FAIR USE HARBORS

Gideon Parchomovsky and Kevin A. Goldman***

ABSTRACT

The doctrine of fair use was originally intended to facilitate those socially optimal uses of copyrighted material that would otherwise constitute infringement. Yet the application of the law has become so unpredictable that would-be fair-users can rarely rely on the doctrine with any significant level of confidence. Moreover, the doctrine provides no defense for those seeking to make fair uses of material protected by anti-circumvention measures. As a result, artists working in media both new and old are unable to derive from copyrighted works the full value to which the public is entitled. In this Essay, we propose a solution to the uncertainty and unpredictability that plague the doctrine: nonexclusive safe harbors that define minimum levels of copying as per se fair uses. These bright-line rules would provide the clarity needed to facilitate countless productive uses that are currently being chilled. Furthermore, by providing an ex ante test for identifying uses as fair, these safe harbors provide a framework for salvaging fair use in the digital age.

ABSTRACT 101
INTRODUCTION 102
I. FAIR USE, UNCERTAINTY, AND OVERDETERRENCE 109
A. Copyright's Balance 109
B. Fair Use As a Balancing Tool 112
C. Uncertainty and Its Cost 114

* Professor, University of Pennsylvania Law School; Visiting Professor, Bar Ilan University, Faculty of Law.

** J.D. 2006, University of Pennsylvania Law School; A.B. 1999, Dartmouth College. This Essay greatly benefited from comments and criticisms by Cam Barker, Abraham Bell, Niva Elkin-Koren, Sasha Goldman, Wendy Gordon, Assaf Jacov, Barak Orbach, Peter Siegelman, Ajay Singh, Dylan Steinberg, Polk Wagner, Ted Weiman, and the participants at the International Intellectual Property Dispute Resolution Symposium at Waseda University, Tokyo and the "Exploring the Boundaries of Intellectual Property Law" Conference at the Radzyner School of Law, Interdisciplinary Center, Herzeliya. We would also like to thank the editors of the *Virginia Law Review* for their insightful advice and careful editing.

II. SAFE HARBORS OF FAIR USE 119
A. Introducing Rules into Copyright Law 119
B. Previous Attempts to Create Rules for Fair Use 120
1. Libraries—From a "Gentlemen's Agreement" to Section 108 121
2. The "Classroom Guidelines" 122
3. The Family Movie Act 125
4. Summary 126
C. Creating the Rules 127
1. Literary Works 128
2. Sound Recordings and Musical Compositions 129
3. Audiovisual Works (I) 130
4. Audiovisual Works (II) 132
D. Implications 134
E. Salvaging Fair Use in the Digital Age 137
III. ADDRESSING POTENTIAL OBJECTIONS 140
A. Safe Harbors May Become a Ceiling, Rather Than a Floor 140
B. De Minimis 143
C. Strategic Abuse 144
D. The Optimal Level of Fair Use 146
CONCLUSION 147

INTRODUCTION

Fair use is at once the most important and the most "troublesome"[1] doctrine in copyright law. By legitimizing certain unauthorized uses of copyrighted works, fair use aims to secure a delicate balance between the rights of content owners and the interests of the public. In its current form, the doctrine falls short of achieving this goal. To see why, it is necessary to understand the role and design of copyright law.

Copyright law purports to perform two potentially conflicting functions. First, copyright promotes the production of new works by recognizing and protecting property rights in original expressive works. Specifically, the Copyright Act grants to content owners the exclusive right to reproduce, adapt, distribute, publicly perform, and publicly display

[1] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1929) (dubbing fair use the "most troublesome [doctrine] in the whole law of copyright").

copyrighted works.[2] The rights of owners are formulated in clear terms and have been construed broadly by the courts.[3]

Yet the rights of owners are not absolute. The copyright scheme limits these rights in order to promote its second aim: ensuring the optimal use of works after they have been created. Thus, the law recognizes a privilege in the public to utilize copyrighted works by incorporating a general fair use defense.[4] In theory, fair use should be a significant limitation on the rights of authors. It sanctions private takings of intellectual property without requiring the payment of compensation. In reality, however, it is more bark than bite: fair use's ability to shield unauthorized users is greatly undermined by the uncertainty that has become the hallmark of the doctrine.

Since its inception over two and half centuries ago, neither the courts nor the legislature have provided a useful definition of fair use, nor have they devised a meaningful method for determining which uses are fair.[5] Instead, the Copyright Act lists essentially four different tests for judges to apply in making fair use determinations. It requires courts to consider the purpose of the unauthorized use, the nature of the protected work, the amount and substantiality of the material taken from the work, and the effect of the unauthorized use on the market for the protected work. The Act does not indicate how to rank the tests in cases of conflict, presumably leaving this task to the courts. Unfortunately, the Supreme Court has consciously avoided devising an internal hierarchy among the factors, insisting that fair use remain "an equitable rule of reason"[6] whose application depends on the specific facts of each individual case.[7]

All this might not be of such concern if judges shared a common understanding of fair use. However, as Judge Pierre Leval has openly ad-

[2] 17 U.S.C. § 106(1)–(5) (2000). The section also recognizes the right of copyright owners in sound recordings to digitally perform the work. 17 U.S.C. § 106(6).

[3] For discussion, see infra Part I.

[4] 17 U.S.C. § 107.

[5] See generally Pierre N. Leval, Toward A Fair Use Standard, 103 Harv. L. Rev. 1105, 1105–06 (1990) (noting that the legislature provided courts with scant guidance as to how to decide fair use cases and that "judges generally have neither complained of the absence of guidance, nor made substantial efforts to fill the void").

[6] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 448 & n.31 (1984) (referring to fair use as an "equitable rule of reason").

[7] Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 552 (1985) ("[F]air use analysis must always be tailored to the individual case.").

mitted, they do not.[8] Indeed, the case law is characterized by widely divergent interpretations of fair use, divided courts, and frequent reversals. This state of affairs has prompted a leading commentator to conclude that the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases are futile.[9]

The Supreme Court's decision to favor ex post fairness over ex ante certainty comes at a steep cost for potential users of copyrighted works. As the law and economics literature has pointed out, ambiguous standards, such as fair use, invariably lead to overdeterrence, which, in turn, will cause potential defendants to overinvest in precautions.[10] The intuition behind this result is straightforward: the more a defendant has invested in precautions, the less likely a court will be to find her liable. Accordingly, the ambiguity of the fair use doctrine works as a one-way ratchet that will in many cases lead to the underuse of copyrighted works.

The overdeterrence problem is compounded by the nature of copyrighted works and the wide arsenal of remedies the law provides to copyright owners. Copyrighted works are information goods, and, as such, they invariably create spillovers (or positive externalities).[11] Consequently, a user who incorporates protected expression into her work without permission from the copyright owners can never capture the full social benefit of the use but still stands to bear the full social cost. Moreover, plaintiffs in copyright cases can readily obtain injunctions

[8] Leval, supra note 5, at 1106 (stating that "[j]udges do not share a consensus on the meaning of fair use").

[9] Lloyd L. Weinreb, Fair's Fair, A Comment on the Fair Use Doctrine, 103 Harv. L. Rev. 1137, 1138 (1990) (expressing doubt that "the results in concrete cases can be made predictably responsive to a limited set of definite principles—certainly not large, general principles and not very often even more specific, intermediate ones").

[10] See, e.g., John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 Va. L. Rev. 965, 995 (1984) (noting that when the "probability [of liability] declines as defendants take more care, then defendants may tend to overcomply"); Richard Craswell & John E. Calfee, Deterrence and Uncertain Legal Standards, 2 J.L. Econ. & Org. 279, 280 (1986) (similar); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 873 (1998) (observing that "if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken . . . and risky but socially beneficial activities may be undesirably curtailed").

[11] On spillovers and whether the law should do something about them, see Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 Colum. L. Rev. 257 (2007) (arguing why the law should not strive to internalize informational spillovers and other positive externalities).

and monetary awards in excess of their harm. The Copyright Act entitles successful plaintiffs to the defendant's profits[12] and to statutory damages of up to $150,000 per work willfully infringed.[13] This means that while the benefit a typical user could derive from a small unauthorized borrowing is rather modest, the potential liability is quite substantial.[14]

Users of copyrighted expression can respond to the uncertainty of the fair use doctrine by adopting two types of precautions. When transaction costs are sufficiently low,[15] they may attempt to secure a license from the copyright owner.[16] When transaction costs are high or in the presence of strategic holdouts,[17] users will copy less protected expression than they are legally entitled to, or refrain from using copyrighted expression altogether. While both responses are socially wasteful,[18] the second is particularly troubling as it means that certain socially valuable projects may not be carried out.

The highly acclaimed *Eyes on the Prize* documentary series, which chronicles the American civil rights movement, is a prime example.[19] For over a decade, the series could not be broadcast or sold because the permission to use archival footage—depicting protest marches, bus boy-

[12] 17 U.S.C. § 504(a)(1) (2000) (stating that a copyright infringer is liable for any of "the copyright owner's actual damages and any additional profits of the infringer").

[13] 17 U.S.C. § 504(c)(2).

[14] And for companies whose business plans depend on fair use, the results can be disastrous. See, e.g., UMG Recordings v. MP3.Com, No. 00-CIV-472(JSR), 2000 WL 1262568, at *6 (S.D.N.Y. Sept. 6, 2000) (finding MP3.com liable for approximately $118 million in statutory damages); see also J. Cam Barker, Note, Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement, 83 Tex. L. Rev. 525, 545–49 (2004) (discussing the punitive nature of statutory damages for copyright infringement).

[15] On the connection between fair use and transaction costs, see Wendy Gordon's classic, Fair Use as Market Failure, 82 Colum. L. Rev. 1600, 1608, 1614–15 (1982) (listing high transaction costs as a prerequisite to a fair use finding).

[16] For excellent discussion, see James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 887–95 (2007); Mark A. Lemley, Property, Intellectual Property and Free Riding, 83 Tex. L. Rev. 1031, 1041 (2005).

[17] See Oren Bar-Gill & Gideon Parchomovsky, The Value of Giving Away Secrets, 89 Va. L. Rev. 1857, 1858 (2003) (discussing the effect of strategic holdups on bargaining between rightsholders and potential improvers in patent law). The discussion applies with equal force to negotiations over copyrights.

[18] Any overinvestment in precautions is socially wasteful. See generally Guido Calabresi, The Costs of Accidents (1970).

[19] Eyes on the Prize: America's Civil Rights Years, 1954–1965 (Blackside, Inc. & PBS Video 1986); Eyes on the Prize II: America at the Racial Crossroads, 1965–1985 (Blackside, Inc. & PBS Video 1990).

cotts, and confrontations with Southern police—had expired, and the cost of renewing the licenses was prohibitively expensive.[20]

Yet even in cases where users elect to rely on fair use and proceed without permission from rightsholders, the practical pressures of litigation often threaten to derail these efforts before fair use rights can be vindicated in court. For example, Google recently launched Google Book Search, which seeks to create a searchable database containing the full text of every book in several major libraries (including those still under copyright protection). Several groups have brought legal challenges against Google, alleging that the project violates copyright law. Notwithstanding the fact that the leading precedent supports the position that Google's use is fair,[21] as well as the massive academic rallying behind the company, it seems likely that Google will settle rather than take the cases to trial.[22]

In this Essay, we explore the possibility of reforming fair use through the recognition of certain types of copying as per se fair. Uses that fall within these bounds would not give rise to liability for copyright infringement, so actors who engage in them would be categorically immune from suit. Carefully tailored, safe harbors would provide much needed certainty to users and potential creators without unduly compromising the rights of current copyright owners. Thus, the introduction of a bright-line rule component into the doctrine of fair use has the potential to significantly enhance social welfare.[23]

---

[20] See Guy Dixon, How Copyright Could Be Killing Culture, Globe & Mail, Jan. 17, 2005, at R1 (noting that the footage of protest marches and police confrontations remain under copyright); Lisa Helem, Civil Rights: A Televised Movement?, Newsweek, Feb. 14, 2005, at 8 (noting that the footage of the Montgomery bus boycotts remains under copyright); see also Colleen Long, Documentary Raises Copyright Issues, Cin. Post, Feb. 5, 2005, at A13 (noting that copyright clearance issues also prohibited the use of "[a] touching and intimate scene in the film [that] shows staff members singing 'Happy Birthday' to Martin Luther King Jr. on his 39th, and last, birthday"). It now appears that, due to charitable contributions of approximately $850,000, PBS has been able to reacquire a license to broadcast the series. See Press Release, PBS News, *Eyes on the Prize*, Produced by Blackside, Returns to PBS on *American Experience* (Jan. 14, 2006), available at http://www.pbs.org/aboutpbs/news/20060114_eyesontheprize.html.

[21] See Kelly v. Arriba Soft Corp., 336 F.3d 811, 817–22 (9th Cir. 2003) (holding that the reproduction of copyrighted works for use as thumbnails in a search engine is a fair use under the Copyright Act).

