provided free licenses without the corresponding anti-commercial-skipping provision. The answer is likely no, given that content providers make substantial revenue from advertisements.[114] If advertisers knew that viewers could skip their advertisements on Dish Network, the advertisers would offer Fox less money to air them. Knowing this, Fox might demand a licensing fee from Dish Network to offset the diminished advertising revenue. Thereby, the *Fox Broadcasting* court ignored or failed to understand the likely substantial market harm from Dish Network's PrimeTime Anytime in lost licensing revenue (paid either upfront with a licensing fee or through advertising revenue)—which is even more probable considering the lucrative market for licensing content today.[115]

Should *Sony*'s analysis of time-shifting have applied to the world of twenty-first century content licensing? As the Supreme Court acknowledged in *Sony*, fair use is an "'equitable rule of reason' analysis to particular claims of infringement" that mandates that "each case raising [fair use] must be decided on its own facts."[116] The district court in *Fox Broadcasting* appeared to acknowledge this tension, stating that "[t]he parties ask this Court to fast-forward *Sony*[] to consider whether 'PrimeTime Anytime' and 'Auto Hop' are merely technological innovations as innocuous as the Betamax video tape

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111 *Id.* (stating that the fourth factor, effect on the market, is the "most important element of fair use" (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985))).

112 *Id.*

113 *Id.* at 1068–69 (holding that Fox had no copyright interest in the commercials, as Fox only owned the programs themselves).

114 Mason Walker & Naomi Forman-Katz, *Cable News Fact Sheet*, PEW RSCH. CTR. (July 13, 2021), https://www.pewresearch.org/journalism/fact-sheet/cable-news [https://perma.cc/8KVA-8KMT] (stating that advertising is one of two main revenue sources for television networks).

115 *See, e.g.*, Kafka, *supra* note 5 (describing Netflix's $100 million deal to secure the television show *Friends*).

116 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 & n.31 (1984) (quoting H.R. REP. NO. 94-1476, at 65–66 (1976)).

recorder ('VCR') of yore or are instruments of infringement causing [Fox] to suffer irreparable harm."[117] The Ninth Circuit similarly recognized that the market harm analysis in *Fox Broadcasting* was different than at the time of *Sony*.[118] Regardless, both courts faithfully applied *Sony* in a determinative way to find fair use.[119] In their reasoning, they suggest that they are constitutionally obligated to follow *Sony* because of vertical stare decisis.[120] However, given the limited frequency with which the Supreme Court speaks about fair use,[121] this Note questions how fact-intensive decisionmaking about technology—an area the Court itself acknowledges is subject to continuous change[122]—should be codified to form forward-looking, binding precedent.

B. Music Distribution: Radio to Peer-to-Peer Networks to Second-Hand Digital Music Stores

In many ways, cases involving technologies distributing copyrighted music offer a more restrictive view of fair use than has been the case with television. Courts have considered several arguably game-changing technologies that would have radically altered the dis-

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117 Fox Broad. Co. v. Dish Network, L.L.C., 905 F. Supp. 2d 1088, 1092 (C.D. Cal. 2012).

118 Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060, 1069 (9th Cir. 2014) ("Because Fox licenses its programs to distributors such as Hulu and Apple, the market harm analysis is somewhat different than in *Sony*, where no such secondary market existed for the copyright-holders' programs.").

119 For an analysis of the Ninth Circuit's reasoning, see *supra* notes 110–15 and accompanying text. For the district court's reasoning, see *Fox Broad. Co.*, 905 F. Supp. 2d at 1098.

120 *See Fox Broad. Co.*, 747 F.3d at 1068–69 (stating that "*Sony* . . . provides strong guidance" and applying *Sony* as governing precedent on time-shifting); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) ("Vertical *stare decisis* is absolute . . . . In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of [the Supreme Court] unless and until it is overruled by [the Supreme Court]."). Importantly, while vertical stare decisis is absolute, lower courts can always distinguish present cases from past ones. The method to distinguish a past case is often left up to the court's discretion.

121 To date, there have been six decisions about fair use by the Supreme Court. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 2 (2020) (listing four fair use opinions from the Supreme Court and one pending case, *Google*); *see also* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023). *Warhol* was taken up by the Supreme Court about a year after it decided *Google*. This development may signal a new trend in the frequency of Supreme Court fair use decisions; however, more data points are needed to establish such a trend. The most recent fair use decision before *Google* was *Campbell*, almost three decades earlier. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

122 *See Google*, 141 S. Ct. 1183, 1197 (2021) (calling for judicial restraint to narrowly rule on Google's use of Java's APIs because of the "rapidly changing technological, economic, and business-related circumstances").

tribution of music fair uses.[123] This Section presents three such decisions and situates them in the development of music distribution.

