Copyright Reform Act

Prepared on behalf of

Report 1

Updating Fair Use for Innovators and Creators in the Digital Age: Two Targeted Reforms

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This Report is one of a series related to the Copyright Reform Act, a project created on behalf of Public Knowledge as a client of the Stanford Cyberlaw Clinic and the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law.[†]

Public Knowledge is a Washington, D.C., based public interest organization that works to protect the rights of citizens and consumers to communicate and innovate in the digital age. Ensuring these rights requires a copyright law that does not unduly restrain everyday communications or new sources of creativity, and one that can account for current and future changes in technology.

I. Introduction

In Parts I, II, and III of this first installment of our Report series, we discuss the critical role fair use plays in copyright's balance between granting exclusive rights to creators and ensuring public benefits; how fair use has changed over time in order to accommodate new technologies and social changes; and where its limitations create roadblocks to innovation and creativity. In Part IV, we propose two limited reforms, (attached hereto as Appendix A):

- Updating Section 107 to provide better guidance to courts, creators, copyright holders, and innovators on how to interpret the statute in light of new technologies and new forms of art and media by adding a limited

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Disclaimer: The Copyright Reform Act and this Report were created on behalf of Public Knowledge as a client of the Stanford Cyberlaw Clinic and the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law. The opinions in this Report do not necessarily reflect the opinions of other Clinic clients and should not be attributed to them.

(and nonexclusive) set of additional uses to its preamble; and

- Reforming Sections 504 and 505 to reduce one of the greatest barriers to making fair use of copyrighted works: fears of excessive and unpredictable statutory damages and attorneys' fees and costs. The unpredictability of these remedies can chill even the most intrepid follow-on users making the most conservative fair uses.

These reforms are limited in scope and general in application for an important reason: one of the great strengths of the American fair use doctrine is its flexibility in accommodating both new uses and new markets for copyright holders.[1] This ability to adapt and change as needed to preserve copyright's critical balance over time has been a hallmark of good copyright policy. As such, in many aspects it is most appropriate for fair use to develop through court cases and community norms,[2] which can flexibly take into account changes in technology, societal and community practices, and business models.

At the same time, fair use is frequently criticized for the tradeoff required by such flexibility: unpredictability.[3] Because it can sometimes be difficult to predict with

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[1] *See, e.g.*, Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009); Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[2] *Fair Use: Its Effects on Consumers and Industry: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Comm., Trade, and Consumer Prot.*, 109th Cong. 6 (2005) (testimony of Peter Jaszi, Professor, Washington College of Law), *available at* http://centerforsocialmedia.org/rock/backgrounddocs/testimony.pdf ("[T]he applications of fair use to particular sets of circumstances are sometimes difficult to predict. The solution to this dilemma lies not with the Congress or the courts, but with disciplinary communities (filmmakers, historians, musicians, teachers, etc.) who rely on fair use. Each such community has the opportunity to articulate their shared understanding of what constitutes a reasonable level of unlicensed quotation from copyrighted works in particular contexts."). Others have worried that this approach can lead to limitations on the doctrine. *See, e.g.*, Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007). Preserving flexibility is key to the success of community norm-based approaches.

[3] Many scholars, copyright holders, and follow-on creators have criticized the unpredictability of fair use, arguing that it puts those who believe their uses are fair in the unenviable position of having to guess at what a judge would decide. These objections

certainty whether a court will find a given use fair, and because the downside risk of high statutory damages, costs and fees is also unpredictable, follow-on creators can be prevented from making and distributing valuable works that rely on fair use.

There is no model that can completely remove unpredictability from a flexible system, though proper understanding of caselaw[4] and community norms[5] can help. This Report focuses on another important method for increasing predictability without unduly sacrificing flexibility: Congress can update the general Section 107 framework with targeted changes that promote consistency across jurisdictions, diminish key chilling effects on fair use, and increase efficiency by limiting the need for litigation, without putting in place specific parameters that might limit the flexibility of the doctrine over time. We have focused our suggested reforms on Congress' ability to achieve these goals.

II. Fair Use's Central Role in Copyright Policy

Fair use plays at least three central roles in copyright policy: first, balancing incentives to create original works with the benefits that flow from encouraging follow-on creators to build on those works; second, creating opportunities for innovation in products and services that use, distribute, or perform copyrighted materials; and third, the independent preservation of First Amendment rights,[6] and free expression values generally,[7] in copyright.

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can be summarized by Lawrence Lessig's memorable characterization of fair use as "the right to hire a lawyer." LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004).

[4] *See* Samuelson, *supra* note 1, at 3; see also Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 554 (2008).

[5] *See, e.g.*, Center for Social Media: Fair Use & Copyright, http://www.centerforsocialmedia.org/resources/fair_use/ (last visited Feb. 8, 2010) (providing guides that describe community-based best practices for creators, educators, and researchers).

[6] Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003) (characterizing fair use as providing "traditional First Amendment safeguards").

Copyright's exclusive rights provide an important incentive to creation. But if creators were not able to build on what came before—if Picasso could not refer to El Greco, [8] if Laurents and Sondheim could not turn *Romeo and Juliet* into *West Side Story*, [9] and if Alice Randall could not give a slave's perspective to *Gone with the Wind* in *The Wind Done Gone*,[10] we would all be worse off. Justice Story's description of follow-on uses in 1845 is still fresh today: "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."[11] Thus, the proper balance of incentives between original works and follow-on works is a critical part of copyright policy, and one that fair use plays a central role in conducting.

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[7] *See, e.g.*, *id.* and Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[8] *See* Susan Sinclair, *Viewing El Greco*, ART HISTORY, June 2004, at 462 (stating that "El Greco's liberation of form, light and colour inspired artists such as Pablo Picasso" and that "Picasso drew inspiration from *The Opening of the Fifth Seal* for the *Desmoiselles d'Avignon*").

[9] *See* Ryan J. Merrill, *Star Cross'd Lovers in Song and Verse: An Interdisciplinary Engagement with* Romeo and Juliet *and* West Side Story, 26 INTERDISCIPLINARY HUMANITIES 101, 103 (2009) ("Arthur Laurents, while writing the book for [West Side Story], was very consciously remaining true to the plot of Shakespeare's play.").

[10] *See* Jeffrey D. Grossett, *The Wind Done Gone*: Transforming Tara into a Plantation Parody, 52 CASE W. RES. L. REV. 1113, 1113 (2002) (" [*The Wind Done Gone*] begins by retelling the *Gone with the Wind* story from the perspective of an illegitimate mulatto slave, Cynara.").

[11] Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436). Allusion and reworkings of existing material are, of course, central to literature and art. As an example of this recognition in the popular press, in her *New York Times* review of *The Wind Done Gone*, book critic Michiko Kakutani gathers a list of high-profile works based on other texts, ranging from James Joyce's *Ulysses* to the 1995 movie "Clueless," loosely based on Jane Austen's *Emma*. Michiko Kakutani, *Critic's Notebook: Within Its Genre: A Takeoff On Tara Gropes For A Place*, N.Y. TIMES, May 5, 2001, at B9, *available at* http://www.nytimes.com/2001/05/05/books/critic-s-notebook-within-its-genre-a-takeoff-on-tara-gropes-for-a-place.html.

