

Fair Use and Copyright Overenforcement

Thomas F. Cotter*

Abstract: Copyright's fair use doctrine permits the unauthorized reproduction and adaptation of copyrighted expression under a variety of circumstances. Economic analysis posits that these circumstances can be roughly grouped into two categories: first, when the transaction costs of negotiating with the copyright owner for permission exceed the value of the use to the would-be user; and second, when the social value of the use exceeds the value to the copyright owner of preventing the use, which in turn exceeds the value to the individual user. Considerable anecdotal evidence, however, suggests that would-be users are often deterred from engaging in conduct that would likely fall within the ambit of fair use, due in part to concerns over incurring attorneys' fees and also to the uncertainty and unpredictability of fair use doctrine itself.

This essay presents a model of the private costs and benefits faced by would-be users of copyrighted materials in settings in which economic analysis suggests that fair use should apply. The model demonstrates how, under current law, this balance of private costs and benefits may cause some users to forgo legitimate fair uses, particularly when those users are risk-averse; it also suggests that, in cases in which fair use is justified by the presence of positive externalities flowing from the potential copyright defendant's use, the asymmetry between individual user gain and copyright owner loss may result in systematic copyright overenforcement. The essay then offers some observations on the likely effectiveness of six different types of fair use reforms.

* Professor of Law, University of Minnesota Law School. I would like to thank (prospectively) participants in the Intellectual Property Scholarship Seminar at the University of California at Berkeley and at a faculty workshop at the University of Minnesota for their comments and criticism. Any errors that remain are mine.

I. Introduction

A frequently-voiced criticism of the U.S. copyright system is that the fair use doctrine is broken. Although some critics focus their attention on what they view as the courts' (or Congress's) lack of appreciation for the public benefits of the doctrine, a problem that almost all of them--including many copyright "moderates"—perceives is that the would-be beneficiaries of fair use often give in too readily to copyright owner demands (as often expressed in feared "cease and desist" letters). Considerable anecdotal evidence backs up the charge that copyright owners routinely and pervasively "overenforce" their copyright rights at the expense of lawful fair uses; as a result, the fair use doctrine seems to many observers to be eroding in practice, even if not as a matter of legal doctrine.¹ The reasons for this erosion are also, to many, apparent: fair use is complicated and unpredictable in its application; would-be users often do not have access to sound advice concerning the scope of their rights; and the costs of fending off a copyright infringement suit are often large in relation to the stakes involved. In response, copyright scholars have suggested a variety of piecemeal reforms to enable fair use to better accomplish its assumed purpose of encouraging the unauthorized use of copyrighted material under circumstances in which unauthorized use is expected either to cause the copyright owner no harm, or to produce positive social benefits (externalities) that outweigh that harm. Depending on the circumstances, these externalities may flow from uses for purposes such as criticism, reporting, or research, or for other educational or transformative endeavors.

What is missing in the literature thus far, however, is a rigorous inquiry into the factors are likely to cause fair use to fail, and how (or to what extent) various reforms would alleviate these failures. As I demonstrate below, one hitherto overlooked reason the fair use doctrine may fail to achieve its intended purposes is inherent in the doctrine itself: at least to the extent fair use rests upon the positive externalities justification, it relies on individuals (users) to champion the public interest in the production of those externalities without providing them a sufficient incentive to do so. Put another way, the fair use doctrine suffers from an "appropriability" problem similar to the one that is often used to justify intellectual property protection itself. Copyright rights, for example, are often rationalized on the ground that, in their absence, would-be creators of expressive works would be unlikely to produce and publish the socially optimal amount of such works, due to others' ability to appropriate much of the works' value without having invested in their creation. But fair use suffers from a similar problem, insofar as potential users whose uses would give rise to positive externalities have less-than-optimal incentives to engage in such uses to the extent the uses would primarily benefit others.

¹ See, e.g., MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL __ (2005); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY __ (2004); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, __ (2004). The aggressive assertion of nonexistent IP rights is of course not limited to copyright in general, or to cases potentially involving the fair use doctrine in particular. One might assert copyright protection over noncopyrightable ideas or facts, or in *scenes à faire*; or in subject matter than falls outside the scope of other IP rights. The analysis herein nevertheless focuses principally on the reasons why fair use rights in particular may be underenforced, and some potential remedies for this phenomenon.