1. Infinity Broadcasting v. Kirkwood

Infinity Broadcasting v. Kirkwood addressed whether Media Dial-Up constituted a fair use of copyrighted radio broadcasts. Media Dial-Up was a technology that allowed subscribers to dial into a phone number ("listen lines") to hear radio broadcasts from different geographic areas.[124] These retransmissions were used by subscribers to, inter alia, find radio talent, verify that advertisements were being aired, and give industry professionals a feel for different radio stations.[125] The Second Circuit overturned the district court's finding of fair use and remanded the case.[126] For the first fair use factor, Judge Wilfred Feinberg of the Second Circuit wrote that although Kirkwood was using Infinity's broadcasts for a new purpose, the use was not transformative as it "merely repackage[d] or republishe[d] the original."[127] The second factor also favored Infinity as the copyrighted works were deemed creative rather than factual.[128] For the third factor, the court found that Kirkwood's "potential" to rebroadcast all of Infinity's content disfavored fair use.[129] For the fourth factor, Judge Feinberg held that the potential for Kirkwood's listen lines to interfere with Infinity's advertising slightly favored Infinity,[130] diverging from the district court's finding that there was no market harm because Kirkwood's listen lines were directed at niche audiences like talent scouts, advertising companies, and industry professionals, and not at the general public.[131]

The Second Circuit's analysis of the fourth factor contrasts with the approach taken in *Sony* and *Fox*. The *Infinity* court was more disposed to look forward in time to see market harm arising from Media Dial-Up. While conceding that the plaintiff did not operate commercial listen lines and only some of the plaintiff's stations offered such

123 *See* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 112 (2d Cir. 1998) (finding no fair use for a technology broadcasting radio over telephone lines); A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) (ruling that Napster, a peer-to-peer file sharing system was not a fair use); Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 663 (2d Cir. 2018) (finding that a technology that allows for reselling of digital music is not fair use).

124 *Infinity*, 150 F.3d at 107.

125 Infinity Broad. Corp. v. Kirkwood, 965 F. Supp. 553, 555 (S.D.N.Y. 1997).

126 *Infinity*, 150 F.3d at 112.

127 *Id.* at 108 (quoting Leval, *supra* note 10, at 1111).

128 *Id.* at 109.

129 *Id.* at 109–10.

130 *Id.* at 111.

131 Infinity Broad. Corp. v. Kirkwood, 965 F. Supp. 553, 559–61 (S.D.N.Y. 1997).

lines (for free) to certain advertisers, the *Infinity* court went further, positing that Infinity had a right to control the distribution of the content on their radio stations, even if it only minimally exploited that market at the time of the case.[132] In essence, the *Infinity* court was more than willing to cede to the copyright holder the future ability to exploit an as-yet unexploited market, adopting a much more forward-thinking approach to market definition than the *Sony* and *Fox* courts. In *Fox Broadcasting*, the court found fair use despite the signs of a market for ad-supported licenses.

A key difference between the cases is that *Sony* generated a precedent on time-shifting upon which the *Fox Broadcasting* court based its analysis.[133] Conversely, *Infinity* was less rooted in precedent and came to fruition before courts had fully considered the transformative nature of music distribution technology. Future courts appear more sympathetic to the access-enhancing possibility of distribution technologies, and the idea that such technologies should be considered fair uses.[134]

2. A&M Records, Inc. v. Napster, Inc.

The Ninth Circuit struck down another potentially utility-expanding technology, peer-to-peer file sharing, in *A&M Records, Inc. v. Napster, Inc*.[135] Leveraging the then-novel Internet, peer-to-peer file sharing enabled people to share MP3 sound files with one another, without the need to purchase or use physical music recordings, such as CDs and cassette tapes.[136] This digital revolution occurred before people were able to access legal copies of music over the Internet.[137] Unlike later online music marketplaces such as iTunes, Napster presented as an unsympathetic defendant. It allowed listeners to freely share artists' works, undercutting artists' attempts to mone-

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[132] *Id.* ("Infinity . . . has decided that its best current use of listen lines is to offer them at no additional cost to certain 'valued customers.' . . . Kirkwood is selling Infinity's copyrighted material in a market that Infinity, as the copyright owner, is exclusively entitled to exploit.").

[133] *See supra* notes 107–15 and accompanying text.

[134] For example, see Judge Leval's discussion of "utility-expanding transformative fair uses" in Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 661 (2d Cir. 2018) ("A secondary use may be transformative if it provides information about the original, 'or expands its utility.'" (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015))); *see also infra* notes 168–74 and accompanying text.

[135] A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[136] *See generally* MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 93–130 (2007) (describing the rise of Napster).

[137] *See* Zoe Kleinman, *A Brief History of Apple's iTunes*, BBC NEWS (June 4, 2019), https://www.bbc.com/news/technology-48511006 [https://perma.cc/6BR7-LEAK] (describing the ascendency of iTunes in the wake of Napster).

tize their music.[138] The harm to content creators was also well-documented in the form of lost CD sales.[139]

The court easily found no fair use. For the first factor, Judge Robert Beezer explained that Napster merely repackaged A&M Records' content for a commercial purpose, weighing against fair use.[140] The second and third factors similarly disfavored fair use: A&M Records' songs were seen as core creative works under the second factor, and Napster reproduced entire works.[141] Finally, the fourth factor weighed against Napster because it harmed A&M Records' market in "at least" two ways: (1) reducing the number of CDs sold, and (2) impeding A&M Records' ability to enter the digital music space.[142] While not explicitly mentioned, the denial of fair use was overshadowed by Napster's unethical business model that stole artists' music to use on their platform.[143]

As in *Infinity*, the *Napster* court considered the effect of the new technology, in this case Napster, on the "future digital download market," suggesting a sensitivity to the evolving market.[144] But compared with *Sony*, this future impact was more immediate, given the "considerable funds and effort" that record labels had put into designing a system for online music sales.[145] Given this, the court did not need to speculate much on potential harms that could arise in the future.