Just as important as copyright's role in supporting creativity is its role in innovation in technologies and services related to copyrighted goods.[12] If technologies like the iPod, YouTube, or, famously, the VCR[13]—an innovation that created new revenues for the copyright industries and forever changed the public's experience of television and movies—were not developed because their inventors feared copyright liability, then the incentive value created by copyright would quickly be outweighed by the roadblocks to innovation and creativity it put into place. In Justice Brennan's words, "The copyright laws serve as the 'engine of free expression' only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas."[14] Fair use is a valuable contributor to this engine, and companies that rely upon it—such as consumer device manufactures, software developers, and Internet platform providers—are extremely productive contributors to the economy. A recent whitepaper published by the Computer & Communications Industry Association trade group finds that in 2006 the "fair use industries" generated $4.5 trillion in revenue, and generated an estimated $194 billion in exports.[15] As copyright scholar Peter Jaszi noted in testimony before the House of Representatives, "[fair use] functions as a kind of secret weapon in support of U.S. competitiveness in the international competitive marketplace."[16]

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[12] *See* Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 831 (2008) ("[F]air use, insofar as it represents legal tolerance for private copying, plays an important and underappreciated role in U.S. technology and innovation policy, particularly in that it draws investment to technologies that are complementary goods to copyrighted works.").

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

[14] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589 (1985) (Brennan, J., dissenting) (internal citations omitted).

[15] THOMAS ROGERS & ANDREW SZAMOSSZEGI, CAPITAL TRADE, INC., FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 7-8 (2007), *available at* http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf.

[16] *Hearing*, *supra* note 2, at 4.

Limitations and exceptions to copyright—especially the broad and flexible fair use doctrine[17]—are thus a key to its success as an incentive system, and are critically important to fulfilling the Constitution's mandate that intellectual property "promote the Progress of Science and useful Arts."[18] Unsurprisingly given its importance to copyright's policy goals, fair use has a long and dynamic history in Anglo-American copyright jurisprudence—the Copyright Act's recognition of fair use echoes Justice Story's influential description of fair use more than 130 years earlier in *Folsom v. Marsh* (1841),[19] and scholars have located fair use or similar doctrines dating back nearly 300 years, to the time of the Statute of Anne.[20] At the same time, fair use has retained its vitality and importance through the years. Since the last major revision to the Copyright Act, in 1976 ("the '76 Act"), the Supreme Court and federal appellate courts have regularly[21] reaffirmed, delineated and expanded the "fair use doctrine's guarantee of breathing space within the confines of copyright."[22]

Congress recognized the judicially created doctrine of fair use in the statute for the first time in the '76 Act, following the courts in eschewing a specific definition. Instead, Congress followed Justice Story's lead, and adopted a short descriptive preamble and four general factors the courts must consider in deciding whether a use is "fair." In its entirety, Section 107 (the fair use provision), reads:

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[17] American copyright law is unusual in the breadth of its "fair use" provision. Other countries do have limitations protecting socially beneficial uses, but they tend to enumerate specific protected activities rather than using a generalized standard. Samuelson, *supra* note 1, at 2540 n.17 (citing Council Directive 2001/29/EC, art. 5, On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10).

[18] U.S. CONST., art. I, § 8, cl. 8.

[19] *See* 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) ("In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

[20] *See generally* WILLIAM PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995).

[21] Professor Beebe counted 306 published fair use decisions from federal courts issued in the time period between January 1, 1978 (when the '76 Act took effect) and 2005. Beebe, *supra* note 4, at 564-65.

[22] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In subsequent years, courts have regularly updated their application of the doctrine, using this flexible statutory framework, to reflect changing technologies and practices. For example, in *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court decided that the then-new practice of "time-shifting" television shows to watch them later was a fair use,[23] allowing new social practices—and valuable new markets for consumer device manufacturers and the television and movie industries—to develop. [24] In *Sega v. Accolade* and *Sony v. Connectix*, the Ninth Circuit Court of Appeals made clear that copying required by reverse engineering is a fair use.[25] And in *Perfect 10 v. Google* and in *Kelly v. ArribaSoft*, the Ninth Circuit Court of Appeals found that search engines were making fair use of copyrighted images by providing thumbnail versions in their search results.[26] In each of these cases, courts considered new technologies and new uses of copyrighted works, and applied Section 107's framework to allow new technologies to

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[23] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454-55 (1984).
[24] *See generally id*.
[25] Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1514 (9th Cir. 1992); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000).
[26] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003).

flourish and to support competition in technology markets, despite the fact that Congress could not have predicted the advent of these technologies when writing the '76 Act.[27]

III. **Need for Reform**

The above examples are valuable updates that have helped strike a balance—protecting copyright holders while allowing for technological innovation and artistic creativity. Yet the clarity of the existing statutory framework for fair use needs improvement—as technologies, practices and the caselaw have evolved, the favored uses set forth in the preamble have remained frozen in time and could be usefully updated.[28] Finally, some aspects of the structural framework set forth in the statute—especially the one-size-fits-all remedies provisions—actively undermine the balancing purpose of the fair use doctrine by chilling fair uses and must be reformed.

Moreover, fair use is an increasingly important balancing feature in a copyright system that recently has tilted strongly toward copyright owners and away from public benefits. Repeated extensions of the copyright term (for example, now life plus 70 years for individually-authored works), which require follow-on creators and the public to wait generations before a work enters the public domain, are a well-publicized example. However, other changes, including expansions of copyrightable subject matter,[29] the

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[27] *See* Samuelson, *supra* note 1, at 2605-06.

[28] In the more than 30 years since the '76 Act took effect, Congress has amended Section 107 only twice: once with a technical update that accommodated the new Section 106A, and once to clarify that unpublished works are also subject to fair uses. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145, 3145 (1992) (amending Section 107 by adding unpublished works); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 603, 104 Stat. 5089, 5128-30 (1990) (inserting Section 106A).

[29] *See, e.g.*, The Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (adding architectural works); Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 259 (5th Cir. 1988) (equating computer programs with literary works); *see also* UNITED STATES COPYRIGHT OFFICE, CIRCULAR 61: COPYRIGHT REGISTRATION FOR COMPUTER PROGRAMS 4 (May 2009), *available at* http://www.copyright.gov/circs/circ61.pdf.

abolishment of formal requirements to register and claim a work,[30] and expansions of secondary liability for innovators who wish to bring new consumer devices and services to market,[31] contribute to a lack of balance in the system. While nearly all of these changes, taken individually, have some benefit in strengthening incentives or making copyright protection easier to obtain, [32] they also require tradeoffs that tilt against the public's interest in efficient licensing, appropriate reuse, technological innovation, and building the public domain. The cumulative effect is to unbalance copyright and diminish its public benefits. Without a robust fair use doctrine as a safety valve, copyright today would be in even greater danger of impeding creators of beneficial new works, and particularly those that make use of existing works.

Rather than allowing structural barriers to continue and fears of lawsuits to increase, Congress should enact carefully chosen, targeted reforms that efficiently counteract

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[30] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (implementing the Berne Convention of 1886); Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, *revised* July 24, 1971, *amended* Sept. 28, 1979, 25 U.S.T. 1341 (providing that "[t]he enjoyment and the exercise of [protection for literary and artistic works] shall not be subject to any formality"). *See also generally* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 489-490 (2004) (discussing the challenges abolishing formalities has created for licensing and other follow-on uses).

[31] *See, e.g.*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (holding that contributory liability results from distributing a device with the intent to promote copyright, despite the device having lawful uses). *But cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (holding that contributory liability does not result from distributing copying devices, provided that the devices "merely be capable of substantial noninfringing uses").

[32] Not all recent changes to copyright law have an easily discernible public benefit. For example, the most recent term extension, passed as the Sony Bono Copyright Term Extension Act, tacked an extra 20 years onto terms for works that already existed—by definition the creation of these existing works could not be incentivized by the change in the law. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827-28 (1998). Leading economists also questioned the relative benefit the Act created in incentivizing future works. *See* Brief for George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 3, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) (stating that "it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs" and that the "CTEA's large transfer of resources from consumers to copyright holders is an additional factor that reduces consumer welfare").

chilling effects without creating undue limitations on fair use's beneficial flexibility and without causing undue harm to copyright holders. In enacting these reforms, Congress should focus its efforts on the role that it best plays: giving all comers a level playing field through enshrining sound principles and general incentive structures in the statute, so that fair users and copyright holders alike—and most importantly, the public—receive the benefit of copyright's bargain.