As a result, one would expect fair use to be an underutilized right even when many real-world complications—including the costs of litigation, potential damages liability in uncertain cases, and risk aversion—are ignored. When these latter complications are added to the analysis, fair use seems even less likely to attain its posited goals, hence giving credence to the need for substantial reform. Unfortunately, many of the proposed reforms threaten either to cause negative consequences that outweigh the benefits—or, if adopted and implemented in a more modest fashion, to have only a correspondingly modest impact. Efforts to reform the fair use doctrine can only accomplish so much, given the inherent limitations of the doctrine itself. Perhaps policymakers would be better advised to devote less attention to remedying fair use and to devote greater attention toward more fundamental (though, for now, politically sensitive) measures, such as reducing the effective term of copyright through the reintroduction of formalities or other measures,² devising alternative ways to compensate content producers,³ or limiting copyright rights to cases involving commercial exploitation.⁴

Part II presents a simple economic model of the fair use doctrine, and Part III of the factors one would expect copyright owners and users to take into account in deciding whether to acquiesce, license, or litigate, on the one hand, or to use, license, or forgo use, on the other. The model suggests that, even in the absence of many real-world complications, users will forgo use in some cases in which fair use should apply under the positive-externalities rationale. The presence of these factors exacerbates the underutilization problem. Part IV then examines six different types of possible fair use reforms, namely (1) increased reliance on liability rules as an alternative to the present options of fair use or injunctive relief; (2) changes to copyright damages rules; (3) increased use of penalties such as the copyright misuse doctrine in response to bad faith efforts to block fair uses; (4) changes to the standards used for awarding attorneys' fees in copyright litigation; (5) measures designed to increase the accuracy of fair use determinations; and (6) measures designed to increase the predictability of these determinations. I will argue that, although many of these reforms are desirable in moderation, their selective adoption may not bring about far-reaching improvements to the current system. Absent more fundamental reform of the copyright system, the risk of copyright overenforcement remains a serious and intractable one.

II. A Model of Fair Use

² See LESSIG, *supra* note 1, at 248-58 (arguing that copyright owners should be required to publish their works or forfeit their copyrights prematurely); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

³ See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT __ (2004) (proposing an equipment levy as a means of compensating content producers); Neil W. Netanel, *Impose a Non-commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, __ (2003) (similar).

⁴ See JESSICA LITMAN, DIGITAL COPYRIGHT __ (2001) (proposing a reformulation of copyright as an exclusive right to commercial exploitation).

The best place to begin is with a model of fair use—that is, of the policies it is intended to serve, as opposed to a wooden restatement of the standard fair use factors.⁵ The model assumes that copyright in general gives rise to net social benefits, either by encouraging the production and distribution of new works of authorship, or by conferring social recognition upon the labor and artistic judgment that goes into the act of authorship

⁵ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 115 (2003) (criticizing the four-factor approach); Patry & Posner, *supra* note ___, at 1644-45 (similar). For the record, the four factors are set forth in Copyright Act § 107, which states:

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—

- (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.

17 U.S.C. § 107 (2000). With respect to the first factor, evidence that the use serves one of the listed purposes (e.g., for criticism or commentary), is noncommercial, or is transformative, is said to weigh in favor of fair use. See Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323, 371 (2003) (providing citations). With respect to the second, the fact that the work is fictional or unpublished weighs against fair use. See *id.* at 376-77. With respect to the third, the more the defendant appropriated, in either a quantitative or qualitative sense, the less likely the use is fair, the overriding question being whether the defendant took more than was necessary to achieve its end. See *id.* at 378. And with respect to the fourth factor, courts are directed to consider whether the use, if widespread, would deprive the copyright owner of substantial licensing revenue. See *id.* at 379. Occasionally courts consider other factors as well, such as whether the defendant acted in bad faith or, alternatively, first sought a license from the owner. See *id.* at 371. The extent to which courts actually rely upon the factors, as opposed to citing them as post-hoc rationalizations for what they perceive to be correct results, is an ongoing question. See David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 281, 282 (2003) (arguing that “[c]ourts tends first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can,” and that “it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases”); Patry & Posner, *supra*, at 1645 (arguing that “[a]ll section 107 really amounts to in practical terms is confirmation that the courts are entitled to allow in the name of fair use a certain undefined amount of unauthorized copying from copyrighted works”); see also Barton Beebe, *An Empirical Study of the U.S. Copyright Fair Use Cases, 1978-2005*, at 7 (preliminary analysis suggests the evidence “is at least consistent with Nimmer’s description”), available at <http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/Beebe.pdf>. If nothing else, the malleability of the factors can lead to unpredictable results. See Nimmer, *supra*, at 287.