3. Capitol Records, LLC v. ReDigi Inc.

The final music distribution case is *Capitol Records, LLC v. ReDigi Inc.*[146] ReDigi was an online music store that enabled the resale of legally purchased digital music. In contrast to the obvious bad faith of Napster, ReDigi specifically tried to follow the strictures of fair use law. Using a technological process to splice a song and upload it in batches, ReDigi ensured that once a person had made the

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138 *See Napster*, 239 F.3d at 1017 (describing how Napster offered plaintiffs' works for free, hurting the copyright owner's own sales).

139 *Id.* at 1016.

140 *Id.* at 1015.

141 *Id.* at 1016.

142 *Id.* at 1016–17 (affirming the findings of the district court).

143 For a discussion of ethical views held by Napster users, see Aron M. Levin, Mary Conway Dato-on & Kenneth Rhee, *Money for Nothing and Hits for Free: The Ethics of Downloading Music from Peer-to-Peer Web Sites*, 12 J. MKTG. THEORY & PRAC. 48 (2004) (reporting study findings about the differing ethical beliefs between people who illegally downloaded music and those who did not).

144 *Napster*, 239 F.3d at 1017.

145 A&M Recs., Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 915 (N.D. Cal. 2000).

146 910 F.3d 649 (2d Cir. 2018).

decision to resell a song that they legally purchased, the song would no longer be available on their devices.[147]

After quickly dismissing the significance of the second and third factors, Judge Leval focused on the linked first and fourth factors of the fair use analysis.[148] Leval reasoned that under the first factor, ReDigi was not providing commentary or otherwise adding to the works in a transformative manner, nor did it qualify as a "utility-expanding transformative fair use[]" because it did not deliver content to consumers in a "more convenient and usable form."[149] The court's discussion of "utility" centered on a technology's ability to "achieve the transformative purpose of improving the efficiency of delivering content without unreasonably encroaching on the commercial entitlements of the rights holder."[150]

However, Judge Leval's analysis betrays a lack of understanding of technology. He suggested that instead of using a platform like ReDigi to resell legally-acquired digital music, one could place "50 or 100 (or more) songs on an inexpensive device such as a thumb drive and sell it,"[151] seemingly failing to understand how ReDigi *efficiently* created a rights-protective market for legally-acquired digital music. As people familiar with computers know, copying digital files onto a hard drive does not delete them at their source. Therefore, Leval's solution would only make the situation worse from a rights perspective because, unlike with ReDigi, the seller of digital music would retain the digital file. In terms of efficiency, Judge Leval's solution is obviously inferior as it involves acquiring physical drives, uploading digital files onto those drives, and then sending those drives. ReDigi instead used a computer program to accomplish all of those tasks with less material waste, less time, and better protection of copyright holders' economic rights.

The decision was colored by Judge Leval's understanding of the technology and how it squared with the first sale doctrine, which denies a copyright holder any control over the resale market for their work.[152] Applying a literal interpretation of reproduction, under

147 *Id.* at 653–54.

148 The court dismissed the second factor's relevance in the case, stating the factor bears little weight in fair use analysis, and said the third factor disfavors ReDigi because it replicated the entirety of the copyrighted works. *Id.* at 661–62.

149 *Id.* at 661.

150 *Id.* (quoting Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177 (2d Cir. 2018)).

151 *Id.* at 659.

152 The first sale doctrine interprets Section 109(a) of the Copyright Act. 17 U.S.C. § 109. Once a copyright holder has sold a physical copy of their work, they cannot dictate further distributions of the work. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER

which ReDigi took files and reproduced them on its server, the court denied ReDigi's first sale defense.[153] This narrow application of the first sale doctrine critically ignored ReDigi's automated system that prevented the original user from continuing to own and store the song after they had sold it.[154]

Finally, the court reiterated that the fourth factor is connected with the first factor, where Judge Leval had not found a transformative purpose for ReDigi.[155] The decision then simply concluded that a market for second-hand digital music supplanted the market for the song generally.[156] Of course, if one agrees with the arguments above about ReDigi performing the transformative purpose of efficiently creating a platform to resell digital music, then no market would be supplanted. Such a market would be different from the market for the original song.

Taken as a whole, *ReDigi* demonstrates the problem identified by Justice Fortas in *Fortnightly*.[157] When a new and novel technology confronts precedent or statutory language created in a materially different past, the balance drawn between technological innovation and rights holders may not account for the equitable dimensions of the present.

C. Contrasting Case Studies

The television and music distribution cases showcase technologies that had the potential to be utility-expanding transformative fair uses. Although the terminology of "utility-expanding transformative fair uses" emerged after they were decided, these cases present examples of technologies that transformed the market for distribution of copyrighted works. Whether it was a new method of storing and viewing

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ON COPYRIGHT § 8.12(B)(1) (2022). For example, if a person buys a painting from an artist, the artist cannot control to whom they may resell the painting.