IV. Updating Fair Use for the Digital Age

Because of the importance of fair use to the overall balance of the copyright system and the importance of maintaining its flexibility over time, we suggest some targeted reforms that respond specifically to documented flaws or ambiguities in the present system. We have focused on two specific areas: updating the list of "favored" uses found in Section 107's preamble to include uses common in today's digital world and critical to innovation and creativity; and removing the serious structural impediments to fair use created by the present remedies structure, which does not adequately distinguish between blameworthy and innocent uses.

a. Updating the Preamble

When Congress created the Section 107 preamble, it could not have predicted the revolution in communications and media technologies that followed the '76 Act. The favored uses listed in the preamble—criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research—are all socially beneficial uses, and together cover many core expressive and educational purposes. Yet the list is missing a set of uses that are either entirely new or have gained in importance since the advent of the digital world: ***incidental uses***, ***non-consumptive uses***, and ***personal, non-commercial uses***. The preamble should be updated to include these uses in the list of favored uses.

A call to update the preamble does not discount the important work courts have done to apply the fair use doctrine to new uses, nor should it undermine the overall flexibility of the doctrine. This is a limited change. Nothing would prevent courts from continuing to apply fair use to new situations, as they have done since the '76 Act took effect. In fact, Barton Beebe, in an empirical study of 306 reported fair use opinions from the effective date of the '76 Act (January 1, 1978) through 2005, found that only 22% of opinions explicitly referred to the preamble.[33]

At the same time, including a modernized list of explicitly favored uses adds clarity for courts and diminishes uncertainty for copyright holders and follow-on users. While the caselaw reflects some new uses and trends that have developed over time, it too is limited in its ability to reduce uncertainty. Fair use is famously fact-specific in its application, and parties may worry that a somewhat different factual situation will result in a different outcome, chilling use. Further, a well-rendered decision in another jurisdiction, while perhaps persuasive to a local court, is not sufficient to clear uncertainty for many users. This issue has special urgency for copyright litigants because, as Beebe has found, a large majority of fair use decisions outside of the Supreme Court—and importantly, the most influential decisions outside of the Supreme Court's—are decided in two circuits: the Second and the Ninth.[34] Litigants in the other circuits have fewer cases—and likely, given the volume difference, fewer cases dealing with recent technological and cultural changes—to rely upon. An update to the statute, on the other hand, would help parties in all jurisdictions. As such, we recommend that the following be added to the preamble's list of favored uses.

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[33] Beebe, *supra* note 4, at 559. There are various possible explanations for this percentage. For example, it may be that this percentage is relatively low because courts pay little attention to the preamble, but it may also be low because cases covered by the preamble generate less litigation due to the extra certainty it provides.
[34] *Id.* at 554.

a. **Incidental Uses**

In this Report we focus on one type of *incidental uses*: uses that involve capturing copyrighted works, where the copyrighted work is not the primary focus of the use—for example, capturing music playing over a radio when filming a family moment. In some cases the capture is unintentional, in some cases it is unavoidable, and in most if not all, cases it contributes to the veracity of the scene or other new creation. There are likely many incidental uses occurring in today's technology- and media-saturated society, and in many instances they will not attract the attention of copyright holders or will not be challenged. However, there is enough documentation of chilling effects to indicate a need for the additional certainty that adding incidental uses to the preamble could provide. Further, with the advent of fingerprinting and filtering technologies, the copyright holder may not need to pay attention or express an opinion about the use in order for it to be chilled.[35] Adding incidental uses to the favored uses set forth in the preamble to Section 107 would increase certainty for follow-on users, intermediaries and copyright holders alike, and make it less likely for works that include incidental capture to be kept from the public.

i. Incidental Capture

As long as we have had recording devices, photographers, filmmakers, and others have captured actions, objects, or sounds that were not the focus of the recording, but which made up part of the fabric of the recorded reality. Capturing someone humming a tune, a phone ringing in the background with a popular song as the ringtone, a copyrighted photograph on the wall when recording someone going about her day—these are all simply aspects of the reality being documented, and do not implicate the expressive, creative value of the copyrights in the works being captured. Incidental captures may be

[35] MEHAN JAYASURIYA ET AL., FORCING THE NET THROUGH A SIEVE: WHY COPYRIGHT FILTERING IS NOT A VIABLE SOLUTION FOR U.S. ISPS 47 (2009), *available at* http://www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf.

so fleeting or minimal that they do not even rise to the level of fair use analysis, and instead should be considered *de minimis* (too trifling a use to even be considered an infringement),[36] or they may constitute enough copying to be analyzed under fair use.[37] Regardless of which reasoning is most applicable in a given situation, such uses can be considered core to the free expression and cultural communication principles behind copyright, and should be allowed. However, a somewhat limited set of caselaw, combined with the high cost of litigation, and high possible damages if a use is not adjudicated fair, have combined to undermine creators' ability to show the whole truth of a recorded situation, including copyrighted works that may be incidentally a part of it. Further, even if a work that includes an incidental capture is unlikely to be a target of suit (for example, a family video posted to YouTube or a social networking site), it may disappear from an intermediary's platform via a takedown notice from the copyright holder[38] or an automatic filtering system that cannot distinguish fair uses from infringement.[39]

Incidental capture has long been a feature of documentary filmmaking and news reporting, but a recent increase in licensing fees and in aggressive demands for them by rights-holders have stymied creators who might not have worried twenty years ago. A study of documentary filmmakers by Patricia Aufderheide and Peter Jaszi of American University's Center for Social Media shows that documentarians have been prevented from using truthful representations of events in recent years, simply because of increasing

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[36] *See e.g.*, Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998)).
[37] *See, e.g.*, Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997)(rejecting defendant's argument that the use of a copyrighted poster in the background of several scenes in a film was de minimis).
[38] *See* 17 U.S.C. § 512(c)(1)(C) (2006); *infra* pp. 15-16 (discussing Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008)).
[39] *See, e.g.*, Posting of Fred von Lohmann to Deeplinks Blog, *YouTube's January Fair Use Massacre*, http://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre (Feb. 3, 2009) (describing how, following a dispute between YouTube and Warner Music, YouTube's Content ID filtering system removed many user videos that used Warner's music without distinguishing fair from infringing uses).

demands for permission fees and a lack of certainty around fair use defenses.[40] Without enough certainty around fair use, filmmakers find that gatekeepers such as distributors and insurers are unwilling to sign off on even likely fair uses, and that demands for excessive licensing fees mean that they cannot simply give up on fair use and pay to license the material.[41]

The study demonstrated various likely or possible fair uses by documentarians that had been chilled, including incidental uses. Filmmakers in the study had been prevented from using a character-developing shot of a subject painting her porch because she was singing along to the radio,[42] from using some shots of subjects singing along to karaoke in the foreign version of a film,[43] and from visually showing an orchestra when filming an impresario's visit to the orchestra.[44] Perhaps the most striking example is Jon Else's decision, when making his documentary *Sing Faster*, to substitute the incidentally captured television shows actually being watched backstage by opera stagehands—"The Simpsons" and a Major League Baseball game—with entirely different material that he pasted into the TV set in the shot.[45] As filmmaker Vivian Kleiman pointed out with regard to music, "How can I, as a documentary filmmaker who is documenting my reality or somebody's reality, be restricted from using [incidental] music? It's like saying I can't film the clouds."[46]