[22] See Jeffrey Toobin, Google's Moon Shot, New Yorker, Feb. 5, 2007, at 34.

[23] While fair use safe harbors found their way into the laws of Australia, Canada, and the United Kingdom, they have never been a part of the law of the United States. Moreover, they have received only scant attention from a handful of legal scholars who have summarily re-

Since copyright law is a balancing act, we recommend that policymakers err on the side of safety and adopt a minimalist approach to crafting these new harbors. This can be achieved by setting fairly restrictive limits that are tailored to each particular type of subject matter. To illustrate, permissible reproduction may include: for literary works, three hundred words or fewer (and in no case more than fifteen percent of the copyrighted work); for sound recordings, ten seconds or less (and in no case more than ten percent of the copyrighted work); and for films and audiovisual works, thirty seconds or less (and in no case more than ten percent of the copyrighted work).[24] Uses that exceed these specified limits would remain subject to the current multifactor fair use analysis. Thus, even if our proposal were to be implemented, parodists would continue to be able to use a much greater amount of protected expression,[25] as would certain highly transformative users.[26] Its implementation would not diminish any free speech privileges,[27] or otherwise alter existing doctrines. It would simply establish supplementary safe harbors that would shelter many users from expensive litigation and the vagaries of case-by-case decisionmaking.

Importantly, implementation of our proposal can salvage fair use in the digital age. The Digital Millennium Copyright Act, by prohibiting circumvention of technological protection measures,[28] made fair use irrelevant with respect to the vast amount of protected expression stored in digital form. As many commentators have observed,[29] the legislation gave copyright owners an absolute veto over any fair uses of their works. Previous efforts to recognize a fair use exception in this context have failed because there was no ex ante way to differentiate circumvention of protective measures for fair uses from circumvention for infringing ones. Accordingly, lawmakers feared that permitting circumvention for fair uses would open the door for the lifting of works in their en-

jected them. See infra note 99 and accompanying text (discussing scholars who have rejected the notion of clarifying fair use with rules).

[24] For a full discussion of the safe harbor limits, see infra Section II.C.

[25] See Campbell v. Acuff-Rose Music, 510 U.S. 569, 574–94 (1994).

[26] See id.

[27] But see Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 Yale L.J. 535 (2004) (arguing that fair use in its current form hampers free speech).

[28] 17 U.S.C. § 1201 et. seq. (2000).

[29] See, e.g., Christopher Sprigman, Reform(aliz)ing Copyright, 57 Stan. L. Rev. 485, 527 (2004).

tirety. This is a classic example of a pooling equilibrium.[30] Our proposal unties this Gordian knot by identifying fair uses ex ante. Thus, Congress could require content providers to employ protective technologies that enable end-users to access limited amounts of protected material that fall within the safe harbors.

But what about copyright owners? At first glance, one might think that our proposal could weaken the incentive to produce new works. But a more careful examination suggests, counterintuitively, that it may actually improve production. As Judge Richard Posner and Professor William Landes have pointed out, if creators as a group had had it their way, they would have chosen to limit copyright protection:[31]

> [t]o the extent that a later author is free to borrow material from an earlier one, the later author's cost of expression is reduced; and, from an ex ante viewpoint, every author is both an earlier author from whom a later author might want to borrow material and the later author himself.[32]

Our proposal reduces both costs and risks for all creators. Thus, on the whole, it may increase the number (as well as quality) of new works.

One final objection may be that the benefits authors stand to gain in terms of reduced cost would be outweighed by the losses they stand to incur from unlicensed reproduction by members of the general public who do not partake in creative activities. We do not find this objection compelling for two reasons. First, the narrow tailoring of the per se fair uses makes them virtually valueless for typical purchasers. Even illegal music downloaders are unlikely to take advantage of our proposed ten second safe harbor as a market substitute for entire songs.[33] Second, as many commentators have noted, digital technologies have blurred the traditional distinction between producers and users of expressive content.[34] Today, a significant amount of content is user produced, and "re-

[30] See, e.g., Eric A. Posner, Law and Social Norms 19–21 (2000) (describing pooling equilibria in the law).

[31] William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 327 (1989).

[32] Id. at 333.

[33] For a discussion of ringtones, see infra notes 147–149 and accompanying text. As to whether end-users might attempt to circumvent the law by reassembling entire songs from ten second segments, see the discussion of strategic abuse in Section III.C.

[34] See Dan Hunter & F. Gregory Lastowka, Amateur-to-Amateur, 46 Wm. & Mary L. Rev. 951, 955–56 (2004) (discussing the ascent of user-based content).

mix" is emerging as an important mode of production.[35] We believe that these technological and cultural changes underscore the need to reform fair use along the lines of our proposal.

The remainder of the Essay unfolds in three parts. In Part I, we demonstrate how fair use's ambiguity upsets the balance underlying copyright law. In Part II, we present our proposal of nonexclusive safe harbors of fair use and examine the implications. In Part III, we address potential objections and criticisms.

I. FAIR USE, UNCERTAINTY, AND OVERDETERRENCE

In this Part, we position fair use in the overall scheme of copyright law and explain its vital role in maintaining the delicate balance copyright law aims to achieve between promoting the creation of new works and securing adequate access to existing ones. We then explain how the vagueness of the fair use doctrine undermines its utility, upsets copyright's balance, and leads to the underuse of protected expression.

A. Copyright's Balance

Unlike other philosophical rationales for intellectual property protection,[36] the American model views protecting authors' rights not as an end unto itself, but rather as a means—specifically, the means to produce a more robust intellectual and artistic culture.[37] On this view, copyright protection is necessary to remedy an underproduction problem that arises from the "public good" nature of expressive works.[38] Unlike tangible goods, public goods share two distinctive characteristics: nonri-

[35] See, e.g., Lawrence Lessig, Creative Economies, 1 Mich. St. L. Rev 33, 35 (2006) (characterizing culture and knowledge as remix).

[36] See, e.g., Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287 (1988) (discussing the leading philosophical justifications for intellectual property protection).

[37] This is evident from the intellectual property clause in the Constitution that empowers Congress "[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." U.S. Const. art. I, § 8, cl. 8.

[38] See, e.g., Richard P. Adelstein & Steven I. Perez, The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective, 5 Int'l Rev. L. & Econ. 209, 218 (1985); Gordon, supra note 15, at 1610; Landes & Posner, supra note 31, at 326.

valry of consumption and nonexcludability of benefits.[39] A good is nonrivalrous in consumption if a unit of that good can be consumed by one person without diminishing the consumption opportunities available to others from that same unit.[40] A good displays nonexcludable benefits if individuals who have not paid for the production of that good cannot be prevented at a reasonable cost from availing themselves of its benefits.[41] The nonexcludability property of public goods gives rise to two related problems. First, public goods are likely to be underproduced if left to the private market. Second, markets for public goods will not form. Since expressive works are essentially information goods, they too are susceptible to the twin problems of underproduction and lack of market exchange.[42] Given that the cost of creating a new expressive work is generally high and the cost of copying that work is generally low, without copyright protection original creators would be reluctant to invest in the creation of new works. Unauthorized reproduction of successful expressive works and inventions would drive the market price down to the point where original authors would not be able to recover their initial expenditures. Although the original authors would still retain certain advantages (such as lead time and claims to authenticity),[43] in many cases those would be insufficient to allow creators to recoup their initial investment, let alone make a profit.[44] As a result, there would be a suboptimal level of production of creative works.[45] By creating and protecting

[39] See, e.g., Robert Cooter & Thomas Ulen, Law and Economics 46–48 (1st ed. 1988); Richard Cornes & Todd Sandler, The Theory of Externalities, Public Goods, and Club Goods 6–7 (1986); Edwin Mansfield, Principles of Macroeconomics 400–04 (6th ed. 1989).

[40] See Cornes & Sandler, supra note 39, at 6.

[41] See id. at 160; see also Patrick Croskery, Institutional Utilitarianism and Intellectual Property, 68 Chi.-Kent L. Rev. 631, 632 (1993).

[42] See William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 19–20 (2003).

[43] See, e.g., Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs, 84 Harv. L. Rev. 281, 299–302 (1970) (discussing the competitive advantages authors would retain even in the absence of copyright protection).

[44] See, e.g., Barry W. Tyerman, The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer, 18 UCLA L. Rev. 1100, 1108–13 (1971) (addressing the "difficulties with the economic argument for [the] abolition of copyright protection for published books"); see also Carla Hesse, Publishing and Cultural Politics in Revolutionary Paris, 1789–1810 (1991) (detailing the harm caused to the publishing industry by the elimination of copyright protection in the wake of the French Revolution).

[45] See Steven Shavell, Foundations of Economic Analysis of Law 138–44 (2004) (discussing the social value of information and the optimal level of its production).

exclusive rights in expressive works of authorship, copyright law assures authors adequate return on their investment in the creation of new works.

Securing adequate returns for authors, however, is not the primary purpose of copyright law. As is clear from the intellectual property clause of the Constitution, the Framers' ultimate goal was "[t]o promote the Progress of Science and useful Arts."[46] The grant of limited exclusive rights to authors is the means selected for achieving this end,[47] but the end itself is the wide dissemination of works after their creation[48] and the promotion of learning.[49]

Accordingly, copyright law must perform a balancing act. If protection is too weak, a suboptimal amount of intellectual work will be produced. If protection is too strong, the public will not receive the full intended benefit from works after their creation. In either case, future authors may be deprived of sources from which they can draw to build new works (either because the materials do not exist or because they are unable to make reasonable appropriations). Thus, when the cycle is out of balance, the public as a whole is the ultimate loser.

In order to ensure adequate provision of expressive works, Congress provided creators with the exclusive rights to reproduce, adapt, distribute, display, perform, and digitally perform[50] their works, as well as any works that are "substantially similar."[51] Together, these legally enforce-

[46] U.S. Const. art. I, § 8, cl. 8.

[47] See, e.g., Dotan Oliar, Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power, 94 Geo. L.J. 1771 (2006) (positing that the promotion of science and useful art is a limitation on Congress's power to enact intellectual property laws); Lawrence B. Solum, Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft, 36 Loy. L.A. L. Rev. 1, 19–20 (2002) (discussing the means-end structure of the intellectual property clause); Kevin A. Goldman, Comment, Limited Times: Rethinking the Bounds of Copyright Protection, 154 U. Pa. L. Rev. 705, 739 (2006).

[48] See Harper & Row, Publishers v. Nation Enters.,, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); see also Jane C. Ginsburg, Creation and Commercial Value: Copyright Protection in Works of Information, 90 Colum. L. Rev. 1865, 1873 (1990) ("[T]he 1710 English Statute of Anne, the 1787 United States Constitution, and the 1790 United States federal copyright statute all characterized copyright as a device to promote the advancement of knowledge.").

[49] See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261–62 (11th Cir. 2001) (noting that the copyright scheme is designed to promote learning).

[50] 17 U.S.C. § 106 (2000).

[51] Although the circuit courts have articulated several variations of the infringement inquiry, they are generally unified in holding that infringement hinges not on a finding of pre-

able rights ensure that content producers can capitalize on the value of their creative output, thus providing a substantial incentive to create new works.

At the same time, in order to protect the public interest in accessing and using works once they have been created and to ensure that excessively strong copyright protection does not thwart the very creativity it seeks to promote,[52] the rights of authors are restricted in three important ways: First, certain subjects, such as ideas, are outside the realm of protection entirely.[53] Second, the duration of protection is limited.[54] And third, there is a fair use privilege that permits, under certain circumstances, the unlicensed reproduction of protected expression.[55]

B. Fair Use As a Balancing Tool

Fair use is perhaps the most crucial policy tool for maintaining copyright's intended balance. The doctrine legitimizes certain reproductions of copyrighted expression that would otherwise constitute copyright infringement. In Hohfeldian terms, the doctrine grants the public a privilege[56] "to use the copyrighted material *in a reasonable manner* without [the owner's] consent."[57]

This reasonableness inquiry has historically been, and still remains, the essence of the fair use doctrine.[58] When Congress codified the doc-

cise or exact copying, but rather on a finding that some manner of copying did occur, that the material actually copied was protected by copyright, and that the amount of copying was "substantial." See Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187, 1188–89 (1990).

[52] Cf. Frischmann & Lemley, supra note 11 (analyzing the manner in which the inability of intellectual property owners to capture the full value of their works encourages greater innovation and increases social welfare).

[53] See, e.g., Baker v. Selden, 101 U.S. 99, 100–01 (1879) (establishing the idea/expression dichotomy); Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (discussing the Scènes à Faire doctrine).

[54] See 17 U.S.C. §§ 301–305 (2000).

[55] See 17 U.S.C. § 107.

[56] See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913) (distinguishing rights from privileges); see also David R. Johnstone, Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law, 52 J. Copyright Soc'y 345, 368–70 (2005) (employing Hohfeld's framework to analyze the fair use doctrine).

[57] Horace G. Ball, The Law of Copyright and Literary Property 260 (1944) (emphasis added).