(or both). As a consequence, the general rule should be that users who would like to copy or adapt copyrighted expression should negotiate with copyright owners for permission. When the user values use more than the owner values excluding the use, that is, when $V_U > V_O$, a straightforward application of the Coase Theorem suggests that user and owner will strike a bargain under which owner will permit the use for a fee ≥ 0 , absent transaction costs or other bargaining obstacles. Alternatively, when the owner values exclusion more than the user values use, that is, when $V_O > V_U$, no bargain will be struck and the use will not occur—or if it does, it will be deemed infringing, and a court will enjoin the user and award damages. This result is optimal as long as the central assumption, that copyright entitlements in general confer a net social benefit, is valid, and if V_U —the user’s private value—captures all or most of the social value of the use. The analysis further suggests, however, that users should be free to make unauthorized uses of copyrighted works in at least two instances.

A first case in which fair use should apply is one in which the transaction costs of bargaining for use discourage the user from seeking permission, despite the fact that, in a transaction-cost-free world, V_U would exceed V_O . In other words, $TC_u > V_U > V_O$, where TC_u denotes User’s (U’s) expected cost of negotiating for use.⁶ In the absence of fair use (or some other exception that would permit unauthorized use) the short-run result is that the user will either (1) forgo the use or (2) infringe.⁷ Forgoing use, however, is Pareto-inferior to unauthorized use, insofar as neither party is better off, and U is worse off, than in the case in which unauthorized use is permitted. Owner (O) receives no royalty in either case. Infringement might appear to present a better outcome than nonuse, insofar as it results in the work being used by the party who values use more highly. Once O discovers the use, however, it will be able, absent an applicable exception, to exercise its right to exclude U by means of an injunction backed up with contempt sanctions. At this point, the parties may well bargain to agreement since, by hypothesis, U values the use more than O does; and transaction costs ex post may be lower than transaction costs ex ante. (For example, ex ante U may have had no practical way of discovering who, if anyone, owned title to a so-called “orphan” work.⁸ Ex post, if U’s use comes to the attention of O, that problem is solved.) Even so, litigation itself imposes costs upon both parties and society as well, which costs could be avoided if unauthorized use were permissible ex ante. A rule permitting U’s unauthorized use therefore is superior to one that permits O to enjoin the use, in cases in which $TC_u > V_U > V_O$.

⁶ For simplicity, we can assume that the value to the owner of excluding the use is net of the owner’s cost of negotiating with the user.

⁷ *But see* LANDES & POSNER, *supra* note 1, at 117 (noting that some would-be users of small portions of a work might purchase a copy of the entire work, if fair use did not excuse the use; even so, the transaction cost “would be . . . very high . . . the difference between the price of the book and the value to the copier of the chapter that he copied”).

⁸ *See* U.S. COPYRIGHT OFFICE, ORPHAN WORKS: REPORT OF THE REGISTER OF COPYRIGHTS __ (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