Importantly, it is no longer only professional filmmakers and their distributors who face this problem. The explosion in technologies that allow ordinary people to record life

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[40] PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 26 (2004), *available at* http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf; Samuelson, *supra* note 1, at 2576.
[41] AUFDERHEIDE & JASZI, *supra* note 40, at 9.
[42] *Id.* at 18.
[43] *Id.* In this instance, the filmmaker could only afford to pay the high licensing fees to use one of two songs in a karaoke scene and had to strip shots of the other from foreign versions of the documentary.
[44] *Id.* at 17.
[45] *Id.*
[46] *Id.* at 29.

events, create multimedia works, and then to share them with a broad audience via platforms like Vimeo and YouTube is a profoundly positive change for society and culture. At the same time, it means that everyday people—non-experts, likely with little familiarity with the complex fair use doctrine—are encountering fair use issues—including incidental capture issues—on a regular basis. The background singing of "Happy Birthday" when capturing a child's reaction to his birthday cake, the rock poster in a college dorm room, and even the music playing on somebody else's boom box down the beach in a family vacation video, are all examples of incidental captures of copyrighted works by amateur creators. A mother who filmed her toddler dancing for 29 seconds to Prince's "Let's Go Crazy" experienced her video being pulled from YouTube in response to a copyright takedown notice sent by Prince's label, Universal.[47] The mother, Stephanie Lenz, insisted that the video be replaced, and sued Universal under Section 512 of the Digital Millennium Copyright Act's provisions disallowing certain misrepresentations in takedown notices. While Ms. Lenz's video was replaced, and the judge told Universal that it should consider fair use before sending a takedown notice, many ordinary people whose videos are pulled from intermediaries may not be willing or able to resort to expensive and time-consuming litigation.

Ms. Lenz's case highlights an additional consideration in cases involving broad-based platforms used by nonprofessionals, such as YouTube. In these situations, it is not only the creator who needs some measure of certainty with regard to fair use; it is the intermediary, as well. When the doctrine is too uncertain, intermediaries may be biased toward takedown in order to limit their own liability.[48] Particularly with the advent of automatic digital filtering systems that match the audio or visual track to major copyright holders' content and then filter any matches off the system without regard to the contextual analysis required under fair use, content can disappear without a trace, even

[47] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008).
[48] Intermediaries are given safe harbor from certain secondary liability for their users' infringements if they follow the procedures required by Section 512 of the Digital Millennium Copyright Act, including, for content hosts such as YouTube, taking down allegedly infringing material upon receiving a takedown notice. 17 U.S.C. § 512(c) (2006).

when it is fair.[49] Further, copyright holders have complained that a lack of certainty in deciding when to send a takedown notice is problematic. In the *Lenz* case, Universal argued that it could not be expected to consider fair use before sending a takedown notice, because it is difficult to predict how a court might rule.[50]

Aufderheide and Jaszi were able to address the barriers for documentary filmmakers by working with the community to draft the Documentary Filmmakers' Statement of Best Practices in Fair Use, a reflection of community norms and practices that can help give documentary filmmakers a solid foundation for claiming fair use.[51] Incidental use (in the Statement's terms, "Capturing Copyrighted Media Content in the Process of Filming Something Else") is one of four categories of uses the community determined to be important to documentary filmmakers and likely fair. A carefully developed statement of community norms can certainly help creators develop the confidence to rely on fair use. Even better, several media insurance companies have agreed to recognize the documentary filmmakers' Statement in writing errors and omissions policies, thus removing the gatekeeper barrier for filmmakers who can verify that their uses comply with the Statement.[52] At the same time, myriad other follow-on creators and innovators—outside of the specific documentary filmmaking space—are left with uncertainty that may prevent them from going forward with incidental uses. Further, even communities with well-developed norms, and who are able to effectively communicate those norms, can benefit from the greater certainty achieved by including incidental uses in the preamble to Section 107.

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[49] JAYASURIYA, *supra* note 35, at 47. *See also* Greg Sandoval, *YouTube Users Caught In Warner Music Spat*, CNET, Jan. 27, 2009, http://news.cnet.com/8301-1023_3-10150588-93.html (describing how YouTube and Warner Music used to have a revenue-sharing deal that allowed YouTube users and creators access to Warner's library, but the deal broke down and any videos made with Warner's music were removed).
[50] *Lenz*, 572 F. Supp. 2d at 1154.
[51] *See* ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005) *available at* http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.
[52] Pat Aufderheide & Peter Jaszi, *Fair Use And Best Practices: Surprising Success*, INTELLECTUAL PROP. TODAY, Oct. 2007, *available at* http://www.iptoday.com/articles/2007-10-aufderheide.asp.

Preventing follow-on users from using incidentally captured footage—uses that may be fundamental to the truthful representation of the reality being captured—clearly undermines the free expression values and balancing goals embodied in the fair use doctrine, as does uncertainty that leads distributors, intermediaries, or other gatekeepers to refuse or remove content or leads copyright holders to send overprotective takedown notices. The negative effect of this lack of certainty is exacerbated for nonprofessional incidental captures shared over platforms run by intermediaries—in such situations, it is especially likely that neither the intermediary nor the person who captured material in the course of making the shared work will have sufficient resources of time or money to dispel uncertainty where the caselaw is not exceptionally clear.

In fact, the caselaw concerning incidental uses generally is supportive of uses that do not focus or trade on the copyrighted work,[53] but is somewhat varied in result[54] and limited in amount. More information to guide interested parties would help diminish the uncertainty—and overly conservative decision-making on the part of gatekeepers and intermediaries—described above. As such, adding "incidental" to the preamble's list of favored uses is likely to be a helpful change that reduces uncertainty in the context of incidental captures of copyrighted works, and we include it in the proposed Copyright Reform Act.

ii. Other Incidental Uses

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[53] *See* Samuelson, *supra* note 1 at 2576 n.272 (stating that "the more central to the second work's message or the more extensive the exposure of the copyrighted work in the second work, the less likely the use is to be fair" and collecting cases).

[54] *Compare e.g.,* Pro Arts, Inc. v. Hustler Magazine, Inc., Nos. 85-3022, 85-3041, 1986 WL 16647, at *1 (6th Cir. Mar. 25, 1986) (finding fair use when defendant reproduced plaintiff's poster in a small part of the background of a magazine ad), *with* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997) (noting that defendant made more than de minimis use of plaintiff's artwork, having shown the work for 26.75 seconds in an episode of defendant's TV sitcom, and therefore holding that defendant's fair use defense should not have won on summary judgment).

Although this Report focuses on incidental capture, it is important to note that courts may find it necessary to apply the term "incidental" to other uses over time. As such, our examples are nonexclusive, and should be updated as needed to preserve the flexibility required of the fair use doctrine in responding to new situations.

As a final note, for a variety of reasons, the Copyright Reform Act treats separately some other uses that might fruitfully be considered "incidental." For example, we treat copies made in the course of creating search indexes as a separate matter. While these copies should be considered fair, and courts might characterize them as either "incidental" to an ultimate fair use, or "non-consumptive," their specific importance militates toward a specific exemption, a topic we will take up in a later Report. Similarly, we separately address incidental copying that is necessary to technological processes, such as running computer programs, transmissions over a network, or other automatic processes, through an exemption; this topic will also be taken up in a future Report.

b. **Non-Consumptive Uses**

Another set of uses the Copyright Reform Act proposes to add to the preamble is the set of *non-consumptive uses*. These are uses, often facilitated by new technologies and increasing computer power, that do not directly trade on the underlying creative and expressive purpose of the work being used.[55] Copying may include only the non-copyrightable aspects of the works, such as ideas, facts, or algorithms—in which case fair use need not come into play—or it may entail copying some expressive aspects of the work, but only as a means to a non-consumptive end. For example, a researcher might use a novel not for its expressive purpose as a narrative, with characters and settings, but as a linguistic sample set. Real-world examples of non-consumptive uses include Franco

[55] *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) (finding that "Arriba's use of Kelly's images in [search engine] thumbnails is unrelated to any aesthetic purpose," and was transformative of the original); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (finding that Google's use of thumbnail images was "highly transformative"). Professor Samuelson classifies this type of use as one of a number of uses *orthogonal* to the purpose of the original work. Samuelson, *supra* note 1, at 2612.