153 *See ReDigi*, 910 F.3d at 656–60 (rejecting ReDigi's arguments that their technology does not create unauthorized reproductions of copyrighted material, but merely transfers a file from one computer to another, on the grounds that the technology involves making a copy of the original file).

154 *See generally* Nicholas Costanza, Note, *Digital Music Garage Sale: An Analysis of* Capitol Records, LLC v. ReDigi Inc. *and a Proposal for Legislative Reform in Copyright Enabling a Secondary Market for Digital Music*, 37 HASTINGS COMMC'NS & ENT. L.J. 135, 142–43 (describing how a textualist approach to the first sale doctrine hinders efforts at innovating the resale of digital music).

155 *ReDigi*, 910 F.3d at 661–62.

156 *See id.* at 662–63 (holding that because digital music files do not deteriorate the way physical items do, the secondary market is identical to the initial market except that the products are cheaper).

157 *See supra* notes 82–83 and accompanying text (arguing that rapidly changing technology presents a challenge to the system of stare decisis).

video content,[158] a state-of-the-art ad-skipping technology,[159] phone lines to hear radio,[160] peer-to-peer file sharing systems,[161] or a store for previously owned digital music,[162] these technologies all served as harbingers of a shifting market for copyrighted works that existing doctrine was ill-equipped to address.

Taken together, these cases uncover the issue with generating and applying legally binding precedent at different times. In *Fox Broadcasting*, with Dish Network's ad-skipping technology, the court was compelled to follow the Supreme Court precedent on time-shifting from *Sony*, even though the equitable balance between rights and access had shifted in the intervening thirty years.[163] In *Infinity*, with radio listen lines, the court took the opposite approach. The *Infinity* court imagined potential markets in the distant future, greatly (and perhaps improperly) benefiting copyright holders.[164] The *Napster* court was similarly sympathetic to potential future markets and found no fair use, even though Napster presented a revolutionary way to distribute music in an era before iTunes existed.[165] Finally, *ReDigi* demonstrated how overly strict applications of doctrine and misunderstandings about technology foreclosed the possibility of a market to resell legally acquired digital music.[166] Whether the issue was failing to predict the future, overestimating a copyright holder's potential market, letting bad facts make bad law, or succumbing to formalistic rulings informed by misunderstandings of technology, these problems could be lessened if judges better appreciated the impact of shifting technological trends within a system of stare decisis.

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158 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (considering Betamax recording devices); *supra* Section II.A.1.

159 *See* Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060 (9th Cir. 2014) (considering on-demand and ad-skipping technology); *supra* Section II.A.2.

160 *See* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998) (considering "listen lines" that enabled radio broadcasts to be heard outside normal geographic constraints); *supra* Section II.B.1.

161 *See* A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (considering an internet-based program that enabled peer-to-peer sharing of digital music files); *supra* Section II.B.2.

162 *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018) (considering a program that created a secondary market for digital music files); *supra* Section II.B.3.

163 *See supra* notes 114–22 and accompanying text.

164 *See supra* notes 132–34 and accompanying text.

165 *See supra* notes 144–46 and accompanying text. It should also be noted that the court was influenced by the bad-faith aspect of Napster's technology that did not pay recording artists. *See supra* note 143 and accompanying text.

166 *See supra* notes 149–57 and accompanying text.

III
Striking a Balance

With a grounding in the purposes of copyright law, the values underlying stare decisis, and cases involving television and music distribution, this Note proposes a new approach for how judges should frame their fair use decisions involving potentially utility-expanding transformative fair uses. As seen in the television and music case studies, while fair use is a fact-specific determination,[167] judges can be controlled by past precedent, which emerged when the state of technology and media markets were different from the present case. This dynamic upsets the careful balance between the rights of copyright owners and the advancement of novel distribution technologies. This Note proposes that courts narrow the effect of stare decisis by both contextualizing and reducing the application of past precedent while also generating future precedent that is expressly limited to the technology before the court.

A. "Utility-Expanding Transformative Fair Uses"

This Note has considered a subset of fair use decisionmaking related to technology: "utility-expanding transformative fair uses."[168] In *ReDigi*, Judge Leval described this emerging category of fair uses to classify a group of technologies that radically change the access and the use of copyrighted works.[169] For example, in addition to *Sony*, this category includes databases that allow for searching across multiple copyrighted works in new ways,[170] the use of copyrighted images in image search engines,[171] the inclusion of copyrighted essays in a program that detects plagiarism,[172] and the bounds of academic institu-

167 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984).

168 *See generally* Victor, *supra* note 46, at 1901–12 (summarizing case law surrounding "utility-expanding fair use").

169 *See* Capitol Recs., LLC v. ReDigi, Inc., 910 F.3d 649, 661 (2d Cir. 2018).

170 *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (finding Google Books to be a fair use); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (finding fair use for HathiTrust's digitization of works to allow for full-text searching and to provide print-disabled users with versions of the works); Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018) (finding no fair use for a platform to search through copyrighted television shows and view ten-minute segments).

171 *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (finding fair use for Google's use of thumbnail images within its image search engine); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (finding fair use for the use of thumbnail images within a search engine).