[58] When Justice Story first laid the groundwork for the doctrine's importation into American law in *Folsom v. Marsh*, he consciously followed the English model, eschewing any in-

trine in 1976, it refrained from defining fair use or articulating a clear test of fairness.[59] Instead, it provided a nonexhaustive list of illustrative uses—such as comment, criticism, scholarship, research, news reporting, and teaching—that may qualify as fair. Then, in keeping with prior doctrine, it enumerated four nonexclusive factors to be considered by courts in deciding whether a particular use is fair. These four factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[60]

Congress provided no guidance as to how to measure these factors against one another, whether all must be satisfied for a finding of fair use, or how conflicts among them are to be reconciled. Instead, Congress simply instructed the courts that "each case raising the question must be decided on its own facts."[61] As a result, the doctrine has become a catch-all exception to copyright protection.[62]

To be sure, courts have attempted to define fair use and make sense of its objectives, but these efforts have failed unconditionally. The judicial path of fair use is paved with split courts, reversed decisions, and inconsistent opinions.[63] The hope that a common understanding would emerge over time did not materialize.[64] This was not the intended state of affairs.

---

quiry into the public interest and focusing solely on whether the defendant's use was, on its own terms, "fair." 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901).

[59] See Gideon Parchomovsky, Fair Use, Efficiency, and Corrective Justice, 3 Legal Theory 347, 352 (1997) (discussing the interpretive problems arising from the statutory text).

[60] 17 U.S.C. § 107.

[61] H.R. Rep. No. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

[62] See Michael J. Madison, Rewriting Fair Use and the Future of Copyright Reform, 23 Cardozo Arts & Ent. L.J. 391, 402 (2005) ("The substantive emptiness of fair use makes it something of a dumping ground for copyright analysis that courts can't manage in other areas.").

[63] See Parchomovsky, supra note 59, at 348 n.7 (demonstrating this point by reviewing the case law).

[64] Leval, supra note 5, at 1105–06.

As Justice Kennedy has noted, "The common-law method instated by the fair use provision of the copyright statute . . . presumes that rules will emerge from the course of decisions."[65] Yet just the opposite has occurred: the repeated application of the fair use doctrine has resulted in it growing increasingly unpredictable.

Academics, for their part, have been unable to rescue fair use from its murkiness. Despite numerous attempts to distill a coherent conception, none of these formulations has been adopted by the courts, and scholars generally agree that it is now virtually impossible to predict the outcome of fair use cases.[66]

Moreover, as Professor Polk Wagner has observed, this ambiguity creates a negative feedback loop: faced with the increasingly unpredictable nature of the doctrine, both copyright owners and content users perceive a loss of their rights and respond by making ever-broadening claims, with content owners claiming more in the way of exclusive rights, and content users claiming more in the way of fair use rights.[67] This, of course, only feeds back into the cycle, increasing each side's perception of loss and exacerbating the doctrine's uncertainty.[68]

C. Uncertainty and Its Cost

To fully understand the harm caused by the overdeterrence of fair use, it is useful to view the doctrine within the larger legal context. U.S. copyright law ostensibly establishes a standard of strict liability; the mental state of a putative infringer is irrelevant to the issue of direct liability.[69] Courts have interpreted liability under the Copyright Act very

[65] Campbell v. Acuff-Rose Music, 510 U.S. 569, 596 (1994) (Kennedy, J., concurring) (citation omitted).

[66] See, e.g., R. Polk Wagner, The Perfect Storm: Intellectual Property and Public Values, 74 Fordham L. Rev. 423, 426–27 (2005) ("[E]ven at [a high] level of generality, there is little more that can be usefully said about the division between fair and unfair uses in practice: The 'know it when you see it' nature of the analytic approach in this context simply precludes such observations."); see also David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, Law & Contemp. Probs., Winter/Spring 2003, at 263, 278–84 (employing a statistical analysis to demonstrate the unpredictability of the fair use doctrine).

[67] Wagner, supra note 66, at 427–28.

[68] Id. at 428–29.

[69] Mental state remains relevant to the issue of secondary liability. See Metro-Goldwyn-Mayer Studios v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." (citations omitted)).

broadly, ruling that it requires neither intent nor knowledge, thus making even unconscious copying actionable.[70]

A closer inspection, however, reveals that the "strict liability" view is inaccurate: it ignores the role that fair use plays in transforming copyright law into a negligence-type regime. Just as a negligence standard imposes liability on individuals for deviating from socially optimal standards of behavior and absolves from liability injurers who invest in reasonable precautions,[71] fair use protects users whose appropriations fall within a socially beneficial range. Consequently, fair use, like the negligence analysis in tort law, attempts to guide behavior by punishing only those who deviate from the socially optimal standard.

No clear understanding of the socially optimal standard has emerged, however, rendering fair use largely unknowable and unpredictable. This comes at a high cost: law and economics scholars have long observed that vague standards cause overdeterrence. Under negligence-type standards, suboptimal investment in precautions leads to full liability whereas optimal investment results in no liability. But the vagueness of the fair use standard prevents actors from precisely discerning the optimal level of investment. As a result, actors find it in their best interest to err on the side of safety and either overcomply (by minimizing the use of protected works) or overinvest in precautions.

In the copyright context, the problem of overdeterrence is aggravated by several factors. First, due to their public good characteristics, expressive works invariably generate spillovers (or positive externalities).[72] Consequently, users of copyrighted material cannot capture the full benefit of the use but stand to bear the full cost if sued. Second, the Copyright Act provides a wide array of remedies to copyright owners, including injunctions and supercompensatory damages. Courts can order the impounding of infringing articles,[73] allow plaintiffs the defendants' profits,[74] or award statutory damages of up to $150,000 per work in-

[70] See, e.g., Bright Tunes Music Corp. v. Harrisongs Music, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976).

[71] Shavell, supra note 45, at 180.

[72] See, e.g., R. Polk Wagner, Information Wants to Be Free: Intellectual Property and the Mythologies of Control, 103 Colum. L. Rev. 995 (2003) (explaining why copyrighted information can never be fully appropriated and assessing the implications of this fact for policymaking).

[73] 17 U.S.C. § 503 (2000).

[74] 17 U.S.C. § 504(b).

fringed willfully.[75] This means that the expected cost faced by unauthorized users is likely to far exceed the expected, often quite modest, benefit. Given this disparity, users are unlikely to engage in fair use, and even in cases where authors are motivated by ideological reasons to take a chance on fair use, their publishers and distributors are likely to oppose the idea. For these gatekeepers, the relatively small reward simply does not justify incurring such substantial risk.[76]

To protect against the uncertainty of fair use, the only alternative to not using the copyrighted content is to secure a license from the rightsholder. But the licensing option is fraught with problems of its own. In an important recent article, Professor James Gibson demonstrates how the vagueness of intellectual property doctrines, including fair use, forces users to secure licenses even when they do not necessarily need to do so and how this dynamic enables rightsholders to expand their rights at the expense of users and the public.[77]

Additionally, securing an unnecessary license is a wasteful expenditure of resources that could be directed to other, more creative, ends. The purpose of fair use, after all, is to spare users from these costs by giving them the privilege to use some protected expression for free.

More importantly, perhaps, licensing fails to provide a solution for cases involving high transaction costs, strategic holdouts, and unconscious or inadvertent copying. We discuss each of these cases in order.

The connection between fair use and high transaction costs was established by Professor Wendy Gordon. She pointed out that in certain settings, the cost of negotiating a license exceeds the value of the use for the user.[78] For example, if a user values a certain line from Gabriel Garcia Marquez's *One Hundred Years of Solitude* at ten dollars and the cost of negotiating with HarperCollins Publishers (the relevant rightsholder)

[75] 17 U.S.C. § 504(c)(2). If the infringement is not willful, the maximum amount a plaintiff can collect is $30,000. § 504(c)(1).

[76] See, e.g., Tushnet, supra note 27, at 583–84 ("It should be no surprise that publishers thus require permission for even brief quotations . . . ."). In addition to fear of costly litigation, there is a secondary element of self-interest, as these same publishers profit when follow-on artists choose to pay licensing fees to use their works. See Kate O'Neill, Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication, 89 Cal. L. Rev. 369, 401 (2001) (noting that "holders of substantial copyright interests have an incentive to narrow the scope of fair use, establish a custom of requiring permission for rights owned, earn revenue, and create a measure of market impact should they wish to challenge unlicensed uses of materials for which they hold the copyright").

[77] Gibson, supra note 16.

[78] Gordon, supra note 15, at 1608.

is fifteen dollars, no deal will be consummated between the parties, even if HarperCollins's asking price is lower than the user's reserve price. More generally, when the cost of transacting exceeds a user's reserve price, no voluntary transactions will occur. Such cases are natural contenders for a fair use finding. Allowing the user to reproduce the protected expression improves her utility without diminishing the utility of the rightsholder.

Of course, transaction costs are not static. The rise of the Internet and the advent of digital platforms, together with the development of copyright clearance agencies,[79] have reduced many of the transaction costs that previously stood as barriers to cost-effective bargaining.[80]

Even so, transaction costs remain high in many settings, especially when a user needs to clear multiple copyrights in order to distribute a new work. Content users, such as documentary filmmakers who find themselves unable to secure licenses for any protected works that appear in their film, are then left with something of a Hobson's choice: they must either obscure the copyrighted material and thereby 'falsify' the 'reality' of the scene, or eliminate the scene in its entirety.[81] Thus, the *Eyes on the Prize* series could not be broadcast or sold for over a decade,[82] and Alex Gibney's documentary *Enron: The Smartest Guys in the Room*[83] was released without several historically valuable short clips in the final cut of the film.[84] It should be emphasized, however, that even when only one protected work is involved, transaction costs may thwart bargaining if the user places relatively little value on the use and the rightsholder cannot be readily ascertained or fails to take advantage of digital negotiation platforms.

[79] See Randal C. Picker, From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright, 70 U. Chi. L. Rev. 281, 295 (2003) ("As transaction costs drop through a combination of institutional arrangements such as the Copyright Clearance Center, and as the internet creates a ubiquitous structure for micro-transactions—microconsents with micropayments—fair use might cease to play a meaningful role.").

[80] See Tom W. Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. Rev. 557, 564–67 (1998).

[81] See Nancy Ramsey, The Hidden Cost of Documentaries, N.Y. Times, Oct. 16, 2005, at C13. See generally Patricia Aufderheide & Peter Jaszi, Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers (2004), available at http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.

[82] See supra notes 19–20 and accompanying text.

[83] Enron: The Smartest Guys in the Room (Jigsaw Productions 2005).

[84] See Elaine Dutka, Copyright Isn't the Last Word, L.A. Times, Nov. 18, 2005, at 16.

Strategic bargaining by rightsholders may also get in the way of licensing. Rightsholders, in attempting to extract the lion's share of the bargaining surplus, may overestimate the value of the license for users and demand excessive licensing fees. For example, many organizations that hold the copyrights to historically significant photographs and film footage traditionally licensed their use at little or no cost. Today, however, they are more likely to view the works as any other commodity and require much higher licensing fees.[85]

The problem is not limited to historic material. Professors Adam Brandenburger and Barry Nalebuff approached the Rolling Stones for permission to open a chapter in their book on game theory with the line "What's confusing you is the nature of my game."[86] The Stones, or more precisely their rights agent, showed no sympathy (devilish or otherwise) for the request and demanded $10,000 for the right to use the line. Even though the authors believed they had a strong claim for fair use, they opted to publish the book without the quotation.[87]

Rightsholders may also refuse to license on ideological grounds. As Professor Rebecca Tushnet reports, "Numerous scholars have been denied permission to quote or reprint pictures on the basis of copyright owners' disagreement with their interpretations, and fair use is no help to such scholars if publishers refuse to rely on the uncertain doctrine."[88]

Finally, licensing is not a viable solution for users who unconsciously or inadvertently reproduce small amounts of copyrighted expression. As the case of *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*[89] demonstrates, creators may subconsciously rely on copyrighted content in creating a new work without realizing it. Furthermore, users may incorporate copyrighted expression into new works based on an erroneous understanding of the law.[90] In addition, users may sometimes inadvertently reproduce protected expression, for example, by capturing a copy-

[85] See Dixon, supra note 20, at R1.

[86] Email from Barry Nalebuff, Milton Steinbach Professor of Management, Yale School of Management, to Gideon Parchomovsky, Professor of Law, University of Pennsylvania Law School (Feb. 20, 2007, 14:57:20 EST) (on file with the Virginia Law Review Association).

[87] Id.

[88] Tushnet, supra note 27, at 585.

[89] 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976).

[90] See, e.g., Lipton v. The Nature Co., 71 F.3d 464 (2d Cir. 1995); U.S. Payphone v. Executives Unlimited of Durham, 18 U.S.P.Q.2d 2049, 2050 (4th Cir. 1991); see also R. Anthony Reese, Innocent Infringement in Copyright Law 7–17 (unpublished manuscript, on file with the Virginia Law Review Association) (discussing the copying of works believed to be in the public domain).

righted poster in the background of a film. Since such users are not even aware that their activities are unlawful, they will not seek to license any rights. Yet even minimal amounts of copying can lead to costly and drawn out litigation.