Moretti's work to apply techniques such as computational linguistics, data mining, computer modeling, and network theory to understand the social and economic themes and trends in novels;[56] the U.S. Geological Survey's use of Twitter feeds to map earthquakes and their magnitudes;[57] and the now-familiar use of tags to create "word clouds" and other graphical representations of content ranging from photography subject matter;[58] to a global comparison of the populations of cities;[59] to the most-often-used words in U.S. presidential speeches.[60]

Non-consumptive uses—such as creating an index-card-based cross-reference system for understanding a body of work—have existed for many years, but they hold new promise with the advent of digital technologies and powerful computing capabilities. In their ability to use the information contained in copyrighted works in ways unavailable in the past to expand knowledge and develop new understandings, innovative non-consumptive uses are some of the most promising digital-age uses of copyrighted material. Because they do not trade on the expressive or aesthetic aspects of copyrighted works, they pose little threat to the core market interests of copyright holders that copyright endeavors to protect. Such a benefit to the public with so little harm to copyright holders' incentives

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[56] *See* Douglas McGray, *Print: Applying Quantitative Analysis to Classic Lit*, WIRED, Nov. 12, 2009, *available at* http://www.wired.com/magazine/2009/11/pl_print. For example, Professor Moretti believes that he has uncovered a link between Victorian writers' word choices and their belief that a person's physical traits reflect the moral aspects of his character. *Id.*

[57] Dept. of the Interior, U.S. Geological Survey: Twitter Earthquake Detector (TED), http://recovery.doi.gov/press/us-geological-survey-twitter-earthquake-detector-ted/ (last visited Feb. 8, 2010). Note that Twitter updates are very short in length and may have only limited, if any, copyright protection. *See* UNITED STATES COPYRIGHT OFFICE, CIRCULAR 34: COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES 1 (Nov. 2009), *available at* http://www.copyright.gov/circs/circ34.pdf.

[58] Popular Tags on Flickr, http://www.flickr.com/photos/tags/ (last visited Feb. 8, 2010).

[59] Many Eyes: Tag Cloud of Large Cities by Population, http://manyeyes.alphaworks.ibm.com/manyeyes/visualizations/tag-cloud-of-large-cites-by-populati (last visited Feb. 8, 2010).

[60] US Presidential Speeches Tag Cloud, http://chir.ag/projects/preztags/ (last visited Feb. 8, 2010).

to create is precisely in line with copyright's purpose to "promote the Progress of Science and useful Arts."[61]

At the same time, there is substantial risk that uncertainty about liability might undermine socially significant non-consumptive uses. While Congress did spend some time considering research uses in developing its 1976 reform, and ultimately included both "scholarship" and "research" in the list of favored uses in the preamble to Section 107, it could not have anticipated the non-consumptive uses made possible by today's computer technology. In addition, this is an area where there is limited caselaw to guide users and copyright holders alike. While there are related cases to draw from—for example, cases holding that intermediate copying made in the course of reverse engineering computer programs is a fair use,[62] and cases holding thumbnail images used in search engines as fair, in part, because they do not trade on the "aesthetic purpose" of the originals[63]—there is little to guide users engaging in other types of non-consumptive uses. Arguably, some of the most closely related cases involve the copying of factual information or other non-copyrightable elements.[64] While these cases certainly provide guidance for situations where the non-consumptive use requires copying only non-copyright-protected material, they do not directly speak to situations involving the fair use of copyrightable, expressive material.

The promise of non-consumptive uses and the need for clarity for all comers are both exemplified by portions of the recent controversy over Google Inc.'s Book Search

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[61] U.S. CONST., art. I, § 8, cl. 8.
[62] *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1514 (9th Cir. 1992); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000).
[63] Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003). *See also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007).
[64] Facts and ideas fall outside of the protection of copyright—they are free to be used by any follow-on innovator and creator. *See* Feist Publ'ns v. Rural Tel. Service Co., 499 U.S. 340, 359 (1991) ("[F]acts contained in existing works may be freely copied."); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985) (copyright owner's rights exclude facts and ideas, and fair use); Baker v. Selden, 101 U.S. 99 (1879).

project. In the proposed settlement agreement[65] among Google, publishers, and the Authors Guild over Google's book-scanning project,[66] the parties set out detailed provisions related to certain defined non-consumptive uses, including among others: extracting textual or structural information from images, analyzing the relationships among or within scanned books through various textual analysis techniques, performing linguistic analysis of the scanned books, and researching different modes of indexing and searching the texts.[67]

While the parties to the Google Book Search settlement should be applauded for their attention to non-consumptive uses in the settlement agreement, they have limited non-consumptive use to research by "qualified users" who seek prior permission of the approved "hosts" of the scanned books.[68] This decision may be understandable from the perspectives of the parties to the settlement, but it also highlights the fact that it is especially important for Congress to make clear that non-consumptive uses are fair for anyone—for example, not just for limited categories of researchers such as those contemplated by the Google Book Search Settlement—to engage in. Among other benefits, this would make clear that the non-consumptive use of books (and other

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[65] At the time this Report was being completed for release, the court was considering the parties' second proposed settlement agreement. Order Granting Preliminary Approval of Amended Settlement Agreement ¶ 13, The Authors Guild, Inc. v. Google Inc., No. 05 Civ. 8136-DC (S.D.N.Y. Nov. 19, 2009), *available at* http://www.googlebooksettlement.com/05CV8136_20091119.pdf (setting a final hearing date of February 18, 2010, to determine whether the court would approve the amended settlement).

[66] *See* Robert Darnton, *Google And The New Digital Future*, THE NEW YORK REVIEW OF BOOKS, Dec. 17, 2009, *available at* http://www.nybooks.com/articles/23518.

[67] Amended Settlement Agreement at 14, The Authors Guild, Inc. v. Google Inc., No. 05 Civ. 8136-DC (S.D.N.Y. 2009), *available at* http://www.googlebooksettlement.com/intl/en/Amended-Settlement-Agreement.zip. It should be noted that the Google Book Search definition of "Non-Consumptive" use contains many of the characteristics described in this Report, but is limited to its context within the settlement agreement and the Google Book Search project. As such, it is too narrow to be used as a general definition of non-consumptive use.

[68] *Id.*

materials) is available to the public generally, and in situations other than those covered by the Google Book Search settlement.[69]

Given the rapid development of valuable techniques for non-consumptive uses, the value of these uses to society, and the limited guidance provided by current caselaw, Congress should alleviate uncertainty and make an affirmative commitment to encourage these nascent methods and technologies by updating the Section 107 preamble to include "non-consumptive" uses.

c. **Personal and Noncommercial Uses**

Users engage in noncommercial personal uses when they employ copyrighted work for strictly private purposes, without any intent of achieving financial gain. These uses, which do not touch commercial markets for copyrighted works, have little chance of harming copyright holders. At the same time, they are ubiquitous: every day, we "time shift" television shows via TiVo, create mix CDs for the car and iPod playlists for the gym, back up our computer hard drives, and read books to our children before bed. Such uses—and their pre-digital-age analogues—are longstanding, and critically important. Professor Jessica Litman argues that people's "reading, listening, viewing, watching, playing and using copyrighted works is at the core of the copyright system,"[70] and it would be difficult to argue with her. After all, if there is no audience willing to experience copyrighted works, then there is little chance of the copyright owner finding a market for those works.