Which is not to say that fair use is the only, or even the best, response to the transaction-cost problem. For one thing, there is always a risk of error, i.e., that courts will be unable to distinguish, at justifiable cost, cases in which $TC_u > V_U > V_O$ from cases in which $V_O > V_U$. There is also a risk that permitting fair use in high transaction cost settings may discourage private actors from coming up with effective solutions for lowering transaction costs.⁹ (Indeed, if fair use applies only in cases in which transaction costs are high, one might envision an ideal world in which transaction costs are reduced to zero, and fair use itself vanishes.)¹⁰ And nothing in the model suggests that O must always have a right to *enjoin* U's use. Protecting O's copyright by means of a liability rule, which permits U to infringe and pay damages only—either on a case-by-case basis, or pursuant to a compulsory licensing scheme—may sometimes be preferable to protecting the copyright by means of a property rule within the shadow of which the parties can bargain to their own solution. For the most part, IP law in general and copyright in particular shun the use of compulsory licenses, out of concerns that courts or other governmental actors lack the information necessary to determine the proper amount of the fee, thus possibly undervaluing O's entitlement and undermining the incentive scheme; and because compulsory licensing itself may discourage the private sector from developing superior transaction cost reducing institutions.¹¹ Nevertheless, U.S. copyright law does permit compulsory licensing in several discrete situations in which transaction costs are likely to be high.¹² Fair use, however, if characterized as a compulsory licensing system under which the cost of the license is zero, may be preferable to compulsory licensing for price above zero when the allocable social costs of compulsory licensing exceed the value to the individual user. For example, a compulsory licensing system that imposed a cost of \$10 upon a given transaction (whether payable by the

⁹ See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1296 (1996).

¹⁰ 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, __ (1998); but see Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, __ (1998) (disputing Bell's thesis).

¹¹ See ROGER D. BLAIR & THOMAS F. COTTER, *INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES* __ (2005).

¹² See 17 U.S.C. § 104(A)(d)(3) (authorizing owners of derivative works based on "restored works," as defined by 17 U.S.C. § 104A(h)(6), to continue using derivative works upon payment of reasonable compensation); *id.* § 111(c) (providing for compulsory licensing for secondary transmissions by cable systems); *id.* §§ 112(e), 114(d)(2), (f) (providing for compulsory licensing of copyrights in sound recordings for use in digital transmission subscription services); *id.* § 115 (providing for compulsory licensing of musical compositions for use in phonorecords); *id.* § 116 (providing for arbitration of disputes between owners of copyrights to musical compositions and jukebox operators, in the event that negotiations fail); *id.* § 118 (providing for compulsory licensing of works for use by public broadcasting entities); *id.* § 119 (providing for compulsory licensing for satellite retransmissions); *id.* § 122 (providing for compulsory licensing for secondary transmissions by satellite carriers); *id.* § 405(b) (authorizing the court to allow an infringer to continue using work upon payment of reasonable license fee, in certain cases involving innocent infringement).

parties or by society generally) would be inefficient whenever V_U , though greater than V_O , is less than \$10.¹³

The other setting in which fair use should apply arises when the social value of the use (V_S) exceeds the amount by which the owner values preventing the use (V_O), which in turn exceeds the individual user's value (V_U); that is, $V_S > V_O > V_U$. This setting could be viewed as presenting a type of transaction cost problem too, in that if transaction costs were zero all of the members of society who valued the use, and whose collective valuation equals V_S , could band together and reach agreement to pay O some amount in between V_O and V_S . This perspective might seem a bit myopic, however, depending on just how one interprets social value. Social value might include, for example, the value of permitting someone to respond to criticism by quoting the critic's words back at him, for purposes of effectively disproving them. In such a case, Wendy Gordon has argued, the use is justified, rather than excused, and a rule requiring payment should be rejected on normative grounds.¹⁴ Furthermore, value itself can be defined in different ways. Economic analysis typically relies upon revealed preferences--that is, the amount one is willing to pay (WTP) to acquire a good or the amount one is willing to accept (WTA) to part with it—to define value, but this choice can be problematic. For one thing, experimental evidence suggests that WTA sometimes exceeds WTP, in which case one must determine which measure better reflects the amount the individual values the good.¹⁵ For another, but WTP and WTA both assume that the amount by which one values a given thing is commensurable in money.¹⁶ WTP, moreover, depends to some extent on one's ability to pay, and thus might seem only a rough proxy for utility (as well as ethically troubling, under some circumstances, to boot.)¹⁷ The conclusion that $V_S > V_O > V_U$ in a given setting, therefore, might reflect a collective judgment that social