II. SAFE HARBORS OF FAIR USE

In this Part, we discuss a way to increase clarity and certainty for users of copyrighted works by enacting clearly defined, nonexclusive fair use safe harbors. Uses that fall within these harbors would be considered per se fair. Uses that fall outside of them would continue to be analyzed under existing doctrine. Drawing on limited past experiences, we advance a specific proposal for enacting nonexclusive fair use harbors and demonstrate how it may be defined and implemented. We then show how our proposal may salvage fair use with respect to digital rights, so as to further fair use interests.

A. Introducing Rules into Copyright Law

Legal norms are generally expressed as either standards or rules.[91] A classic illustration of a standard is "drive safely," whereas an oft-cited example of a rule is "drive 55 miles per hour or less."[92] Standards are relatively easy to promulgate and provide judges with considerable discretion.[93] Yet this discretion provides no ex ante certainty[94] and allows for potentially inconsistent decisions, making future applications of the standard difficult to predict.[95]

Rules, on the other hand, generally are more costly to promulgate, and their enforcement can often seem arbitrary and harsh.[96] They typically provide little or no flexibility to judges, and their application may lead to inequitable results in individual cases. However, the rigidity of rules

[91] See generally Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1992); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Pierre J. Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985); Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 953 (1995).

[92] See, e.g., Kaplow, supra note 91, at 560.

[93] See, e.g., id. at 564–65.

[94] See, e.g., Sunstein, supra note 91, at 976.

[95] See, e.g., id.

[96] See, e.g., id. at 995–96 (noting that "[r]ules [c]an [b]e [d]ehumanizing and [p]rocedurally [u]nfair").

provides substantial clarity and predictability, informing the public how to behave in order to comply with the legal norm.[97]

Intellectual property law relies heavily on numerous vague standards, most notably fair use. The harm that flows from this ambiguity has prompted some scholars to call for the introduction of rules in this area in order to increase certainty.[98] Numerous other scholars, though, have expressed skepticism at the idea of clarifying fair use with rules, arguing that a flexible, muddy standard is necessary to protect the public's interest and maintain copyright's balance.[99] Notwithstanding the academic opposition, there have been several attempts to enact safe harbors for copyright users. The next section examines the successes and failures of these efforts.

B. Previous Attempts to Create Rules for Fair Use

Given the uncertainty of the current fair use doctrine, it is not surprising that there have been several attempts to establish a clearer understanding of the doctrine's contours. Those attempts provide a valuable reference point for our analysis and allow us to draw on the mistakes and successes of the past in designing our proposed system.

---

[97] See, e.g., id. at 976–77.

[98] See, e.g., Tushnet, supra note 27, at 588 ("[T]he law might limit what counts as sufficient copying to constitute reproduction or creation of a derivative work, so that activities such as sampling and quoting would clearly be noninfringing."). Tushnet, however, also suggests that "there is no way to know in advance how much copying is too much." Id. We disagree with that assertion—at a low enough threshold, it is possible to make that determination ex ante. See also Lawrence Lessig, Free Culture 295 (2004) (advocating for clearer and narrower lines demarcating the scope of protection for derivative works); Joseph P. Liu, Regulatory Copyright, 83 N.C. L. Rev. 87, 151–52 (2004) (suggesting that the Copyright Office could be given the regulatory authority to promulgate rules and safe harbors).

[99] See, e.g., Dan L. Burk, Muddy Rules for Cyberspace, 21 Cardozo L. Rev. 121, 140 (1999) ("[F]air use appears to be employed in situations of high transaction costs, where a muddy entitlement may be appropriate. . . . The 'muddy' four-part balancing standard of fair use allows courts to reallocate what the market cannot."); Michael W. Carroll, Fixing Fair Use, 85 N.C. L. Rev. (forthcoming 2007) (arguing that rules for fair use would lack sufficient context-sensitivity); Madison, supra note 62, at 396 ("Since the complexity of the copyright statute already compares unfavorably to the tax code, it seems unwise to 'solve' fair use by adding more details to the statute."); Matthew Sag, God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine, 11 Mich. Telecomm. & Tech. L. Rev. 381, 435 (2005) (arguing that a flexible fair use standard is needed to allows courts to adapt copyright protection to new innovations); see also Jason Scott Johnston, Bargaining Under Rules Versus Standards, 11 J.L. Econ. & Org. 256, 257 (1995) ("When the parties bargain over the entitlement when there is private information about value and harm, bargaining may be more efficient under a blurry balancing test than under a certain rule.").

1. Libraries—From a "Gentlemen's Agreement" to Section 108

The so-called "Gentlemen's Agreement" of 1935[100] was the earliest attempt to create a fair use safe harbor. Enacted in response to the advent of microfilm and photo-duplication technology,[101] the agreement was negotiated between the Joint Committee on Materials for Research (on behalf of libraries and their patrons) and the National Association of Book Publishers. It permitted libraries, museums, and similar institutions to reproduce, under a carefully specified set of circumstances, part of a copyright-protected work for scholarly purposes, so long as the copy was not produced for a profit and the recipient was notified that she was still bound by applicable copyright law regarding her use of the material.[102]

Although this agreement did not have the force of law, it was nevertheless consistently honored by both libraries and publishers.[103] Moreover, when a publisher did attempt to challenge the practice, the Court of Claims, in a decision affirmed by an equally divided Supreme Court, held that the practice constituted fair use.[104]

In the Copyright Act of 1976, Congress codified a version of the Gentlemen's Agreement, providing several safe harbors for libraries to facilitate fair uses of protected materials.[105] The Act allows a library to make a single copy

> of no more than one article or other contribution to a copyrighted collection or periodical issue, or [to make a single copy] of a small part of any other copyrighted work, if—
>
> (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

[100] The Gentlemen's Agreement and the Problem of Copyright, 2 J. Documentary Reprod. 29, 31–33 (1939).

[101] See Peter Hirtle, Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935, 53 J. Copyright Soc'y U.S.A. 545, 545–46 (2006).

[102] See The Gentlemen's Agreement, supra note 100, at 31.

[103] Randall Coyne, Rights of Reproduction and the Provision of Library Services, 13 U. Ark. Little Rock L.J. 485, 488–89 (1991).

[104] Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1362 (Ct. Cl. 1973), aff'd by an equally divided Court, 420 U.S. 376 (1975).

[105] See 17 U.S.C. § 108 (2000).

> (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.[106]

Although the statute is not a model of predictability—for example, it does not define what constitutes a "small part" of a protected work[107]—it has been effective at providing guidance for libraries and shielding them from liability.[108] This safe harbor does not provide any protection for end-users, however, leaving them subject to the traditional four-factor analysis.[109]

2. The "Classroom Guidelines"

The most famous attempt to create a fair use safe harbor was the establishment of guidelines for copying by teachers for classroom use, commonly known as the "Classroom Guidelines."[110] These rules were the product of negotiations between representatives of educational institutions, authors, and publishers.[111] While the terms of the agreement

[106] Id. § 108(d).

[107] See Hirtle, supra note 101, at 3–4 (noting that the amount of copying that would be permissible was consciously left out of the discussion).

[108] See, e.g., Office of Legal Counsel, Dep't of Justice, Whether and Under what Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing "Fair Use" under Section 107 of the Copyright Act of 1976, at 15 (Apr. 30, 1999), available at http://www.usdoj.gov/olc/pincusfinal430.htm ("If a certain library practice is noninfringing under the specific and detailed provisions of section 108(a) (as confined by section 108(g)(2)), a library need not be concerned about how that particular photocopying practice would fare under section 107's more complex and indeterminate fair use standards.").

[109] See, e.g., Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 916 (2d Cir. 1994) ("We do not deal with the question of copying by an individual, for personal use in research or otherwise (not for resale), recognizing that under the fair use doctrine or the de minimis doctrine, such a practice by an individual might well not constitute an infringement.").

[110] See Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, H.R. Rep. No. 94-1476, at 68–70 (1976); see also Kenneth D. Crews, The Law of Fair Use and the Illusion of Fair-Use Guidelines, 62 Ohio St. L.J. 599, 615–19 (2001) (discussing the "Classroom Guidelines"). Similar frameworks were promulgated to address the copying of musical works and television broadcasts. See Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes, H.R. Rep. No. 97-495, at 8–9 (1982); Guidelines for Educational Uses of Music, H.R. Rep. No. 94-1476, at 70–71 (1976); see also Crews, supra, at 619–21 (discussing the "Music Guidelines" and "Off-Air Videotaping Guidelines").

[111] H.R. Rep. No. 94-1476, at 67.

were not incorporated into the statute itself, they were included with the House Report accompanying the Act.[112]

Most notable among the Guidelines is the portion that seeks to clarify the meaning of Section 107's provision that "multiple copies for classroom use" could constitute fair use by providing that

> Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:
>
> A. The copying meets the tests of brevity and spontaneity as defined below; *and*,
>
> B. Meets the cumulative effect test as defined below; *and*,
>
> C. Each copy includes a notice of copyright[.][113]

The "brevity" requirement limits the number of words that may be copied from a literary work.[114] "Spontaneity" requires that the decision to make a copy be sufficiently close in time to its educational use for "maximum teaching effectiveness" such that "it would be unreasonable to expect a timely reply to a request for permission."[115] Finally, the "cumulative effect test" limits the total number of excerpts a teacher may make from a single author or during a single class term.[116]

Although these Guidelines appear to be an improvement over a traditional four-factor analysis, they fall short of constituting real bright-line safe harbors.[117] The problem lies in the fact that the Guidelines incorporate by reference murky standards that offset any clarity provided by the rules. The brevity requirement, for example, allows for the copying of "a complete article, story or essay of less than 2,500 words," but a subse-

[112] Id. at 67–70.
[113] Id. at 68.
[114] Id. at 68–69.
[115] Id. at 69.
[116] Id.
[117] See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05[E][3][a] (4th ed. 2007); Crews, supra note 110, at 619 ("The guidelines may well offer more certainty, but they still raise their own questions and pose their own problems for application.").

quent qualification excludes from that group a vaguely defined class of "special works."[118]

Similarly, the "spontaneity" rule does not provide a set amount of time in which to use the copied work, but rather includes such amorphous thresholds as the reasonability of expecting a timely reply and "the moment of [a work's] use for maximum teaching effectiveness."[119] The Guidelines, moreover, provide only vague prohibitions, such as "[c]opying shall not . . . substitute for the purchase of books, publishers' reprints or periodicals."[120] These embedded standards provide tremendous leeway for rightsholders to claim that many types of copying fail to conform to the Guidelines.

Finally, the Guidelines do not have the force of law.[121] Although the House Judiciary Committee endorsed the Guidelines as "a reasonable interpretation of the minimum standards of fair use,"[122] they cannot be relied upon with the same confidence as if they were legally binding.[123]

Notwithstanding these shortcomings,[124] the Guidelines seem to be reasonably effective at providing traditional classroom teachers with some ability to make educational use of copyrighted materials. Their major failing seems to be that they offer the potential for greater utility at the expense of predictability. Although the Classroom Guidelines set out to establish a minimum amount of use that would be considered fair, rather than a maximum,[125] the negotiators aimed to set the threshold at

[118] H.R. Rep. No. 94-1476, at 68–69 (defining special works as "[c]ertain works in poetry, prose or in 'poetic prose' which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience [and which] fall short of 2,500 words in their entirety").

[119] Id. at 69.

[120] Id.

[121] See Marcus v. Rowley, 695 F.2d 1171, 1178 (9th Cir. 1983) (noting that the Guidelines are "instructive on the issue of fair use" but "not controlling on the court").

[122] H.R. Rep. No. 94-1476, at 72.

[123] See, e.g., Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 919 n.5 (2d Cir. 1994) (noting that the Guidelines are not binding and exist only as persuasive authority); Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1536 (S.D.N.Y. 1991) (citing 4 Nimmer, supra note 117, at § 13.05[E][3][a] for the proposition that "a use which is within the [Classroom] Guidelines may exceed fair use").

[124] For further academic criticisms, see Ann Bartow, Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely, 60 U. Pitt. L. Rev. 149, 159–63 (1998) (discussing numerous flaws in the Classroom Guidelines); Carol M. Silberberg, Preserving Educational Fair Use in the Twenty-First Century, 74 S. Cal. L. Rev. 617, 636–39 (2001) (same).