As with incidental and non-consumptive uses, the rapid rate of technological change has made reform that protects personal uses more important. Such uses are becoming increasingly prevalent in today's society, as the advancements in reproduction

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[69] Of course, the corpus of books scanned by Google itself would not be available to competitors.

[70] Jessica Litman, *Frontiers of Intellectual Property: Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879 (2007).

technologies vis-à-vis personal computers and the Internet have significantly expanded the ability of individual users to make copies of copyrighted works within the confines of their own homes. The digital video recorders (DVRs) and podcasts mentioned above have revolutionized the ability of consumers to time shift, by recording programming to a digital storage medium to be viewed or listened to at a more suitable time. In addition, consumers can now use their computers and portable music devices to space shift, by converting media from one format to another, which allows the media to be transferred between server locations and devices. With the rise of remote computing and storage (sometimes termed "cloud computing"), this trend seems likely to continue, and even accelerate. Fred von Lohmann argues that such personal copying can enhance the value of the copyrighted works for the audience:

> . . . the value of an iPod to a music fan increases with the size of her existing CD collection: without a preexisting stock of music with which to fill the iPod, the device would be far less attractive. But the iPod also makes an existing CD collection more valuable, as its owner can now carry her collection into new environments and enjoy it in new ways. The same is true for DVRs. The more television programming a consumer has access to, the more valuable a DVR will be. Having a DVR increases the value to the consumer of whatever broadcast, cable, or satellite programming package the consumer is already paying for.[71]

This additional value is one aspect of what von Lohmann calls the "innovation policy" of fair use.[72] Such an effect is likely to encourage the music fan to buy both more music and the technology that allows her to enjoy it.

Moreover, von Lohmann makes a broader argument that "fair use, insofar as it represents legal tolerance for private copying, plays an important and underappreciated role in U.S. technology and innovation policy, particularly in that it draws investment to technologies that are complementary goods to copyrighted works," an argument echoed in the CCIA report discussed in Section II, above.[73] The Supreme Court's 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.* both exemplifies and undergirds this

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[71] von Lohmann, *supra* note 12, at 836.
[72] *Id.*
[73] *See supra* Section II.

benefit provided by noncommercial personal copying.[74] In *Sony*, the Court specifically recognized "time-shifting" as a fair use because of its noncommercial personal nature.[75] In particular, the Court held that private home taping of television broadcasts for the purpose of time shifting constituted a fair use of the copyrighted programming. The decision was based largely on the Court's finding that there was little likelihood that noncommercial time shifting would cause harm to the potential market for, or the value of, the copyrighted works.[76] Famously, the so-called *Sony Betamax* case ushered in the age of the videotape recorder, opening up new markets to copyright holders as well as the new personal and noncommercial uses that relied upon technological tools such as the camcorder and VCR—what von Lohmann terms "complementary goods."[77]

Congress also has recognized the value of noncommercial personal copying, and has already explicitly exempted certain noncommercial personal uses from findings of infringement. Section 1008 of the Audio Home Recording Act of 1992[78] states that the copying of digital musical recordings or analog musical recordings by a consumer for noncommercial use is not actionable as an infringement of copyright. The accompanying Senate Report explains that the purpose of Section 1008 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.[79] With the Family Movie Act of 2005, Congress added a

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[74] 464 U.S. 417 (1984).
[75] *Id.* at 454-55.
[76] *Id.* at 451.
[77] *See* von Lohmann, *supra* note 12, at 831.
[78] Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001-1010).
[79] *See* S. Rep. No. 294, 102d Cong., 2d Sess. 30-45 (1992). In *Recording Industry Association of America v. Diamond Multimedia Sys., Inc.*, the Ninth Circuit Court of Appeals relied on this legislation in holding that the "space shifting" performed by a portable MP3 player is a "paradigmatic noncommercial personal use," since it involves making copies of files that already reside on a user's hard drive in order to render them portable. *Recording Industry Association of America v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

right to use software to "make imperceptible" movie content deemed objectionable.[80] It has also exempted other uses over the years.[81]

As such, both Congress and the courts have clearly articulated the importance of protecting users from infringement claims when they engage in legitimate personal uses that are not made for the purpose of gaining commercial advantage. At the same time, as with other uses covered by this Report, caselaw considering personal noncommercial uses is quite limited,[82] and Congress has never adopted a general statutory protection for such uses.[83] Incorporating noncommercial personal uses into the list of favored uses in the first sentence of section 107 would enable users to more confidently engage in noncommercial private uses of copyrighted material, so long as they do not intend to impinge on the copyright owner's ability to reap benefits from that material. Importantly, this change would meet copyright's broader innovation objectives by encouraging innovators to develop new platforms and tools through which consumers can "read[], listen[] view[], watch[], play[] and us[e] copyrighted works."[84]

Copyright holders have legitimate concerns about uses, such as the trading of copyrighted movies and music over peer-to-peer networks, that may affect core markets for creative works even though they are not undertaken for commercial gain. Therefore, it is important to note that adding noncommercial personal uses to the preamble would not make all private copying fair. Section 107 still requires courts to review a challenged use under all four factors. As such, a noncommercial personal use (or other private use) that sufficiently harms the copyright holder's market would not be fair. Professor Pamela Samuelson, who recently published a comprehensive review of fair use cases decided under the '76 Act, believes that evaluating personal uses under the *Sony* approach—presuming private, noncommercial copies to be fair unless the copyright holder can show

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[80] 17 U.S.C. § 110(11) (2006).
[81] *See, e.g.*, 17 U.S.C. § 102(b) (2006) (exempting photographing or painting architectural works); 17 U.S.C. § 117 (2006) (exempting the making of back-up copies of computer programs).
[82] *See* Samuelson, *supra* note 1, at 2588.
[83] *See id.*
[84] Litman, *supra* note 70, at 1879.

either actual market harm or a likelihood of market harm—would show that "ordinary personal uses, such as backup copying and platform-shifting, would be fair, but P2P filesharing would not be."[85]

As the Supreme Court noted in *Sony,* uses—such as noncommercial personal uses like the time-shifting at issue in that case—that have "no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit."[86] At the same time, making clear that noncommercial personal uses are fair helps innovators flourish by removing uncertainty around their customers' customary behavior and ensures that the public has the ability to access and use creative works. As such, whenever a user engages in a genuinely personal use of copyrighted material without demonstrating an intent to gain commercial advantage, that use should be considered presumptively fair, unless and until the copyright holder can show a likelihood of market harm. To help make this clear and to facilitate this type of fair use, Congress should update Section 107's preamble by adding *personal and noncommercial uses* to the list of favored uses.

b. Rebalancing Remedies for Reasonable Fair Use Defenses

Updating the preamble to bring it in line with contemporary creative and innovative practices would give courts, copyright holders, and new creators useful guidance and would help alleviate the chilling effects of uncertainty by clarifying some aspects of fair use doctrine. An additional targeted reform, however, is critical: addressing the United States' unusual statutory damages and cost-shifting provisions, which create a high structural barrier to making fair uses. Under U.S. law, the magnitude of possible damages and costs is unpredictable and the higher-end possibilities are exorbitantly high, creating a severe downside risk that stymies potential fair users. This should be remedied through two reforms: first, expanding existing protections for some institutional users to

[85] Samuelson, *supra* note 1, at 2592.
[86] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450-51 (1984).