172 *See, e.g.*, A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009) (finding fair use for a program that copied student submissions into a database that detects plagiarism).

tions' uses of copyrighted books and articles.[173] Such uses center technology between the dueling goals of copyright law to protect content creator rights and to ensure access by the public to copyrighted works. As Judge Dennis Jacobs explains, "a secondary use may be a fair use if it utilizes technology to achieve the transformative purpose of improving the efficiency of delivering content without unreasonably encroaching on the commercial entitlements of the rights holder."[174]

However, how much efficiency is enough to justify a fair use? What is an "unreasonable" encroachment on rights? These are difficult, value-laden questions. Moreover, as seen above, they critically depend on the state of technology surrounding the allegedly infringing use.

For example, imagine if Napster existed in a world before iTunes *and* had paid artists for their songs. A court might be more inclined to find fair use because Napster would have transformed the access to and consumption of music forever, in a way that respected rights holders. Conversely, had Napster existed in a world *after* iTunes had been created and still paid artists an unnegotiated fee, a court might be less inclined to grant a fair use. Napster would not radically alter people's access to music and would interfere with revenues for artist-sponsored sales. This example suggests that at their core, "utility-expanding transformative fair uses" depend on an understanding of the technology and market in which the use operates—a factual inquiry limited by the realities at a fixed point in time.

B. Recommendations for Following and Generating Precedent

Within this changing landscape, judges follow and create precedent about the permissibility of utility-expanding transformative fair uses. Applying precedent involves judges looking backwards to apply previous case law while also looking forwards to acknowledge that

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[173] *See, e.g.*, Cambridge Univ. Press v. Becker, 446 F. Supp. 3d 1145 (N.D. Ga. 2020) (finding fair use for a university's distribution of some copyrighted works but not all); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (not finding fair use for a copy shop that photocopied articles for college course packs); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994) (not finding fair use for the photocopying of copyrighted journal articles for oil research); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (not finding fair use for the duplication of copyrighted materials into college course packs).

[174] *TVEyes*, 883 F.3d at 177. The father of "transformative use" doctrine, Judge Leval cites Judge Jacobs for this restatement of the law in *Capitol Recs., LLC v. ReDigi, Inc.*, 910 F.3d 649, 661 (2d Cir. 2018). *See also* Leval, *supra* note 10, at 1111 ("[T]he answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*."); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (incorporating Judge Leval's views of "transformative" use into the fair use doctrine).

their decisions will impact future cases.[175] In both applying past precedent to and generating new precedent about potentially utility-expanding transformative fair uses, stare decisis should carry less weight than it currently does.[176]

More specifically, when courts are following past precedent, they should take three steps to guide their analysis of fair use. First, a judge should contextualize the precedent's findings on transformativeness under the first factor and market effect under the fourth factor within the precedent's time. With transformativeness, courts should analyze the state of technology at the time of the past decision and how the past court's precedent fits into the existing landscape. The Napster hypothetical above demonstrates this point.[177] The court should similarly evaluate market effect at the time of the decision's issuance. For example, a court applying *Sony*'s precedent should contextualize the court's analysis of the market, noting the dominance of broadcast distribution at that time, decades before streaming emerged. Barring unusual circumstances, the analysis of the second factor (nature of the copyrighted work) and third factor (amount of the work used) should not need greater context beyond the decision itself as these factors are less subject to changing conditions.[178]

Second, the court should undertake a similar, but de novo analysis of the current case without referencing the precedential case. The judge should contextualize the arguments for the first factor and fourth factor within the current state of technology and the market, respectively. The court should do so without reference to the previous

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[175] *See generally* Schauer, *supra* note 63.

[176] Copyright law is not the only place that courts have needed to account for changing technology within a system of stare decisis. For example, criminal procedure law has struggled to keep pace with surveillance technology. *See, e.g.*, United States v. Jones, 565 U.S. 400 (2012) (considering whether the government's use of GPS to track a defendant was a "search" under the Fourth Amendment). *See generally* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004) (arguing that courts should allow legislatures to take the lead in assessing new technologies under the Fourth Amendment). While some have argued for a broadening of fair use decisions, shifting technological changes would render such broader reasoning difficult, if not impossible, to apply. Moreover, there would still be concerns that today's precedent would not account for tomorrow's realities. *See* Jonathan Alexander Fisher, *"Fair" in the Future? Long-Term Limitations of the Supreme Court's Use of Incrementalism in Fair Use Jurisprudence*, 32 FORD. INTELL. PROP., MEDIA & ENT. L.J. 808, 852 (2022) ("[C]ourts seem to look toward precedential *analyses*, and not specific *holdings*, to interpret the fair use factors. In that sense, fair use is inherently incremental . . . .").

[177] *See supra* Section III.A.

[178] These factors can occasionally still play an important role, such as in the Supreme Court's most recent fair use case, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021), which showed more consideration of the flexible nature of the second factor. *Id.* at 1202.

case and rely on evidence provided in the current case.[179] The judge should analyze the second and third factors—the nature of the copyrighted work and the amount taken from the copyrighted work—as courts have done in the past, because these factors are not radically affected by the new, disruptive technology.