[125] See H.R. Rep. No. 94-1476, at 68 ("The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 . . . .").

something more akin to a middle ground compromise, rather than a true minimum.[126]

3. The Family Movie Act

With the Family Entertainment and Copyright Act of 2005,[127] Congress created a technologically sophisticated exception to copyright infringement, and one that also differs philosophically from the two safe harbors discussed above. In response to parental concern about objectionable content, several media companies began offering to edit lawfully acquired copies of movies by removing content such as nudity and profanity.[128] Shortly thereafter, different entrepreneurs developed systems that would program DVD players to automatically make similar changes while a film was being played, by skipping certain scenes[129] or lowering the volume over particular pieces of dialogue. After the Directors Guild of America inadvertently posted a press release indicating their intention to sue over these practices,[130] a consortium of companies filed for a declaratory judgment that these editing practices were protected by the first sale[131] and fair use doctrines.[132]

[126] The two main criticisms levied against the Guidelines are that they are too restrictive and too unpredictable. See Bartow, supra note 124, at 162–63. In practice, of course, greater predictability would likely require greater restrictions, while less restrictive rules probably would be accompanied by less predictability.

[127] Pub. L. No. 109-9, § 167, 119 Stat. 218 (2005).

[128] See, e.g., Michael Janofsky, Utah Shop Offers Popular Videos With the Sex and Violence Excised, N.Y. Times, Jan. 31, 2001, at A11.

[129] See, e.g., Rick Lyman, Hollywood Balks at High-Tech Sanitizers: Some Video Customers Want Tamer Films, and Entrepreneurs Rush to Comply, N.Y. Times, Sept. 19, 2002, at E1.

[130] See Press Release, Directors Guild of America, DGA files lawsuit against entities that provide unauthorized altered versions of videocassettes and/or DVDs (Aug. 20, 2002), http://www.viewerfreedom.org/legal/20020820DGA/DGAfileslawsuit.PDF.

[131] The first sale doctrine distinguishes the rights to a copyrighted work from the rights to an embodiment of that work. Once someone lawfully acquires a book, for example, she may resell that copy without violating the copyright holder's exclusive right to distribute the work. See 17 U.S.C. § 109(a) (2000).

[132] See Second Amended Complaint and Jury Demand, Clean Flicks of Colo., L.L.C. v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) (No. 02-M-1662) ("Plaintiffs disagree that their third party editing of commercial movies violates any trademark or copyright laws and believe that their actions set forth above are free speech and/or fair use and are protected by the First Amendment to the U.S. Constitution.").

While the case was being litigated, Congress stepped in with the Family Movie Act of 2005 ("FMA"),[133] which created an explicit exception to copyright infringement for the practices at issue.[134] The law essentially acts as a bright-line safe harbor and was sufficiently clear to halt the extant litigation.[135] Moreover, the FMA represents a significant evolutionary step up from the Classroom Guidelines and the Gentlemen's Agreement because it allows content users to creatively alter protected works.[136]

Although it is probably too soon to make a definitive evaluation of the FMA's effectiveness as a safe harbor, the statute appears to have substantially improved both clarity and predictability in this one particular area, reinforcing the notion that sufficiently detailed and precise rules can be valuable additions to the current fair use framework.

4. Summary

Taken together, the above examples provide several reasons to be optimistic that new safe harbors, if properly crafted, would be both palatable and effective at improving the current copyright scheme. Although our proposal differs from these examples in several important regards, incorporating the lessons of the past is crucial to any plan going forward. The Gentlemen's Agreement has been largely successful because it balances the needs of both copyright owners and content users by allowing copying that is broad enough to be useful but still limited so as to protect the market for the original work. The Classroom Guidelines follow a similar model but have been less successful because, in trying to allow maximally useful copying, the broad scope necessitated the incorporation of corresponding checks against abuse, leading to decreased predictability. Finally, the FMA seems to strike an ideal balance, clearly delineating the scope of acceptable modification while ensuring that the commercial vitality of the original work is not diminished.

[133] The FMA was passed as Title II of the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 167, 119 Stat. 218, 223–24.

[134] See id. § 202(a)(3), 119 Stat. at 222.

[135] *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240, 1243.

[136] This also distinguishes the FMA from the statutory license that permits cover versions of songs. See 17 U.S.C. § 115(a)(2) (2000). While the license requires that "the arrangement shall not change the basic melody or fundamental character of the work," id., the FMA contains no such limitation; indeed, it is rooted in protecting a behavior designed to change a work's fundamental character.

Essentially, these earlier forays into fair use safe harbors suggest that the core principle—fairness—is not so inscrutable or elusive as to render bright-line rules impracticable. To the contrary, these case studies reveal that clearly defined and narrowly tailored safe harbors promote productive uses of protected materials that would otherwise be chilled, thereby pushing the copyright scheme closer to its optimal balance.

C. Creating the Rules

The lessons of the past give rise to several design principles. First, copyright owners and content users seem unlikely to ever reach a negotiated agreement on their own, even as to minimal safe harbors of fair use. Even though both groups would be made better off by the implementation of clarifying rules, unilateral action by Congress (or a designated rule-making body) will be necessary to enact a system of fair use harbors.

Second, for the safe harbors to be effective at facilitating fair use, they must be clear and predictable. This means employing bright-line rules that are free from any offsetting standards.

Third, it is important to adopt a minimalist approach to the design of the safe harbors. That is, the safe harbors should protect appropriations of relatively small amounts of expression.

Fourth, the safe harbors must apply to end-users, rather than just to intermediaries. Although content users often depend on libraries and other third parties to make certain materials available, it is important that the safe harbors shield *all* parties seeking to make fair use of protected materials.

Consistent with the above observations, our proposed safe harbors seek to eliminate uncertainty wherever possible. Furthermore, they are intended to be nonexclusive additions to the current framework. Uses that fall outside of a harbor would not necessarily lead to liability; they would simply require a traditional four-factor analysis.

As is the case with any legal rule, one may take issue with the specific limitations we suggest. Virtually all rules display a certain level of arbitrariness. Reasonable people may disagree about the specifics of speed limits, tax rates, and building codes. Yet those rules remain highly effective in guiding and promoting efficient behavior. Furthermore, the level of arbitrariness under our proposed scheme would in any event be lower than that of the current fair use regime.

1. Literary Works

Scholars and judges have identified the practice of copying a brief quotation as perhaps the clearest example of fair use in the case law. Nevertheless, a belief persists that even for a small snippet of a literary work, a license is required.[137]

We propose that for any literary work consisting of at least one hundred words, the lesser of fifteen percent or three hundred words may be copied without the permission of the copyright holder. The words need not appear consecutively (either in the original or in the copy), so long as the total number of duplicated words does not exceed the threshold.[138]

One can quibble, of course, with where the threshold is drawn,[139] but the more important point here is simply to be precise and predictable. So long as a user stays within the prescribed limits, she is safe from claims of infringement and the need to face the uncertainties of the current four-factor analysis.

Previous safe harbors have avoided placing any minimum size restriction on the work being copied.[140] We have rejected such a formulation to avoid the scale problem that plagued the Classroom Guidelines and required the inclusion of the vague and confusing "special works" exception.[141] Instead, we simply exclude from the safe harbor appropriations from any works shorter than one hundred words. This means that the

[137] Landes & Posner, supra note 42, at 216 n.16.

[138] For example, Dr. Seuss famously wrote *Green Eggs and Ham* using only fifty different words. See Louis Menand, Cat People: What Dr. Seuss Really Taught Us, New Yorker, Dec. 23 & 30, 2002, at 148, 152. While an end-user might be permitted to copy all fifty different words, and even to repeatedly use those words in varying combinations, an attempt to assemble those words into a recreation of the original work in excess of three hundred words would clearly exceed the safe harbor threshold. Cf. Jorge Luis Borges, Pierre Menard, Author of Don Quixote, *in* Ficciones 29, 32 (Anthony Bonner & Emecé Editores trans., Alfred A. Knopf, Inc. 1993) (1939) (describing a fictional author's attempt to independently conceive and write a novel that mimics, word for word, the text of Miguel de Cervantes's *Don Quixote*).

[139] We selected the lower bound—fifteen percent of a one-hundred-word work—to correspond roughly to two lines from a sonnet and the upper bound—three hundred words from a longer piece—to capture passages approximately the size of Hamlet's "To be or not to be" soliloquy. See William Shakespeare, Hamlet, Prince of Denmark act 3, sc. 1.

[140] See, e.g., H.R. Rep. No. 94-1476, at 67–70 (1976) (discussing the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5680–83; Bruce A. Lehman, U.S. Patent and Trademark Office, The Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use § 4.2.1, at 53 (1998).

[141] See H.R. Rep. No. 94-1476, at 69.

safe harbor will be inapplicable to some forms of artistic expression, such as haiku[142] and other short poems. While in the future it might be possible to create additional safe harbors specifically tailored to those types of works, we do not attempt to do so here, choosing instead to focus on a single exception for all literary works in order to emphasize both simplicity and predictability.

2. Sound Recordings and Musical Compositions

As for sound recordings, we propose that the lesser of ten percent or ten seconds may be copied without permission. The portions borrowed need not be consecutive, so long as the cumulative amount does not exceed the safe harbor. In order for this safe harbor to be clear and predictable, there should be no restrictions on the types of uses that end-users may make. Moreover, this harbor must extend to any musical composition underlying a ten-second sound recording, with an important caveat: just as an end-user can take no more than ten seconds from a single recording, she can take no more than ten seconds embodying any particular musical composition.[143]

At the same time, though, this safe harbor could allow for the recreation of more than ten seconds of a work that itself incorporates protected material. Take, for example, Eminem's "Stan,"[144] which heavily samples Dido's "Thank You."[145] An artist would be free to take ten seconds from "Thank You" as well as ten seconds from "Stan," so long as the ten seconds taken from "Stan" did not also contain any portion of the "Thank You" sound recording. Placing the two portions back-to-back might theoretically replicate twenty seconds of "Stan," yet the work would remain within the safe harbor.

[142] For a discussion of the applicability of fair use to haiku, see Posting of David A. Giacalone to f/k/a, Haiku and the Fair Use Doctrine, http://blogs.law.harvard.edu/ethicalesq/haiku-and-the-fair-use-doctrine/ (Jan. 16, 2004, 16:57 EST).

[143] For example, one might wish to contrast the studio recording of "Maggie's Farm" that Bob Dylan released on *Bringing It All Back Home* (Columbia Records 1965), with the faster, more controversial version performed that year at the Newport Music Festival (and captured by Martin Scorsese in the documentary *No Direction Home* (Paramount Pictures 2005)). Under the safe harbor, one could copy five seconds from each, or any other combination of the two, so long as the finished work contained no more than ten total seconds worth of appropriation embodying the "Maggie's Farm" musical composition.

[144] Eminem, Stan, *on* The Marshall Mathers LP (Interscope Records 2000).

[145] Dido, Thank You, *on* Sliding Doors: Music from the Motion Picture (MCA 1998).

This aspect of the safe harbor has some interesting implications for collage. Take the case of a collage artist, who assembles a string of ten-second clips from ten different sound recordings. Could anyone copy that entire one-hundred-second work and fall within the safe harbor? The answer is no. The key is to realize that these ten-second clips should be treated like public domain materials: there is no copyright protection in them individually, but someone who assembles them nevertheless maintains copyright protection in their selection and arrangement.[146]

This proposal would shift the established order far more than the literary works proposal. In the absence of a fair use exception, the music sampling market has grown more sophisticated,[147] and ringtones for cellular phones have become a substantial source of revenue for the record labels.[148] Yet it does not appear that protecting these short samples is necessary to foster the creation of new musical works. To the contrary, their dissemination appears to aid musical sales.[149]

Nevertheless, we are cognizant of the fact that this aspect of our proposal is likely to meet substantial resistance, and so we note that it could be modified to protect ringtones by incorporating a second baseline, such that the safe harbor would not apply to new musical works that consist of more than ten percent copied material. This would significantly limit the safe harbor's utility for collage artists and music samplers, but it would substantially reduce the viability of safe harbor works as market substitutes for ringtones.

3. Audiovisual Works (I)

For audiovisual works, we propose a safe harbor that would allow users to reproduce the lesser of ten percent or thirty seconds of any pro-

[146] See 17 U.S.C. §§ 101, 103 (2000); see also Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 350–51 (1991); Key Publ'ns v. Chinatown Today Publ'g Enters., 945 F.2d 509, 514–16 (2d Cir. 1991).

[147] David W. Opderbeck, Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation, 20 Berkeley Tech. L.J. 1685, 1743 (2005) ("The music sampling market is beginning to mature as licensing terms become standardized and royalty-free sample content fills a market niche.").

[148] In 2005, for example, sales of ringtones in the United States exceeded $600 million. Jeff Leeds, The Loudest Ringtone: Hello? It's 50 Cent Calling Collect, N.Y. Times, Dec. 25, 2005, at AR2.

[149] Paul R. La Monica, Ringtones: The Sound of Money, CNNMoney.com, Apr. 12, 2006, http://money.cnn.com/2006/04/12/commentary/mediabiz/ ("[M]usic executives say that ringtones serve as a marketing tool that can help lift sales of singles and albums.").

tected work.[150] The nature of this medium necessitates certain restrictions. Without any limitations, one could take, say, an image of Mickey Mouse from a single frame of *Fantasia*,[151] transfer it onto T-shirts or hats, and directly compete with Disney's clothing line. For this reason, we propose limiting the safe harbor to appropriations into other audiovisual works. Thus, an artist could take thirty seconds from *Fantasia* and incorporate it into her own film, but not into a children's book.