anyone with a reasonable fair use defense; and second, preventing cost- and fee-shifting to plaintiffs where the defendant has a reasonable fair use defense. These targeted reforms would help rebalance copyright and its fair use doctrine generally by mitigating one of the attributes of United States copyright law that most hinders fair use. In addition, they would bring needed fairness to the existing remedies limitations, which presently favor certain institutional users over small creators, innovators, and the public.

i. Reforming Section 504 to Remit Statutory Damages for Reasonable Fair Uses

The imbalance is created in part by the present structure of an unusual attribute of United States copyright law (compared to other countries' laws): its provision for so-called "statutory damages."[87] Section 504 of the Copyright Act allows copyright plaintiffs who have registered their works within three months of publication[88] to elect an award of damages within a range set out in the statute—from $750 to $150,000 per work infringed[89]—rather than the actual damages caused by the alleged infringement. Courts

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[87] Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) ("The United States is an outlier in the global copyright community in giving plaintiffs in copyright cases the ability to elect, at any time before final judgment, to receive an award of statutory damages . . . ."); Industry Canada, *Fact Sheet on Copyright Remedies*, http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip00090.html (describing that in addition to Canada, the United States, Israel, Russia and Germany have statutory damages in their copyright regimes).

[88] 17 U.S.C. § 412 (2006).

[89] In theory, the court can use its discretion to reduce statutory damages to as little as $200 per work infringed. However, this can only occur if "the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2) (2006). This burden is so high for the defendant—as the fair use doctrine is flexible and fact-specific, it is difficult to see how defendants claiming fair use would often meet the burden of having "no reason to believe" that their uses might be infringing—that it seems unlikely to provide much comfort to those who wish to make fair uses. And in fact, Samuelson and Wheatland find that the discretionary reduction is virtually never used. Samuelson & Wheatland, *supra* note 87, at 453-54 ("However, this part of the statutory damage framework has virtually no significance in litigation, not even in the fair use context.").

can award these damages in any amount within this very broad range, and the statute offers them little guidance on applying the range to a given case.[90] A recent article by Pamela Samuelson and Tara Wheatland shows, through an extensive review of cases brought under the '76 Act, that statutory damages awards are unpredictable and, in their words, "frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive."[91] For example, although amounts over $30,000 per work infringed are reserved for situations where the copyright owner can show that the infringement was "willful,"[92] there is little statutory guidance on what "willful" means. Consequently, courts have interpreted willfulness very broadly indeed, to mean infringement where the defendant "should have known" his conduct was infringing.[93] Fair users, among others, are not protected by this standard: Samuelson and Wheatland found that courts have "even found infringement to be willful as to defendants who proffered plausible, if ultimately unsuccessful, fair use defenses."[94]

This formulation of remedies strongly hinders those who wish to make fair uses. Without the ability to gauge what the damages might be—and with the plausible possibility of enormous statutory damages awards—fair users cannot properly assess the risk of releasing their follow-on works and standing on their fair use rights. Moreover, even if the fair user is willing to accept the risk, many of the fair uses that are most valuable to society—for example, muckraking documentary films, scholarly commentary on important works of literature and poetry, and technological innovations that allow new personal uses or other disruptive benefits—are made by creators and innovators who

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[90] Further, there is only one very narrow overall exception to statutory damages awards—Section 504(c)(2) remits statutory damages for a limited class of institutional users (nonprofit educational institutions, libraries, archives, and, in some situations that are limited even further, public broadcasters). 17 U.S.C. § 504(c)(2) (2006). All others, including innocent infringers, are liable for at least some statutory damages. We discuss the inadequacy of this limited exception further *infra* pp. 30-31.
[91] Samuelson & Wheatland, *supra* note 87, at 441.
[92] 17 U.S.C. § 504(c)(2) (2006).
[93] Samuelson & Wheatland, *supra* note 87, at 459 (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[D] (2008)).
[94] *Id.* (citing Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991), and Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)).

answer to risk-averse gatekeepers. Even if the scholar is willing to take the heat, his publisher may not be; and even if the innovator is willing to risk a lawsuit to get her device to market, the venture capitalists on which she relies for seed money may prefer to avoid that risk. For example, as noted above, Aufderheide and Jaszi found that risk-averse gatekeepers in the form of insurance companies and distributors felt unable to support documentary filmmakers' fair use claims. While insurers' acceptance of the Documentary Filmmakers' Statement of Best Practices in Fair Use has alleviated the chilling effect in this specific creative space, myriad other beneficial fair uses remain at risk.

Though Congress has amended the statutory damages provision since developing the current structural provision as part of the '76 Act, these amendments have not addressed the unpredictability created by the broad range of possible damages; further, they have raised the ceiling of maximum awards.[95] As such, the provisions remain out of balance with the harm they are intended to prevent. As Samuelson and Wheatland found, a serious issue remains in the lack of guidance for courts working to tailor damages awards to more or less blameworthy infringements. Until this is remedied, those with fair use defenses—even objectively reasonable fair use defenses—likely will continue to be limited by concerns about downside risk.

Samuelson and Wheatland offer some sensible guidelines for courts applying Section 504, including awarding the reduced amounts allowed for "innocent" infringers "in close

[95] The most recent amendment to the statutory damages provisions of the Copyright Act increased the range of damages from $500-$20,000 to $750-$30,000, and increased the award for willful infringement from $100,000 to $150,000. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (1999). The legislative history indicates that Congress intended to increase awards as an deterrent to infringement, particularly for those who use the Internet to infringe. *See* H.R. Rep. No. 106-216, at 3 (1999) ("Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct."); *id.* at 2 (stating that increased statutory damages are necessary to provide "more stringent deterrents to copyright infringement and stronger enforcement of the laws").

fair use cases;"[96] requiring "clear and convincing evidence of willfulness" before awarding the higher damages;[97] and avoiding findings of willfulness in close cases, "especially not in close fair use cases when freedom of speech or of expression values are at stake."[98] They also suggest structural reforms to the statute that would encourage courts not to award disproportionate damages and to more carefully separate "ordinary infringement" cases from those of "egregious infringers."[99] Should Congress decide to consider a more general reform, Samuelson and Wheatland encourage it to consider whether statutory damages have a place in U.S. copyright, at all, particularly given how unusual the United States is in providing for them.[100]

We agree that Samuelson and Wheatland's suggestions would be judicious reforms, and hope that courts and Congress will heed their advice. At the same time, Congress could more quickly address the challenges Section 504 poses for fair use, specifically, through two targeted reforms. First, statutory damages should be remitted in cases where the defendant has made a reasonable fair use defense. We recommend that Congress do so by adopting the following change to Section 504:

> REMITTING STATUTORY DAMAGES FOR REASONABLE FAIR USE DEFENSES. —Section 504(c)(2) of title 17, United States Code, is amended by striking the language following "his or her use of the copyrighted work was a fair use under section 107" up to the beginning of paragraph (3).