Finally, only after having undertaken this independent analysis, courts should consider how past precedent relates to the current case. As fair use is an "'equitable rule of reason' analysis to *particular* claims of infringement,"[180] courts should be especially sensitive to how technological, social, and economic changes that have occurred in between the precedent and the current case affect the outcome of the transformativeness and market effect factors. If there is greater variance between facts and equities underlying the past case and the current case, courts should be less inclined to follow past precedent.

While fair use demands a careful consideration of the specific facts of a case,[181] courts continue to cite past precedent, generated in a materially different past, to decide current cases. *Fox* demonstrates this point.[182] When analyzing the fourth factor, the *Fox* court mentioned the radically different market of streaming services available in 2014 compared to those in the world of Betamax tapes.[183] However, this consideration did not sway the court. Under the analysis this Note proposes, the court would appropriately discount the weight of *Sony*'s holding on time-shifting because of its divergence from the circumstances of the twenty-first century. Such an analysis would not operate with mathematical precision but would track the less-exacting nature of qualitatively balancing the fair use factors.[184]

But the *Fox* court had little room to maneuver, as it was obligated to follow the Supreme Court's precedent in *Sony*.[185] This facet is important, as courts must acknowledge their role in generating precedent that future courts will have to follow. When the Supreme Court is deciding a fair use case regarding technology, they should limit their holding to the dispute at issue and narrow their holding to the technology and time in question. For example, in *Sony*, the Court would rule that tape-based recording devices were fair uses, instead of

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179 *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

180 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (emphasis added).

181 *See supra* note 51 and accompanying text.

182 *See supra* notes 102–22 and accompanying text.

183 Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060, 1069 (9th Cir. 2014) (referencing secondary markets for copyrightholders' programs).

184 *See, e.g.*, *Campbell*, 510 U.S. at 577 (citing Stewart v. Abend, 495 U.S. 207, 236 (1990)) (urging courts to avoid rigid applications of the fair use factors).

185 *See supra* note 120 and accompanying text.

creating doctrine around "time-shifting." By limiting a holding to a particular technology, courts will likely ensure that their holding will have a fixed period of influence on future decisions. Because technology changes so quickly, the technology's relevance should track a relatively short amount of time.

Although not relating to utility-expanding fair uses, the recent Supreme Court decision in *Google v. Oracle* appears to embrace this approach to creating new precedent, stating the Court "believe[s] [it] should not answer more than is necessary to resolve the parties' dispute."[186] The Court held that Google's use of Sun Java's API, user interface components that help coders build programs, in its mobile phone operating system Android was a fair use and did not violate Java's copyright.[187] In doing so, the Court cited the rapid pace of "technological, economic, and business-related" change.[188] This fact, coupled with the rarity with which the Supreme Court hears fair use cases,[189] counsels that the Supreme Court was right to limit their holding. Instead of wading into a larger discussion of the copyrightability of software more generally, they focused their decisions on APIs and instructed lower courts to read their opinion narrowly.[190] By doing so, they help avoid the situation in *Fox*, which applied *Sony* despite the changed media landscape.[191]

A legislative solution would not ameliorate the issues with stagnant precedent identified in Part II. Realistically, the situation likely would become worse. Because of the relative infrequency with which Congress passes laws about copyright,[192] laws trying to ascertain the

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[186] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021). Such a statement is not a novel revelation in Supreme Court decisionmaking. The *Google* Court cites to *Aiken*, decided even before *Sony*, for the proposition that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose." *Id.* (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)). However, the application of such a principle in practice is much less clear.

[187] *Id.* at 1201–09.

[188] *Id.* at 1197.

[189] *See* Beebe, *supra* note 121, at 2 (describing how there have only been five fair use decisions by the Supreme Court). A sixth fair use case was decided on May 18, 2023. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023).

[190] *Google*, 141 S. Ct. at 1197 ("[W]e should not answer more than is necessary to resolve the parties' dispute."). A recent Second Circuit opinion appears to take *Google*'s message to heart. *Andy Warhol*, 11 F.4th at 51 ("[T]he Supreme Court in *Google* took pains to emphasize that the unusual context of that case, which involved copyrights in computer code, may well make its conclusions less applicable to contexts such as ours."), *cert. granted*, 142 S. Ct. 1412 (2022).

[191] To reiterate, this Note does not center *Google* in its analysis because *Google* is a case about declaring code APIs and not about a utility-expanding transformative fair use. *See supra* note 15.

[192] The last updates to the still-governing Copyright Act of 1976 were the Music Modernization Act in 2018 and the Digital Millennium Copyright Act in 1998. Orrin G.

balance between rights holders and the public would have a hard time keeping up with shifting technologies that continually change the calculus.

C. *Stare Decisis and Lower Courts' Decisionmaking*

Given that the Supreme Court rules so little on fair use, Courts of Appeals decisions are also critically important to fair use doctrine. One might think that circuit courts are able to promulgate comparatively broader holdings about fair use because circuit courts generate many more opinions than the Supreme Court[193] and would therefore have more opportunities to revise outdated decisions.