¹³ See LANDES & POSNER, *supra* note __, at 116. There may also be instances in which a rule that required payment as a condition of use would degrade the value of the use or have other negative consequences. For example, Wendy Gordon has argued that more widespread use of liability rules in copyright would (1) enable “industry lobbyists more easily [to] argue in favor of even greater copyright extensions,” and (2) potentially undermine the creative process. Apropos of the latter, Gordon suggests that “[i]f . . . an author could only expect money, her perception of her task--and the quality of what she produces --could degrade,” and in addition that “a requirement of ubiquitous payment may erode everyone’s sense of indebtedness to the community” by promoting “the illusion that we are not net recipients.” Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC’Y U.S.A. 149, 193-96 (2003) [hereinafter, Gordon, *Excuse and Justification*]. Gordon expands upon the degradation point in Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 78, 87-89 (2004) [hereinafter Gordon, *Incentives*] (defending the thesis that “imposing a duty to pay for use might in particular be inappropriate for . . . persons who are peculiarly well placed to be motivated by perceptions of gift because they have a personal relationship to the text”).

¹⁴ See Gordon, *Excuse and Justification*, *supra* note __, at __.

¹⁵ [CITES]

¹⁶ [CITE TO INCOMMENSURABILITY LITERATURE].

¹⁷ [CITE]

utility is greater if a given use proceeds, despite the fact that the individual user would not or could not pay the owner's going rate.¹⁸

Another way of restating the condition that $V_s > V_o > V_u$ --one that is easier to integrate within the framework of mainstream economics—is that the individual user's use gives rise to some spillover or positive externality, which redounds to the benefit of third parties. Collectively these third party benefits may exceed the amount O would be willing to accept to consent to the use, but the amount any single user would be willing to pay does not. Many of the uses specifically referenced in § 107 of the Copyright Act as possible manifestations of fair use, such as uses for purposes of education and news reporting, may fall within this category.¹⁹ But externalities can take many forms, and many discrete applications of fair use, including some that are typically thought of as being rooted in other policies, can be viewed as falling within a broadly construed externalities rationale. For example, it is often said that fair use permits brief quotations for purposes of reviewing a literary or other work, because reviews are a form of advertising; but the advertising is credible only if author and publisher permissions are not required.²⁰ Ex ante, authors and publishers benefit from a system in which permission is not required, even if ex post it might be in a specific author's or publisher's interest not to grant consent to a specific reviewer. But this is just another way of stating that the social benefit of the use is presumptively high, even when the value to an individual copyright owner exceeds the value to the individual reviewer. Moreover, reviews and other forms of criticism (including parodies) might be viewed as giving rise to positive externalities even apart from the interest of authors and publishers, to the extent they enable audiences to decide in advance whether to consume certain works, or affect their appreciation thereof. Such information may well affect the market for the work under review--perhaps negatively--but the readers' interest in evaluating the quality of the work under review must be viewed as outweighing the loss to the author; any other view would almost surely give rise to a conflict between copyright and the First Amendment guarantee of freedom of speech.²¹ Yet another example of an application of fair use that might generate positive externalities would arise when an author wishes to include quotations from multiple copyrighted works in the author's own work. As Ben Depoorter and Francesco Parisi have shown, if each of the quoted authors insists upon the

¹⁸ Put another way, fair use may confer distributive benefits by exempting users from having to pay for content in some situations in which ability to pay constrains willingness to pay. See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1543-45 (2005). Another way of approaching the matter is to posit that the *private* value (V_u) of some uses may exceed V_o , if some measure of utility other than willingness to pay applies—perhaps due to a normative judgment that permitting a particular use (say, a use for purposes of self-defense) is appropriate, regardless of whether the owner objects. See Gordon, *supra* note __, at __.

¹⁹ See 17 U.S.C. § 107 (2000).

²⁰ See LANDES & POSNER, *supra* note __, at __. If the quotation is longer than is necessary to make the point, however, it threatens to supplant demand for the original, and is therefore less likely to be fair use.