Some might object to this safe harbor on the ground that it would negatively impact, for example, sports leagues that currently license highlights to news broadcasts and later package that same footage into "Best Moments" DVDs.[152] While this safe harbor might allow for some competition in the derivative works marketplace, we do not believe that allowing thirty-second clips to be used, either alone or in montage format, would act as a market substitute for the sporting events themselves, nor do we suspect that they would substantially undermine the incentive to create new works.[153]

Digital editing presents a related, yet different, challenge. In *Forrest Gump*, for example, director Robert Zemeckis altered preexisting footage of historical events to make it appear as though Tom Hanks were interacting with Elvis Presley, John F. Kennedy, and Richard Nixon.[154] Similarly, filmmakers have taken thirty-second clips from preexisting footage to make it appear as if Fred Astaire were using a Dirt Devil and John Wayne were drinking a Coors.[155] Employing similar techniques, someone could theoretically cull thirty-second clips from the approximately one hundred films featuring Samuel L. Jackson[156] and then digi-

[150] While some might argue with this amount on the grounds that copying thirty seconds from a film could, for example, reveal a major plot twist, we do not find this concern compelling, as critics already have the ability to act as "spoilers" under the current framework. See, e.g., Michael Blowen, The Bickering Game, Boston Globe, Mar. 23, 1993, at 54 (describing critic Gene Siskel's on-air revelation of the plot twist to *The Crying Game*).

[151] See The Sorcerer's Apprentice, *in* Fantasia (Walt Disney Pictures 1940).

[152] See, e.g., The NFL's Greatest Hits (NFL Films 1992).

[153] But see New Boston Television v. Entm't Sports Programming Network, 215 U.S.P.Q. 755, 757–58 (D. Mass. 1981) (rejecting a fair use defense and issuing a preliminary injunction against the use of sports highlights during news broadcasts).

[154] Forrest Gump (Paramount Pictures 1994).

[155] See Leora Broydo, Attack of the Celebrity Vacuum-Cleaner-Salesman Ghouls, Salon, July 8, 1997, http://www.salon.com/july97/media/media970708.html.

[156] See The Internet Movie Database Filmography of Samuel L. Jackson, http://imdb.com/name/nm0000168/ (last visited May 15, 2007) (listing the actor's film and television appearances).

tally edit the materials to create a single, coherent narrative. Obviously, there are certain practical limitations to this technique, but it does not seem fanciful to suppose that someone could draw short film and sound clips from the 400 episodes of *The Simpsons*,[157] combine them with original drawings and/or sound dubbing that does not infringe copyright, and produce a market substitute for a new episode.[158]

Our solution to this problem? Do nothing. Many of the concerns with such scenarios are already addressed by other aspects of copyright[159] and by other areas of the law generally (most notably trademark, unfair competition, and right of publicity).[160] But if no other laws are violated, copyright should not stand in the way of the creative manipulation and reuse of existing materials.[161]

4. Audiovisual Works (II)

We propose an additional audiovisual safe harbor that expands upon the first: anyone may include in an audiovisual work any architectural, choreographic, or pictorial work, so long as that work is not displayed

[157] See, e.g., Benjamin Toff, 'Simpsons' Milestone Boosts Ratings, N.Y. Times, May 22, 2007, at E2 (noting that 400 episodes of *The Simpsons* have been produced).

[158] The National Lampoon used a similar process to create "The Lost Episode" of *Seinfeld*. The Lampoon crafted a new narrative arc by weaving together scenes from the *Seinfeld* television program with the infamous video of Michael Richards' racist tirade during a stand-up comedy performance. See Greg Connors, Keeper of the Comedy Flame, Buffalo News, Feb. 4, 2007, at M11.

[159] For example, copyright law already extends independent protection to fictional characters. See, e.g., Gaiman v. McFarlane, 360 F.3d 644, 660–62 (7th Cir. 2004) (noting that fictional characters are independently copyrightable); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753–55 (9th Cir. 1978) (holding that Disney characters such as Mickey and Minnie Mouse are copyrightable as distinct entities); Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 432–34 (2d Cir. 1940) (holding that the character of Superman was infringed by the similar "attributes and antics" of the Wonderman character). Although the Ninth Circuit once notoriously held that Dashiell Hammett's detective Sam Spade was not copyrightable as a distinct character, Warner Bros. Pictures v. CBS, 216 F.2d 945 (9th Cir. 1954), that decision has been roundly criticized and effectively overturned. See *Gaiman*, 360 F.3d at 660 ("The Ninth Circuit has killed the [Sam Spade] decision, see Olson v. National Broadcasting Co., 855 F.2d 1446, 1452 and n.7 (9th Cir. 1988); Walt Disney Productions v. Air Pirates, supra, 581 F.2d at 755 and n.11, though without the usual obsequies . . . .").

[160] See generally Bela G. Lugosi, California Expands the Statutory Right of Publicity For Deceased Celebrities While Its Courts Are Examining the First Amendment Limitations of that Statute, 10 DePaul-LCA J. Art & Ent. L. 259, 261, 275, 278 (2000).

[161] Furthermore, some content owners have concluded that permitting such uses is beneficial to their own interests. See, e.g., Slicing, Mashing Shows OK with CBS, Chi. Sun-Times, Jan. 10, 2007, at 61.

for more than thirty seconds and provided those thirty seconds comprise no more than ten percent of the new work.[162] We do not draw any distinction between a "featured" display and a "background and montage" display[163]—to ensure clarity and predictability, any use would be permitted.

This proposal is likely to be significantly more controversial than the preceding proposals. It would allow, after all, for one hundred percent of these works to be copied. Yet, in the case of visual works, it is often difficult to make many productive uses of less than the entire work.[164] Thus, we have proposed a safe harbor designed to facilitate effective use of these works, although we suggest several limitations to prevent potential abuses.

Take the following hypothetical: A photographer arranges three *Peanuts* comic strips so that they fill the panel on a single frame of film, then places three more strips on a second frame, and so on, until she places the last of 2,160 strips on the 720th frame. Played at the standard rate of twenty-four frames per second,[165] the entire film would last thirty seconds. Yet one could also pause the film and watch it frame by frame, making it effectively a *Peanuts* e-book containing nearly six years' worth of strips.

While this may strike some readers as problematic, it is difficult to distinguish this scenario from the case of an end-user copying thirty seconds from an animated film. In that case, the end-user copies 720 (or more) frames from an existing work, even though each frame contains a distinct (and independently copyrightable) drawing.

---

[162] The ten percent maximum is employed to prevent certain scenarios from falling within the safe harbor, such as the conversion of a single photograph into a thirty-second short film set to repeat over and over again, making it virtually indistinguishable from a digital image.

[163] Cf. 37 C.F.R. § 253.8 (2006) (setting the royalty rates for the use of pictorial works by public broadcasting entities, with varying rates depending on whether the use of a work is designated a "featured" display or a "background or montage" display).

[164] See Tushnet, supra note 27, at 588 ("Requiring complete or near-complete copying to find infringement would be most helpful with literary works and least helpful with visual works, which often need to be shown in full for 'quotation' to be effective."); see also Crews, supra note 110, at 634 (noting that "[t]he use of visual images . . . will most likely require the entire work, a fact that most often weighs against fair use").

[165] It is worth noting that digital compression allows for the creation of works that contain many more than twenty-four frames per second. See, e.g., Candus Thomson, Speed and Danger Rise; Falls, Injuries are Accumulating at the Winter Games, Balt. Sun, Feb. 15, 2006, at 1A (noting that NBC's Olympic coverage used a camera that captured two thousand frames per second).

Our solution is to create a separate cap for visual works, including serialized or sequential art. To fall within the safe harbor, an end-user may not copy more than three visual works of art that are part of a single sequence or series, or feature the same copyrighted character. The key to making this limitation work is finding a useful way to distinguish copying 720 frames of *Peanuts* comic strips, which are intended to be viewed separately and which should not fall within the safe harbor, from copying 720 frames worth of Mickey Mouse images, which are intended to be viewed as a single cartoon and to which the safe harbor should apply. Here, the Copyright Act comes to our aid. The Act defines the visual portion of "audiovisual works" as "consist[ing] of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment."[166] Applying this definition to the work being copied would allow the safe harbor to capture films, including animation, while excluding comic strips, graphic novels, or a series of paintings or photographs.

A separate but related concern is that this safe harbor would unfairly burden certain media and certain types of works. For example, while a newspaper would need to license a photograph to use alongside a story, a television broadcast could run the same image for free (for up to thirty seconds). An Internet news site, meanwhile, might string together a slide show containing the ten best photographs on the subject. One way to address this issue would be to resuscitate the "fresh news" rationale of *International News Service v. Associated Press*[167] and require a one-year postpublication moratorium before pictorial works are eligible for this particular safe harbor. While this is far from a perfect solution, we believe that it would not unduly undermine the incentive effect of copyright law; that is, the ability to make fleeting use of images after one year should not substantially erode the incentive to create new works.

D. Implications

Implementation of our proposed safe harbors—modest though they may seem to some—is likely to have far-reaching implications for the real world. Such implementation would secure the practice of incorporating brief quotes from preexisting literary works into new ones, allowing Professors Brandenburger and Nalebuff to quote a line from "Sym-

[166] 17 U.S.C. § 101 (2000).
[167] 248 U.S. 215, 235, 245–46 (1918).

pathy for the Devil" without fear of legal reprisal. Likewise, it would legitimize the art of sampling[168] and provide greater freedom to a wide variety of creators, from the authors of trivia games[169] to collage artists and documentary filmmakers.[170] As we have seen, these artists often seek to appropriate only small amounts of expression that nevertheless constitute a significant contribution to their new works. Without a robust and predictable fair use doctrine, however, they are left with little choice but to secure permission for their use of the material, often from multiple copyright owners, and their efforts are easily thwarted by high transaction costs or strategic holdups. Safe harbors invert the system, guaranteeing protection for the most fundamental acts of appropriation.

The proposed scheme would also shelter users who inadvertently or unconsciously reproduce small amounts of protected expression. A brief display of a protected quilt, poster, or a photograph in a film or a television series[171] would not give rise to liability so long as it fell within a safe harbor. This change would be especially significant for the new generation of YouTube authors, who are generally unaware of the minutiae of copyright law. We are not suggesting that widespread ignorance of the law justifies changing it but rather that the law should recognize and facilitate these flourishing new forms of expression that make modest uses of preexisting material.

Furthermore, our proposal would also reduce the problem of ideological refusals and copyright misuse. Content owners often use restrictive licenses and the threat of litigation to censor certain types of commentary[172] or critical reviews.[173] With safe harbor protection, so long as the

[168] Cf. Bridgeport Music v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004) ("Get a license or do not sample.").

[169] See, e.g., Castle Rock Entm't v. Carol Publ'g Group, 150 F.3d 132, 135, 146 (2d Cir. 1998) (concluding that a *Seinfeld* trivia book was not protected by fair use). While the safe harbor would apply to trivia questions that directly quote particular lines of dialogue, it would have little application to instances where the material copied is not words but broader concepts.

[170] See supra notes 19–20 and accompanying text (discussing the struggle to secure the rights necessary to broadcast the documentary *Eyes on the Prize*).

[171] See, e.g., Ringgold v. Black Entm't Television, 126 F.3d 70, 71–73, 81 (2d Cir. 1997) (finding that the use of a pictorial work that appeared on screen for less than thirty seconds was not so clearly fair use as to sustain defendant's motion for summary judgment).

[172] See, e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1282, 1282 n.6 (11th Cir. 2001) (Marcus, J., concurring) (noting that the Margaret Mitchell estate refuses to license *Gone With The Wind* to derivative works that deal with miscegenation or homosexuality). DC Comics is notoriously zealous in suppressing any suggestion of Batman and Robin as lovers. See, e.g., Jeet Heer, Pow! Wham! Permission Denied!, Lingua Franca, Mar. 2001,

amount taken falls within the prescribed limits, users would be free to reproduce expression for any purpose.

Looking forward, the adoption of fair use harbors may enable a more limited version of Google Book Search.[174] Although the full-scale copying of entire books would remain beyond the bounds of our safe harbors, our proposal would guarantee Google the right to display, in response to users' search requests, segments not exceeding three hundred words from any literary work posted on the Internet now or in the future.

But what would be the effect of our proposal on the production of new works? The short answer is that the implementation of safe harbors is unlikely to significantly chill the incentive to create new books, songs, and films. The safe harbors we propose should have a rather minimal effect on the revenues of most copyright owners. Many of the uses we seek to protect are of relatively small value, such that, given positive transaction costs, users would generally choose to forgo them rather than negotiate a license. Second, even if content owners could collect payment for some of the uses that fall within the safe harbors, it may not be socially desirable to let them do so.[175]

Formalization of our scheme would have a small negative effect on the income of most current copyright owners, but at the same time it would decrease the cost of creating new works by allowing creators to reproduce limited amounts of protected expression for free. If Professor Larry Lessig is correct that contemporary culture develops incrementally and incorporation of preexisting material is emerging as the new mode of production,[176] then the establishment of safe harbors would actually increase production and enrich the pool of creative expression.

at 21, 21–22; Gallery Told to Drop 'Gay' Batman, BBC News, Aug. 19, 2005, http://news.bbc.co.uk/1/hi/entertainment/arts/4167032.stm.