Congress has already recognized the inappropriateness of statutory damages for some fair users: statutory damages are remitted for nonprofit educational institutions, libraries, and archives whose employees believed, and had reasonable grounds for believing, that their use was a fair use.[101] Public broadcasters are similarly protected, though only for performances or transmissions of already-published non-dramatic literary works.[102] As

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[96] Samuelson & Wheatland, *supra* note 87, at 501.
[97] *Id*. at 504.
[98] *Id.* at 508.
[99] *Id.* at 509.
[100] *Id*. at 510.
[101] 17 U.S.C. § 504(c)(2)(i) (2006).
[102] 17 U.S.C. § 504(c)(2)(ii) (2006).

such, our recommendation represents a very straightforward change, requiring only the deletion of language that limits the existing safe harbor against statutory damages to these few types of users. These institutions, all valuable public resources, and all of which rely on the fair use doctrine, certainly should be protected against unpredictable and disproportionate statutory damages awards. But there is little reason that these institutions' reasonable fair uses should receive greater protections than equally valuable fair uses made by others, and little reason that the large number of fair users not affiliated with one of these institutions—likely the vast majority of fair users—should not receive similar protections. In fact, parties with insufficient bargaining power or resources to withstand a threat (for example, consumers, documentary filmmakers, independent artists, start-up companies)[103] are particularly sensitive to risks from too-high remedies, and would greatly benefit from remedies limitations for reasonable fair users. Expanding the safe harbor against statutory damages to this broader class of reasonable fair users would thus go far to help diminish uncertainty around the risk of claiming fair use.

ii. Reforming Section 505 to Prevent Cost- and Fee-Shifting to Reasonable Fair Users

Second, Congress should address the chilling effect of Section 505, which allows a court, in its discretion, to shift all costs of the litigation to one party, and to award attorneys' fees to the prevailing party.[104] The statute offers little guidance to courts making a decision under Section 505,[105] meaning that even a defendant in a close case, making a reasonable fair use defense, cannot predict whether he will be left responsible for not only his costs and fees, but the plaintiff's costs and fees, as well. Making matters worse, copyright litigation is very expensive, requiring specialist attorneys and sometimes,

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[103] Beebe, *supra* note 4, at 565 n.66.
[104] 17 U.S.C. § 505 (2006).
[105] Section 505 simply says that "the court in its discretion may allow the recovery of full costs by or against any party…[and] may also award a reasonable attorney's fee to the prevailing party as part of the costs." *Id*.

detailed fact investigations.[106] The costs and fees can easily run into prohibitively large amounts, especially for defendants with limited resources.[107] For example, in a recent case in which the fair user prevailed, the court awarded her $326,000 in attorneys' fees.[108] While fair use won out in that case, a possible fair user must seriously consider the risk of being required to pay similarly high amounts if she loses her case. As with the statutory damages, then, the present fee-shifting provision can thwart those who wish to make fair uses by creating unreasonable and unpredictable risk. Congress should reform it to address this problem via the following amendment to Section 505:

> COSTS AND FEES NOT AWARDED FOR REASONABLE FAIR USE DEFENSES. —Section 505 of title 17, United States Code, is amended by adding at the end of the section the following:
>
> "The court shall not award costs or an attorney's fee to a copyright holder in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107.

iii. Limiting Principle: A Protected Fair Use Defense Must Rest on Reasonable Grounds

It is important to recognize that our recommended reforms are both targeted and limited. While Congress may wish to reconsider Section 504 more generally, as suggested by Samuelson and Wheatland among others, we presently are proposing a much more

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[106] Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 390 (2002) (stating that "copyright cases are exceedingly complicated, often protracted, and invariably expensive" and that "[c]opyright law is considered a 'specialty' among large law firms").

[107] Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 311, 311 n.164 (2004) (reporting the results of a 2001 survey of the American Intellectual Property Law Association calculating the average cost through trial of copyright disputes at $400,000, and an average cost of $750,000 for copyright disputes where greater than $25 million was at risk).

[108] The parties eventually settled on $240,000. *See* Posting by Anthony Falzone to The Center for Internet and Society, *Joyce Estate Pays $240,000 in Attorneys' Fees to Shloss and Her Counsel*, http://cyberlaw.stanford.edu/case/shloss-v-estate-of-joyce (Sept. 28, 2009).

limited reform. An alleged infringer cannot get out from under the shadow of statutory damages, costs and fees merely by cobbling together an insincere or unsupportable fair use defense. Instead, he must believe, and have reasonable grounds for believing, that his use is a fair one.

This objective standard mirrors the standard already in place for institutional users in Section 504, and would prevent opportunistic attempts to lean on fair use when it is not reasonable to do so. While this may in practice limit the risk assessment for some particularly avant-garde fair uses, we believe that Section 107 is sufficiently flexible to capture most reasonable fair uses—and as more uses are found to be fair by courts, the protections will expand as needed. At the same time, allowing the defendant to avoid statutory damages only when it is objectively reasonable for her to mount a fair use defense, and only when she has a reasonable belief that her use was fair, together will limit the application of this exception; poor or insincere fair use defenses will not qualify. As such, we find an objective standard to be the approach that best balances fair users' need for more predictability and less disproportionate downside risk with copyright holders' need for protection from overstated fair use claims.

V. **Conclusion**

The fair use doctrine is a foundational feature of United States copyright law, and is increasingly important to keeping the "engine of free expression"[109] humming in the face of a growing imbalance in copyright law's system of incentives to create. As Professor Jaszi has pointed out, fair use "serves an affirmative cultural and economic mission" in creating space for innovation and creativity within the confines of copyright protection.[110] While fair users ranging from consumer device manufacturers,[111] to scholars,[112] to

[109] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).
[110] *Hearing*, *supra* note 2, at 6.
[111] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); ROGERS & SZAMOSSZEGI, *supra* note 15, at 6 (reporting that fair use is "vital to many industries and stimulate[s] growth across the economy").

filmmakers,[113] to loving mothers[114] rely on the doctrine every day, others are chilled from creating, or distributing their creations, by its uncertainty, which is exacerbated by the possibility of prohibitively high remedies. As such, Congress should enact the targeted reforms proposed in this Report, in order to restore balance to copyright and to give copyright holders and follow-on users alike a better framework for predicting which uses are fair.

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[112] Shloss v. Sweeney, 515 F. Supp. 2d 1068 (N.D. Cal. 2007) (describing a Stanford Professor suing for declaratory judgment that her use of Joyce family quotations on her academic website was fair use, ultimately resulting in a settlement agreement).
[113] Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (holding that use of Lennon's song "Imagine" in a documentary was fair use).
[114] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (mother arguing fair use of unlicensed music captured in a video of her child dancing).

Appendix A

A BILL

To restore the balance to Copyright Law and to promote creativity and innovation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; PURPOSES

(a) SHORT TITLE— This Act may be cited as the "Copyright Reform Act of 2010."

(b) PURPOSES— The purposes of this Act are—

(1) to further innovation, to protect copyright holders, and to ensure consumer access to new technologies;

(2) to protect the creative endeavors of artists and innovators from the chilling effect of abusive practices, such as misrepresentation of the scope of copyrights or the scope of lawful use;

(3) to improve the adequacy of information available to consumers, to prevent deception, and to improve competition in the marketplace;

(4) to foster the delivery of nondramatic musical works through new technological channels, to strengthen competition in the market for music, and to assure that copyright holders reap the benefits of technological change by clarifying the rights implicated by the digital transmission of such works and by creating a simplified regime for licensing of such works; and

(5) to promote the fair use of copyrighted works, to enable the development of information location tools, and to encourage creative building upon existing works.

SECTION 2. FAIR USE REFORM.

(a) INCIDENTAL, NON-CONSUMPTIVE, OR NONCOMMERCIAL PERSONAL USES. —Section 107 of title 17, United States Code, is amended by inserting after "research," the following: "or a use that is incidental, non-consumptive, or both noncommercial and personal;"

(b) REMITTING STATUTORY DAMAGES FOR REASONABLE FAIR USE DEFENSES. —Section 504(c)(2) of title 17, United States Code, is amended by striking the language following "his or her use of the copyrighted work was a fair use under section 107" up to the beginning of paragraph (3).

(c) COSTS AND FEES NOT AWARDED FOR REASONABLE FAIR USE DEFENSES. —Section 505 of title 17, United States Code, is amended by adding at the end of the section the following:

> "The court shall not award costs or an attorney's fee to a copyright holder in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107."