²¹ [CITES] More generally, forbidding certain uses might inhibit the flow of ideas and thus undermine the purpose of copyright itself

profit-maximizing price for permission, the collective fee demanded may outweigh the value of the use, thus discouraging the use altogether.²² A third example may arise when a copyright owner objects to the temporary copying of its software code for the purpose of reverse-engineering the code so as to develop a noninfringing complementary or competing product. The public interest in competition may outweigh the value to both the copyright owner and to the copier, thus justifying a fair use right to reverse engineer.²³

To be sure, as in the high transaction cost setting, fair use is only one possible way of addressing a potential market failure, here due to the presence of positive externalities. If a way were found for users to internalize all of the positive externalities, for example, they would be willing to pay an amount that exceeds V_O . Rules designed to increase the internalization of externalities, however, may at some point give rise to counterproductive costs, as suggested in a recent article by Frischmann and Lemley.²⁴ Or, in theory, society could decide to subsidize the posited social value in other ways—as to some extent it already does through, for example, public education—and leave copyright alone. And as before nothing in this analysis suggests that copyright owners necessarily must be paid nothing. Although a compulsory licensing fee that equaled V_O would defeat the purpose of permitting unauthorized use under this second class of cases, in theory a court could require the user to pay some fee less than or equal to V_U . Teasing out what this value is might not be worth the candle, however; moreover, as noted above, perhaps in some settings a rule requiring payment would itself exert a negative effect upon the ways in which people value certain uses.²⁵

Finally, it should be clear that nothing in the preceding analysis suggests that the fair use framework described above is easy to apply. Reasonable minds may well differ on the issue of whether transaction costs are sufficiently high, or positive externalities sufficiently present, to justify the exercise of fair use in a given case. Courts and commentators have vigorously disagreed, for example, about whether satire and burlesque, “critical engagements,” and reverse engineering of software²⁶ should or should not count as fair use. Moreover, since externalities are not directly measurable in any event, fair use tends to make use of presumptions that certain uses (such as criticism and

²² See Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, GEORGE MASON UNIV. SCHOOL OF LAW, LAW & ECON. WORKING PAPERS SERIES, WORKING PAPER NO. 01-03 (2001), available at http://papers.ssrn.com/paper.taf?abstract_id=259298.

²³ See Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, 48 WM. & MARY L. REV. __ (forthcoming 2006).

²⁴ See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, __ COLUM. L. REV. __, __ (2006).

²⁵ See *supra* note __.

²⁶ For discussions of the contours of the debate, see Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 390-94 (2005) (discussing critical engagements, satire, and burlesque); Cotter, *supra* note __, at __ (discussing reverse engineering of software).

its close cousin, parody) have high social value--and in this sense may be closer than it sometimes appears to the systems applied in some other countries which, lacking a fair use doctrine as such, include, within their copyright statutes, a long list of specific permissible uses.²⁷ (Even with this caveat, however, most commentators agree that fair use is a broader, more flexible exception than any that exists elsewhere except perhaps Canada.)²⁸ On the other hand, some cases may be relatively easy because the use at issue almost certainly fits in one category or the other--and maybe both. For example, a teacher who photocopies a single article from the morning newspaper for relevant classroom use later in the day almost certainly has engaged in a fair use, whether the theoretical justification is found in the transaction-cost rationale (it might be difficult to obtain permission for such spontaneous use at any price, and the copyright owner most likely would consent anyway) or the externalities rationale (because education is a public good).²⁹ Fair use nevertheless remains fairly unpredictable and uncertain in many settings; as we shall see, this feature of the doctrine has important implications for the analysis of copyright overenforcement.

III. The Decision to Use (or Not)

Suppose that U, an author, wishes to reproduce or adapt a portion of O's copyrighted expression. At the outset, U has three possible options. First, she may seek out O and ask permission; assuming that O responds, O will either agree to the use (whether for a fee or not), or will decline. If O declines, U can either use—and risk detection and possible legal action—or forgo use. Presumably, U's decision in light of O's rejection will be based upon U's evaluation of the likely outcome if U decides to use without permission. If U uses, she risks detection and possible legal action, which may result in a judgment favorable to U, a judgment favorable to O, or settlement. If U does not use, she forgoes the value of the use to her but avoids the potential negative consequences of litigation. Second, U might decide to use without first contacting O (or to give up the search for O before making contact). As above, U then risks detection and possible legal action, which may result in a judgment favorable to U, a judgment favorable to O, or settlement. Third, U may decide to forgo the use before making contact with O, based upon her evaluation of the likely consequences of unauthorized use.