[173] See, e.g., Ty, Inc. v. Publ'ns Int'l, 292 F.3d 512, 520 (7th Cir. 2002) (noting that the manufacturer of Beanie Babies attempts to stifle criticism by requiring, in exchange for a license to publish Beanie Baby photographs in a collector's guide, the right to veto any text in the book).

[174] See supra notes 21–22 and accompanying text (discussing Google Book Search).

[175] See supra notes 147–149 and accompanying text (discussing music sampling and ringtones).

[176] Lessig, supra note 35, at 37–38; see also Yochai Benkler, Coase's Penguin, or, Linux and *The Nature of the Firm*, 112 Yale L.J. 369, 374 (2002) (discussing the value of large-scale collaborations in information production).

E. Salvaging Fair Use in the Digital Age

The Digital Millennium Copyright Act ("DMCA")[177] effects an important shift in the traditional balance of copyright law by prohibiting users from circumventing Technological Protection Measures ("TPMs")[178] employed by copyright holders to protect content. The use of TPMs is ubiquitous: DVDs, CDs, and downloadable files are regularly encrypted to prevent their duplication.[179] The anticircumvention provisions of the DMCA do not contain a fair use exception; Congress consciously decided not to allow circumvention even for the purpose of making a fair use of protected material.[180]

We suggest one final application of these fair use safe harbors: a requirement, imposed by Congress, that TPMs allow a single, portion-limited fair use of any protected work. This is perhaps the most radical of our suggestions, insofar as it seeks to create a previously nonexistent partial "right" to fair use in the digital context.

Under the current copyright framework, fair use is properly characterized as a Hohfeldian "privilege" rather than as a "right."[181] That is, the public is free to make fair uses of protected works, but rightsholders owe no affirmative "duty" to make their works available for such uses.[182] So, for example, a playwright cannot stop a critic from writing a scathing review of her play,[183] but she is under no obligation to provide the critic with tickets to a performance. Indeed, that playwright could choose to

[177] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in part at 17 U.S.C. §§ 1201–1205 (2000)).

[178] This is also referred to as Digital Rights Management ("DRM"). See, e.g., Edited & Excerpted Transcript of the Symposium on the Law & Technology of Digital Rights Management, 18 Berkeley Tech. L.J. 697, 760 (2003). But see Brad Stone & Jeff Leeds, Amazon to Sell Music Without Copy Protection, N.Y. Times, May 17, 2007, at C1 (discussing the growing trend of distributing digital music files without encryption).

[179] In some cases, the content distributors go to extreme lengths to ensure the material cannot be copied. See, e.g., Joe Morgenstern, The Screens Have Eyes, Wall St. J., Dec. 10–11, 2005, at P3.

[180] See 17 U.S.C. § 1201(c); see also H.R. Rep. No. 105-551, pt. 2, at 86 (1998) (discussing the rejection of "an equivalent fair use defense").

[181] See Hohfeld, supra note 56, at 30.

[182] See Johnstone, supra note 56, 368–70 (analyzing fair use in Hohfeldian terms).

[183] Assuming, of course, that the critic's review otherwise meets the requirements of fair use.

bar a critic's access to the work by any number of legal means,[184] and fair use would provide the critic with no recourse.

This dichotomy is perhaps seen most clearly in the context of the DMCA.[185] The DMCA sought to facilitate the use of TPMs as effective tools to prevent copyright infringement by creating civil and criminal penalties for their circumvention.[186] The statute, by its own terms, does nothing to alter the fair use framework;[187] nevertheless, its effect is to virtually negate fair use with respect to many works offered in digital media.[188] This is, of course, consistent with the Hohfeldian framework. Content users are still free to make fair use of protected materials, if they can independently obtain access to them. But they have no right to circumvent protection measures, just as theatre critics have no right to sneak into a playhouse by breaking open the back door.

Commentators have harshly criticized the anticircumvention provisions of the DMCA, citing concern over the potential chilling effect of the legislation on free speech and especially on the ability of content owners to eliminate certain forms of fair use.[189] These concerns are well founded.

The problem is that until now there seemed to be no viable alternative. The opposite solution—permitting circumvention for fair use purposes—would in all likelihood throw copyright's balance off in the other direction. Creating a statutory exception that gives content users the ability to circumvent TPMs for any fair use purpose may open the floodgates for mass infringements. The reason for this is straightforward: ex ante, there is no effective way to distinguish the true fair users from the spurious ones. Likewise, there is no ex ante test capable of

[184] For example, the playwright could prohibit the use of photography to capture the performance, even if the film would be used solely for fair use purposes.

[185] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in part at 17 U.S.C. §§ 1201–1205 (2000)).

[186] See 17 U.S.C. § 1201; see also Sharon R. King, Consumers Still Seem Resistant to Some New High-End Electronics, N.Y. Times, Mar. 8, 1999, at C1 (noting that several motion picture studios held off on releasing their most popular titles in DVD format, for fear that the copy protection would be circumvented).

[187] See 17 U.S.C. § 1201(c)(1) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.").

[188] See, e.g., Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1, 80–81 (2001).

[189] See, e.g., Electronic Frontier Foundation, Unintended Consequences: Seven Years under the DMCA 1 (2006), available at http://www.eff.org/IP/DMCA/DMCA_unintended_v4.pdf.

evaluating the intended use that would allow fair uses to occur while still preventing those that are improper. Thus, any system that enabled circumvention for possible fair uses would inevitably permit substantial unfair uses as well.

Our proposed safe harbors present an opportunity to revive fair use with respect to content stored in digital media and thereby reinstate the balance between content owners and users. Under our proposed system, there would be no difficulty establishing a system that permitted end-users to make certain fair uses of protected works. Therefore, Congress could mandate that content providers employ TPMs that enable end-users to access the minimal amounts of protected material that the safe harbors would otherwise allow. To prevent repeated application of the safe harbor as a means of engaging in potentially unfair uses—for example, copying an entire film in thirty-second increments—the TPMs should be designed to permit a single safe harbor-sized appropriation of any particular copy of a work. Thus, someone who purchases a new *Blade Runner* DVD[190] would be able to copy any thirty-second segment, but after that initial appropriation, the TPMs could bar any additional copying over the lifetime of the disc.

It is important to note that this proposal would not alter the current DMCA framework; all it requires from Congress is the reclassification of fair use as a Hohfeldian right and the imposition of a corresponding duty on content distributors to create a limited right of access. Such a move is not entirely without precedent. Congress has promulgated similar TPM carve-outs in other contexts. For example, the DMCA prevents copyright owners and/or content distributors from encrypting television broadcasts in a manner that would prevent the public from recording them for later viewing,[191] essentially creating a Hohfeldian right to engage in the "time-shifting" that the Supreme Court had previously found to be fair use.[192]

[190] Blade Runner (Warner Bros. 1982).

[191] 17 U.S.C. § 1201(k)(2).

[192] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 444, 456 (1984) (holding that private, noncommercial time-shifting of television broadcasts is fair use). The DMCA also requires content distributors to provide authorized transmitting organizations (such as radio and television stations) the means to make ephemeral and archival copies of the encrypted works that they broadcast, and permits those organizations to circumvent the encryption if the content distributors fail to provide them with the means to do so "in a timely manner." See 17 U.S.C. § 112(a)(2). Another example is the Audio Home Recording Act, which requires digital audio recording devices to contain a "Serial Copy Management System" that

As with all of our proposals, this limited right of access is no magic bullet—it will not permit *all* fair uses of protected works. But it nevertheless represents a substantial improvement over the current system, which does not allow *any* fair uses (without prior approval).

III. ADDRESSING POTENTIAL OBJECTIONS

Although we have attempted to design the safe harbors narrowly, so as to minimize the risk of abuse and other ill effects, we are mindful of the fact that several objections and criticisms might be raised against our proposal. In this Part, we address several of those concerns.

A. Safe Harbors May Become a Ceiling, Rather Than a Floor

The strongest objection to the adoption of safe harbors in the past has been the fear that the safe harbors would become a ceiling, rather than a floor. This concern has led James Gibson to summarily reject the idea of safe harbors. In his words, "courts convert safe harbors into the only harbors, floors into ceilings, and minimums into maximums."[193]

It is tempting to dismiss this objection as theoretically meritless; after all, copyright holders, users, and judges are all perfectly capable of understanding the plain meaning of the language. But as Yogi Berra famously observed, "In theory there's no difference between theory and practice. But in practice, there is."[194] Take the case of the Classroom Guidelines, for example.[195] Although they purport to set a minimum, for many educators they have become a de facto maximum, because their institutions will not permit any uses that exceed them.[196]

There are several important differences between the Classroom Guidelines and our proposed safe harbors. The Guidelines came to be viewed as maximums because they were set at a substantially higher

allows end-users to make first generation copies of digital audio recordings, but encodes those copies with a tag to prevent anyone from making copies of those copies. 17 U.S.C. §§ 1001–1002.

[193] Gibson, supra note 16 (footnote omitted).

[194] This quotation may be apocryphal. Although generally attributed to Yogi Berra, it is also sometimes credited to computer scientist Jan L.A. van de Snepscheut. See Said What? Quotations: Theory Quotes, http://www.saidwhat.co.uk/bio/theory (last visited May 16, 2007).

[195] See supra notes 110–126 and accompanying text (discussing the Classroom Guidelines).

[196] Eugene R. Quinn, Jr. & Michelle Beveridge, Legal Issues in Building Course Web Sites: Copyright Law for Academics, 26 Hamline L. Rev. 83, 117 (2002).

threshold. They were negotiated, in effect, *not* to reflect a minimum level of utility, but rather as a sort of middle ground compromise. Given this status, it was easier for parties on all sides to fall into the trap of letting the floor become the ceiling.

Moreover, the Classroom Guidelines lacked the force of law and thus were not binding on courts. Without the force of law, the Guidelines became a convenient benchmark for litigation. For example, New York University, in order to settle a lawsuit filed by the Association of American Publishers, agreed to be bound by the Classroom Guidelines, not as a minimum but as a maximum.[197] This type of outcome has led some scholars to conclude that any bright-line fair use rules would pose a danger of becoming ceilings rather than floors,[198] but this sort of analysis misses the point. The extant safe harbors, despite claiming to be minimums, became maximums precisely because they *did not* carry the force of law.

Further, it is not clear how courts could alter current fair use doctrine in a direction less favorable to would-be copiers. A review of the case law reveals only a handful of bright spots for users. At this time, the only uses that seem to enjoy relative immunity from liability are parodies[199] and home videorecording for purposes of time shifting.[200] It is hard to imagine that courts would change their positions on these uses were our proposal to be adopted.

More importantly, even if the critics are absolutely correct, we still believe that *on the whole* our proposal will improve upon the current state of affairs. We concede that our safe harbors will exert something

[197] See Addison-Wesley Publ'g Co. v. N.Y. Univ., No. 82 CIV 8333 (ADS), 1983 WL 1134, at *2 (S.D.N.Y. May 31, 1983); see also Crews, supra note 110, at 641 ("For all practical purposes, the minimum standards of the original guidelines became maximum standards at NYU."); Robert A. Gorman, Copyright Conflicts on the University Campus: The First Annual Christopher A. Meyer Memorial Lecture, 47 J. Copyright Soc'y U.S.A. 291, 313 n.36 (2000) (noting that the settlement agreement in *Addison-Wesley* produced a "'chilling' effect on faculty members inclined to invoke broader fair use permissions").

[198] See, e.g., Crews, supra note 110, at 697 (arguing that fair use guidelines should be flexible rather than rigid); Hillary Greene, Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse, 48 Wm. & Mary L. Rev. 771 (2006) (arguing that nonbinding guidelines are often treated in a precedent-like manner); Gregory K. Klingsporn, The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines, 23 Colum.-VLA J.L. & Arts 101, 122 (1999) (arguing that "fair use guidelines should be primarily a statement of principles" and that the current system "encourages [the use of clearly defined examples of fair use] as a maximum rather than a minimum standard").

[199] See Campbell v. Acuff-Rose Music, 510 U.S. 569, 572 (1994).