However, procedural mechanics around the "law of the circuit" and *en banc* proceedings reveal that circuit courts, like the Supreme Court, often generate binding precedent that may be infrequently revised. With the possible exception of the Seventh Circuit, the circuit courts have adopted a version of the "law of the circuit," under which earlier three-judge panels' decisions bind later panel and district court decisions within that circuit.[194] Panel decisions can theoretically only be overruled when a circuit sits *en banc*, allowing all active judges in the circuit to hear a case.[195] *En banc* proceedings are rare occurrences.[196] Taken together, circuit courts generate a lot of precedent that is rarely revisited. Therefore, as with the Supreme Court, they should be similarly careful to avoid broader fair use holdings, along the lines of *Sony*, lest their future decisions become rooted in antiquated assumptions.

By contrast, district courts operate with a more relaxed standard of horizontal stare decisis, or the giving of persuasive, non-binding, weight to other district court opinions within and outside of their circuit.[197] In practice, district courts vary in how much they afford weight to prior district court decisions.[198] Correspondingly, any recommendation about the scope of a district court's holding would inversely relate

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Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

193 *See* Beebe, *supra* note 121, at 7–8 (explaining that the author cataloged 139 circuit court opinions on fair use from 1978 to 2019).

194 *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–800 (2012) (outlining the history and current function of law-of-the-circuit rules).

195 *See id.* at 798. In practice, Mead notes that there is some flexibility in later three-judge panels overturning past rulings. *Id.* at 797–800. Also, if the precedent upon which a previous panel relies is overruled by the Supreme Court, then the new panel does not need to follow the past panel's decision. *See, e.g.*, *id.* at 800 n.97.

196 *See id.* at 818.

197 *See id.* at 800–02.

198 *See id.* at 801–04.

to the strength with which it binds other, future district court opinions. However, while there are certainly many more district court opinions on fair use than appellate ones,[199] a district court judge at the time will not know how much deference their opinion will garner. Other judges may take it up, or they may not. The district court judge should therefore also limit the scope of their holding to the technology at issue when generating new precedent.

D. Additional Considerations for the Market Factor

While courts should account for technology's changing purpose, they should also consider potential transformative uses for technologies that address market failures. *ReDigi* demonstrates this point.[200] One would not expect record labels to create a platform to resell digital music when labels can instead dictate that everyone must buy a "new" copy. To remedy this gap, ReDigi created a platform that allowed the resale of verified, legally purchased music and prohibited the unauthorized copying of the music from the seller. In doing so, they addressed the market failure for a second-hand digital music store while also protecting the copyright holder's rights.[201] Finding market failure should sway courts in favor of finding fair uses, recognizing that market failure is a fact-specific determination rooted in a particular point in time.

Additionally, courts need to consider how far into the future to project the market effect under the fourth factor. In the case studies, there were varying approaches to this inquiry. In *Sony*, the Court took an approach to root the analysis at the time of the case, relying on surveys and then-current facts.[202] Conversely, in *Infinity* and *Napster*, courts were more disposed to look further into the future to understand the effect of the distribution technologies on future markets for value.[203] As scholars have identified, isolating the market under the fourth factor creates a circularity problem: A court must evaluate the ability of the copyright holder to exploit the work via any legal means and also the *legality* of the use of the defendant.[204] Naturally, the par-

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[199] *See* Beebe, *supra* note 121, at 7 (explaining that the author cataloged 433 district court opinions on fair use from 1978 to 2019, compared to 139 circuit court opinions).

[200] *See supra* notes 155–57 and accompanying text.

[201] This Note characterizes this case as one of "intermediate" market failure within Wendy Gordon's market failure framework. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1618 (1982).

[202] *See supra* Section II.A.1.

[203] *See supra* Sections II.B.1–2.

[204] *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 896 (2007) ("[W]e cannot know the market effect until we first decide

ties will vigorously disagree about how much consideration a court should give to "likely to be developed" markets and how likely those markets need to be.[205] The rights holder will want to extend the potential markets further into the future, while the defendant will want to consider only the actual and prospective markets already in existence.

In the cases addressed above, this determination can be quite consequential. However, if courts were to follow the recommendations about narrowing their holdings to a particular technology and, when applying precedent, more rigorously contextualize past decisions, this determination need not carry as much weight. With narrower holdings and more thoughtful application of precedent, decisions made under past scenarios will hold less sway over future disputes. More concretely, *Sony*'s decades-old holding about time-shifting would not have been rigidly applied in *Fox*. Instead, the *Sony* Court would have offered a narrow holding about Betamax (and similar tape-based technology) that would have been scrutinized by the *Fox* court in the context of streaming, and likely rejected due to new market realities.

Together, these recommendations about applying past precedent and generating new precedent should appropriately narrow the scope of stare decisis for fair use decisionmaking involving utility-expanding transformative fair uses. This change is desirable because technology and markets quickly change.

E. The Future of Stare Decisis

One could argue that this more limited role for stare decisis may undercut the values that stare decisis upholds. When analyzing the frequently cited reasoning for stare decisis, this Note considered the value of precedent globally within our legal system.[206] Facts about technological change complicate these more general rationales. As was seen with technology and fair use, facts underlying courts' analyses are in constant states of flux. The *Sony* court could not have predicted that in fifty years, storage technology would have improved by a factor of fifty million.[207] However, the factual assumptions upon which they relied created precedent that have arguably bound future

whether there is a market to be affected—yet market effect is supposed to help us make that decision.").