More precisely, we can model U's decision as follows. U will decide to engage in the unauthorized use of O's work when:

$$(1) P_A V_U + (1 - P_A)[P_F(V_U - (1 - \alpha)C_U) - (1 - P_F)(C_U + \beta C_O + D + E)] - R_U > 0,$$

²⁷ [CITE TO FRENCH AND GERMAN COPYRIGHT STATUTES AS EXAMPLES]

²⁸ [CITES]

²⁹ [CITE TO GUIDELINES]

where P_A is U's subjective probability that O will acquiesce in the use; V_U is the value U expects to derive from the use; P_F is U's subjective probability that a court would rule that the use is fair; C_U is U's expected cost of litigating; α is the portion of C_U that U expects to recover from O if U prevails at trial, where $0 \leq \alpha \leq 1$; C_O is U's subjective estimate of O's cost of litigating; β is the portion of C_O that U expects O will be awarded if O prevails at trial, where $0 \leq \beta \leq 1$; D is the expected damages award if the court rules in favor of O; E is U's expected cost of complying with an injunction if the court rules in favor of O; and R_U is U's risk premium, where $R \geq 0$.³⁰ Realistically, U may not stop to think about all of the possible contingencies; or she may have no idea, without first consulting counsel, what value to accord some of the above variables. Nevertheless, to the extent U attempts to make some type of rational evaluation of the likely consequences of use, the variables presented above would appear to include everything that would be relevant to that evaluation.

U's subjective probability that O will acquiesce in the use (P_A) depends upon U's estimate of O's estimate of O's likely payoff if O proceeds to trial. O's payoff can be modeled as follows:

$$(2) \quad (1 - P_F)(D + I - (1 - \beta)C_O) - P_F(\alpha C_U + C_O) - R_O,$$

where I is the value to O of obtaining an injunction forbidding U from future use.³¹ Note that $D + I$ should equal V_O , O's expected value from the use not occurring (assuming, that is, that all damages awarded are collectable). Equation (2) therefore can be rewritten as:

$$(2a) \quad (1 - P_F)(V_O - (1 - \beta)C_O) - P_F(\alpha C_U + C_O) - R_O.$$

Of course, the parties may differ in their estimates of all of these variables. O will file suit only if O believes that equation (2) is greater than zero; P_A , on the other hand, can be thought of as U's subjective probability that equation (2) is less than zero.

Based on the foregoing analysis, we can derive a few conclusions about the behaviors an ideal copyright system would induce. First, the system would encourage U to use without permission—that is, to conclude that equation (1) is greater than zero—whenever either $TC_u > V_U > V_O$ or $V_s > V_O > V_U$. Second, the system would encourage

³⁰ A risk-averse person, “when faced with a choice between two gambles with the same expected value . . . will choose the one with a smaller variability of return.” WALTER NICHOLSON, MICROECONOMIC THEORY 250 (5th ed. 1992). In the present context, a risk-averse litigant would be willing to pay a risk premium R to ensure an immediate payoff below the actuarial value of litigating to judgment. See Thomas F. Cotter, *Antitrust Implications of Patent Settlements Involving Reverse Payments: Defending a Rebuttable Presumption of Illegality in Light of Some Recent Scholarship*, 71 ANTITRUST L.J. 1069, 1073 (2004).

³¹ The value of an injunction would include the value of the future stream of royalties, if any, from U, in the event the parties agree to a license subsequent to the entry of judgment, and also any positive effect on the value O can extract from other users—which value will be diminished if U prevails.

U to ask permission whenever $V_U - TC_u > V_O$. Third, the system would encourage U to forgo use when $V_O > V_S > V_U$.³² We can also begin to consider what might cause the system to diverge from the ideal and instead to produce perverse outcomes, e.g., U forgoes use despite the fact that $TC_u > V_U > V_O$ or $V_S > V_O > V_U$, or alternatively U uses without permission despite the fact that $V_O > V_S$.