[200] See Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 421 (1984).

akin to a gravitational force on end-users. To picture this, imagine Artist *A* as she contemplates the inclusion of a short film clip in her new multimedia work. Under the current system, she might decide to incorporate thirty-five seconds and hope that the use would be found fair. Under our proposed system, she would have a strong incentive to limit that clip to thirty seconds. We submit, however, that for every Artist *A* who decides to limit her copying to within the safe harbor limits, there will be Artists *B* through *Z* who would make fair uses that they would have otherwise foregone for fear of litigation. To understand this more clearly, the key is to see that in the current framework, the gravitational pull is towards *no* use or licensing. Safe harbors would essentially shift the center of gravity, pulling down some Artist *A*-types, while pulling up far more Artist *B*- through *Z*-types. Thus, the sum total of fair uses would be far greater within a safe harbor system.[201]

Our proposed safe harbors also run the risk of a different pitfall: becoming a victim of their own success. Courts have sometimes looked at the traditions and customs of the copying community to help determine whether a particular use is fair.[202] Although not part of the literal wording of the statute, this sort of analysis draws on the view, most closely associated with David Hume, that the law should mirror popular practices and understandings.[203] It follows, then, that if the safe harbors ex-

[201] Cf. Gibson, supra note 16, at 887–906 (discussing the problem of "doctrinal feedback" in copyright law, which encourages some copyright users to apply for licenses even when their intended use of copyrighted material would be a fair use and discourages others from attempting to use the copyrighted material at all); Wagner, supra note 66, at 426–29 (noting the increasing uncertainty among copyright users regarding whether their intended use will be protected by the fair use doctrine).

[202] See, e.g., Harper & Row, Publishers, v. Nation Enters., 471 U.S. 539, 593 (1985) (Brennan, J., dissenting) ("The Nation's stated purpose of scooping the competition should under those circumstances have no negative bearing on the claim of fair use. Indeed the Court's reliance on this factor would seem to amount to little more than distaste for the standard journalistic practice of seeking to be the first to publish news."); Lee v. A.R.T. Co., 125 F.3d 580, 581 (7th Cir. 1997) (noting that "framing and other traditional means of mounting and displaying art do not infringe authors' exclusive right to make derivative works"); Triangle Publ'ns v. Knight-Ridder Newspapers, 626 F.2d 1171, 1176 (5th Cir. 1980) (giving weight to the fact that the alleged infringement took the form of "a comparative advertisement done in a manner which is generally accepted in the advertising industry").

[203] See William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1659, 1692 (1988) (noting the "tradition emphasizing the limited power of the positive law and the degree to which it must and should track customs and popular understandings—a tradition whose most insightful exponent was David Hume"); see also H.L.A. Hart, The Concept of Law 44–48 (2d ed. 1994) (discussing the role of custom in shaping law); David

hibit a sufficient gravitational pull, courts might later conclude that staying within the harbors represents the community norm and that exceeding them violates the customary practice, thus weighing against a finding of fair use.[204]

It is precisely this fear that has motivated, in part, the recent movement to encourage documentary filmmakers to make more fair uses in order to establish certain practices more clearly as a tradition within the community.[205] In the context of our proposed safe harbors, however, we think that this fear is exaggerated: it simply does not follow that the addition of safe harbors would lead to the demise of more robust fair uses. Analysis that relies on industry practices is unlikely to be so myopic as to disregard the existence of a range of uses, and, as now, litigants would be able to inform courts of the various practices that continue to exceed the proposed safe harbor thresholds.

B. De Minimis

A second potential criticism of our proposal is that it is unnecessary in light of the de minimis doctrine. The doctrine forgives technical violations of the law where the impact of the transgression is so trivial as to be essentially nonexistent.[206] Readers familiar with the application of the doctrine to copyright law know that this argument misses the mark.

The failing of de minimis is that, like fair use itself, it has become a vague and unpredictable standard. Courts have applied the doctrine in a highly inconsistent fashion, reaching widely divergent results. Moreover, judges evaluate a claim of de minimis copying not just for the quantitative amount of material copied, but also for the qualitative amount: if the material represents the "heart" of the work, then a court

Hume, A Treatise of Human Nature 484–513 (Prometheus Books 1992) (1739) (discussing the role of custom in property law).

[204] Cf. Hirtle, supra note 101, at 549 (noting that the Gentlemen's Agreement, despite its origins as a voluntary guideline, came to be viewed "as a defacto [sic] cap on the extent of acceptable reproduction by librarians and researchers").

[205] Ass'n of Indep. Video & Filmmakers et al., Documentary Filmmakers' Statement of Best Practices in Fair Use 1 (Nov. 18, 2005), available at http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf ("Fair use is shaped, in part, by the practice of the professional communities that employ it.").

[206] See, e.g., On Davis v. The Gap, Inc., 246 F.3d 152, 172–73 (2d Cir. 2001) (discussing the de minimis doctrine); Ringgold v. Black Entm't Television, 126 F.3d 70, 74–76 (2d Cir. 1997) (same).

will be far less likely to find that the copying was fair or de minimis.[207] Content users cannot know, ex ante, how this open-ended evaluation may turn out. More to the point, normatively, content users should be allowed to make minor appropriations, even from the qualitative "heart" of a work. Our safe harbors would allow this usage in a manner that the de minimis doctrine clearly does not.

A further problem with the de minimis doctrine is that it has been construed so narrowly in copyright cases as to render it virtually meaningless. As Rebecca Tushnet has noted, many of the important types of uses *require* that the audience be able to recognize the material being copied.[208] Yet "a taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize the appropriation."[209] As a result, de minimis will never be available to end-users seeking to quote a short passage from a book or to play a brief scene from a film.

For all these reasons, the de minimis doctrine does not provide a real alternative to our proposal. As it stands, the doctrine serves no substantive function in sheltering users from liability. Due to its narrow construction, the doctrine has become a dead letter. Hence, there would be nothing lost if it were to be supplanted by our proposal.

C. Strategic Abuse

A further concern that might be raised against our proposal is that it is susceptible to strategic abuse. To illustrate, consider the proposed safe harbor for video clips. If the appropriation of any thirty-second segment is a per se fair use, then an individual could post the first thirty seconds of a film on her web page and make it available to download. Another individual could then post the next thirty seconds, and so on.[210] In this manner, the entire film could be posted online, with little the copyright

[207] See *Harper & Row*, 471 U.S. at 548, 564–65 (finding that the three to four hundred words copied constituted the "heart" of the original work); Dun & Bradstreet Software Servs. v. Grace Consulting, 307 F.3d 197, 208 (3d Cir. 2002) (finding that de minimis did not apply to the copying of twenty-seven lines of code from a 525,000 line program because those twenty-seven lines were of high qualitative value).

[208] Tushnet, supra note 27, at 583.

[209] Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986); see also *On Davis*, 246 F.3d at 173 (finding that "the de minimis doctrine is not applicable" because "the infringing item is highly noticeable").

[210] Arguably, this could even be done by a single individual, claiming that each segment constituted a different "work."

holder could do to prevent members of the public from obtaining the entire film and reassembling it on their own computers.[211]

This concern is not as grave as it first appears. Assembling the film would exceed the safe harbor and would clearly constitute a copyright infringement under traditional fair use analysis. Just as in patent law, which has had to deal with similar problems of strategic abuse, copyright law provides for causes of action for contributory and vicarious liability. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, the Supreme Court explicitly adopted the patent law approach and held that the active inducement of copyright infringement is actionable.[212] Accordingly, any person who would seek to coordinate the reassembly of a film, or any other work, from discrete parts (by, say, providing a list of websites where each individual piece could be located) would face potential liability.[213]

A separate but related concern is that the creation of these safe harbors would artificially alter the course of technological and artistic development. In light of the *Sony* decision, for example, file-sharing services made sure their devices were capable of "substantial noninfringing uses."[214] This suggests that if safe harbors take away a certain revenue stream, content owners will likely try adapting to recapture it. For example, television networks might make their shows available for download in one minute increments, claiming that each portion is an individual work (and thus limiting the amount that could be copied to six seconds per minute). This is not so far-fetched: writers for *The Simpsons* already build their episodes around one- to two-minute stand-alone segments designed to be posted on the Internet,[215] and Fox produced a spin-

[211] This same logic could be applied with equal force to the safe harbors for appropriating portions of literary or musical works.

[212] 545 U.S. 913, 931–37 (2005).

[213] Cf. Tegal Corp. v. Tokyo Electron Co., 248 F.3d 1376, 1378–79 (Fed. Cir. 2001) (citing Fromberg, Inc. v. Thomhill, 315 F.2d 407, 411 (5th Cir. 1963), to argue that the term "active inducement" "is as broad as the range of actions by which one in fact causes, or urges, or encourages, or aids another to infringe a patent"); *Fromberg*, 315 F.2d at 411 n.11 (quoting Anthony William Deller, Walker on Patents 1764–71 (Anthony William Deller ed., Supp. 1962), to note that active inducement includes "passing on information intending to bring about infringement").

[214] See Jennifer S. Lee, Digital Video Recorders: First, ReplayTV 4000 Must Face the Courts, N.Y. Times, Dec. 31, 2001, at C3 (noting that the makers of digital video recorders made sure that their devices were capable of "substantial noninfringing uses").

[215] Lonny Pugh, Top 10 "Simpsons" Tidbits, LA.com, Mar. 16, 2007, http://www.la.com/blog/6541437.html?month=March&year=2007.

off of the television show *24* made up of twenty-four one-minute episodes that could be downloaded onto cellular phones.[216] Such strategies may require courts to decide what constitutes the "total work," but they do not undermine the safe harbor itself. Furthermore, market forces provide an inherent limitation on the ability of content providers to manipulate their works and distribute them piecemeal.

D. The Optimal Level of Fair Use

The final potential objection we wish to address is more general. Our analysis so far has proceeded on the assumption that the current fair use regime results in too little fair use of copyrighted expression. This, of course, raises the question of what is the optimal level of fair use. Questions of optimum pose a Herculean challenge for legal theorists.[217] In the patent context, Professor William Nordhaus demonstrated that the optimal duration of patent protection balances the utility of incentives for innovation against the costs produced by monopoly-induced deadweight loss.[218] Unfortunately, determining where this balance lies in the real world has proven to be elusive. Determination of the optimal level of fair use would similarly require policymakers to analyze a host of theoretic and empirical variables. Even a purely theoretical estimation of the optimal level of fair use necessitates complex computations. Professor William Fisher, who attempted to establish a framework for such a calculus, expressed serious skepticism about the usefulness of his analysis for judges.[219]

We offer a two-pronged response to this challenge. First, as several leading copyright scholars have noted, fair use in its current form offers very little protection to speech interests. As Professor Neil Netanel observed, "[T]oday's fair use doctrine provides no more than a bare, insubstantial trace of that protection [of First Amendment interests]."[220] If we

[216] Laura M. Holson, Cellphone Content, Straight From the Creators, N.Y. Times, Feb. 27, 2006, at C1.

[217] For discussion of this challenge in a more general property context, see Abraham Bell & Gideon Parchomovsky, A Theory of Property, 90 Cornell L. Rev. 531 (2005).

[218] William D. Nordhaus, Invention, Growth and Welfare: A Theoretical Treatment of Technological Change 76–86 (1969).

[219] Fisher, supra note 203, at 1718 (cautioning that "[i]t is hard to imagine a judge making even rough guesses at some of the figures critical to the calculus").

[220] Netanel, supra note 188, at 23.

think that fair use is valuable at all in safeguarding these interests,[221] it is hard to justify a doctrine that provides protection in name only.

Second, and more importantly, we posit that our proposal is beneficial irrespective of whatever the optimal level of fair use might be. The establishment of fair use harbors would reduce the ambiguity that surrounds the current doctrine. Regardless of one's opinion on the optimal level of fair use, it is advantageous to clear the doctrine of unnecessary ambiguity. Ambiguity distorts fair use: it favors risk-seeking users and disfavors risk-averse ones. It should be noted in this regard that some commentators have estimated that most users are indeed risk averse.[222] Whether this assessment is correct is ultimately an empirical question. Irrespective of the total number, though, there is no good policy or textual reason to favor risk-seeking users.

CONCLUSION

In this Essay, we have presented the case for establishing a system of fair use safe harbors and demonstrated how this system might be implemented. The benefits stemming from our proposal are substantial. A system of safe harbors would introduce much-needed certainty into this important doctrine. It would enable users to reproduce certain quantities of copyrighted expression without fear of liability, turning many would-be users from potential infringers (or reluctant abstainers) into legitimate, productive borrowers. These changes are especially desirable in an era when an increasing amount of content is produced by laypersons outside the traditional copyright industries, and the creative culture relies on borrowing from preexisting material. The incremental nature of artistic creativity suggests that allowing limited safe harbor access to expressive building blocks may enhance, rather than retard, the production of new works.

Naturally, not everyone will benefit from the proposed change. As Judge Guido Calabresi famously observed, virtually every move from the status quo will work to someone's disadvantage.[223] Some content owners will oppose any change in the current fair use regime. Yet it is

[221] Cf. Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003) (describing fair use as a First Amendment safeguard).

[222] See Gibson, supra note 16, at 887.

[223] Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 Yale L.J. 1211, 1212 (1991).

the overall effect that should count, and that is likely to be positive. What is more, our proposal also holds the key to revitalizing fair use in the digital age, thereby restoring the intended balance of copyright law.