[205] *See, e.g.*, Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930 (2d Cir. 1994) (involving defendant Texaco arguing that there was no viable market for photocopying royalties of American Geophysical Union's works).

[206] *See supra* notes 63–70.

[207] *See* Walter, *supra* note 99.

courts for decades. From the outset, technology seems a poor fit for a system of decisionmaking that relies centrally on past assumptions. This insight imperils stare decisis's purported benefits relating to predictability, decisionmaking efficiency, and equity.

Stare decisis is not absolute because cases can be overruled, and, more subtly, a future judge can always distinguish a current case from a past one.[208] In the recent abortion decision in *Dobbs*, which overturned two previous Supreme Court precedents, Justice Alito's statements about precedent in his majority opinion demonstrate the lack of predictability in a system of stare decisis.[209] At its core, Alito's method to overrule precedent assesses the "strength of the grounds" on which the precedential case was based and asks if the precedential case was "egregiously wrong from the start."[210] If yes, then precedent does not control the current case.[211] It is unclear how much Alito's statements apply outside of the abortion context. He stated that stare decisis works differently in the abortion context[212] and is the weakest for constitutional interpretations.[213]

Nonetheless, Alito notably claimed that changed factual predicates are not needed to justify overturning past precedent.[214] Such an approach diverges from the often-cited *Planned Parenthood v. Casey*, which, among other factors, centered changes in factual conditions to consider whether precedent should be overruled, asking "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[215] While Alito wrote that factual changes are not *necessary* to overturn past

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[208] *See supra* notes 68–69; *see also* F. E. Guerra-Pujol, *Bitcoin, the Commerce Clause, and* Bayesian Stare Decisis, 22 CHAP. L. REV. 143, 154–55 (2019) (outlining the ease of distinguishing from past cases).

[209] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261–65 (2022).

[210] *Id.* at 2243–44.

[211] *See id.* at 2242–44. More formally, Alito cited five factors for courts to consider when deciding to overturn precedent: "the nature of [the precedential court's] error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." *Id.* at 2265.

[212] *Id.* at 2281 ("[T]he factors that our doctrine instructs us to consider . . . are different for [other] cases than for our abortion jurisprudence.").

[213] *Id.* at 2262.

[214] *Id.* at 2279–80.

[215] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–69 (1992). While *Casey* advises this approach, the case studies paint a picture of courts largely applying past precedent in spite of changed factual conditions. Moreover, *Casey* is focused on the Supreme Court's approach to precedent. The Supreme Court has heard five cases on fair use over the course of the roughly four decades since the modern Copyright Act took effect. Beebe, *supra* note 121, at 2. Therefore, while the Supreme Court may have the freedom to change its precedent in approximately eight-year increments, lower courts and parties will be bound by aging precedent.

decisions, he did not make clear if changed factual circumstances make it more likely that a decision should be overturned. He seems to suggest that changed factual circumstances justify reconsidering past precedent because he dedicated several pages of the opinion to the post-*Roe* and *Casey* factual changes.[216] The strength of this relationship remains unclear. Therefore, in the context of technology, precedent *may* theoretically be given less weight because technology is in a content state of flux.

Even if changed factual circumstances are not strictly needed to overrule past precedent, in the case of technology, they make application of past precedent more difficult, leading to what Justice Fortas characterized as "trying to repair a television set with a mallet."[217] As discussed in the television and music case studies, whether a new, state-of-the-art technology is similar to a past technology in a previous case may not be straightforward. This slippage not only reduces predictability for those trying to follow the law, but also increases the difficulty of judicial decisionmaking. Moreover, relating to equity, it becomes more challenging to say that similar cases have been treated alike. Significant changes in facts will strain what it means to be "alike," making comparisons less feasible and potentially leading to inequitable outcomes.

This Note looks to the future, advocating for courts to generate precedent that better accounts for the balance between rights holders and technologies, while simultaneously considering how technology changes over time. Fundamentally, fair use is an equitable and fact-specific defense.[218] In the context of changing technology and markets, broad fair use precedent is a particularly poor fit for a system that is biased to the past.

Conclusion

Is a fair use forever fair? In the context of "utility-expanding transformative fair uses," the answer is likely no. Because of how quickly technology and markets for copyrighted works change, what is a fair use today may not be fair tomorrow. However, under a system of stare decisis, courts today are bound by the decisions of courts yesterday. To escape this conundrum, this Note has proposed that courts should apply past precedent to evaluate possible utility-expanding technology only after considering the precedential opinion's first and

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216 *Dobbs*, 142 S. Ct. at 2258–59, 2273–76, 2280.

217 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 403 (1968) (Fortas, J., dissenting).

218 *See supra* note 116 and accompanying text.

fourth factor analyses within the context of the precedent's own time. Courts can evaluate how similarly the facts and equities of the current case correspond to those of the precedential case. The more the circumstances diverge, the less weight courts should give past precedent. When generating precedent, courts should narrow their holdings to a specific technology. By doing so, they avoid solidifying an equitable judgment that may not represent the appropriate balance between rights holders and technology in the future.