The first point to note is that the “ideal” copyright system may be even more difficult to achieve than one might at first blush imagine. To illustrate, let us assume (unrealistically) that the parties have perfect information, that both are risk-neutral, and that litigation is costless.³³ Under the conditions stated, equation (2) equals $(1 - P_F)(D + I)$. In the extreme case in which $P_F = 1$, equation (2) equals 0, and O will acquiesce. P_A therefore equals 1, and equation (1) reduces to V_U . U engages in the unauthorized use of the work, as she should. At any point at which $P_F < 1$, however, equation (2) is positive. This means that O is better off litigating than acquiescing. Under these circumstances, P_A is 0 and equation (1) reduces to $P_F V_U - (1 - P_F)(D + E)$. U is better off settling for a fee F, if $V_U - F > P_F V_U - (1 - P_F)(D + E)$, which can be restated as $(1 - P_F)(V_U + D + E) > F$. (Settlement will be feasible, however, only if U’s threat to use and risk provoking a lawsuit is credible, that is, only if $P_F V_U - (1 - P_F)(D + E) > 0$.) Both parties will be better off settling on terms that permit U to use, rather than litigating, if there exists an F such that

$$(3) \quad (1 - P_F)(V_U + D + E) > F > (1 - P_F)(D + I).$$

Furthermore, if we make the not implausible assumption that $E \leq I$ —it should cost less for the defendant to comply with an injunction than the value the plaintiff expects to derive from the injunction, otherwise the defendant should buy out the plaintiff’s right to an injunction—then equation (3) can be restated as follows, given that $D + I = V_O \geq D + E = xV_O$, where $0 \leq x \leq 1$:

$$(3a) \quad (1 - P_F)(V_U + xV_O) > F > (1 - P_F)(V_O), \text{ or}$$

$$(3b) \quad V_U > V_O(1 - x).$$

Referring to the ratio of U’s value to O’s value (V_U/V_O) by the arbitrary symbol γ , equation (3b) can be further restated as

$$(3c) \quad \gamma > (1 - x).$$

If, on the other hand, $\gamma < (1 - x)$, no mutually agreeable settlement on terms permitting U to use is possible. One possibility is that both parties will choose to litigate

³² There may be forms of speech, such as threats or hate speech, that provide subjective value to U but which reduce social wealth, that is, in which $V_U > V_S$. The First Amendment largely precludes courts from comparing social and private utilities in this fashion, though with some exceptions.

³³ If the decisionmaker has perfect information also, then it knows whether $TC_u > V_U > V_O$ or $V_S > V_O > V_U$. If the parties are aware that the decisionmaker has perfect information, then P_F equals either 0 or 1, in which case U either forgoes use or uses without permission, respectively.

instead, though if so this is likely due to defects in the available remedies. For example, suppose that $P_F = .75$, $V_U = 100$, $V_O = 200$, and $x = 0.4$. On these facts, $\gamma = 0.5 < 1 - x = 0.6$, so settlement is not an attractive option. U foresees a positive payoff of \$55 if she litigates ($.75(100) - .25(80)$). O foresees a positive payoff of \$50 if he litigates ($.25(200)$). O would accept a fee of \$50 or more to settle, but this would leave U with only \$50 or less ($100 - F$), which is a worse outcome for U than litigating. U would pay no more than \$45 to settle. (Indeed, in the extreme case in which $x = 0$, settlement will never occur when $V_O > V_U$; γ will always be < 1 .) The problem is attributable to the fact that x is too small. If x is set such that $x > (V_O - V_U)/V_O$, the parties will always be better off settling than litigating. Thus, in the preceding example, if $x > .5$, U foresees a payoff of no more than \$50 if she litigates, which makes settling for a \$50 fee attractive.

A second possibility, depending on the relevant values, is that U will forgo the use altogether. Recall that U will litigate only if there is a positive payoff from doing so, that is, if $P_F V_U - (1 - P_F)(xV_O) > 0$. Rearranging terms, this becomes $\gamma > (1 - P_F)x / P_F$ or, more conveniently, $\gamma > ((1/P_F) - 1)x$. U therefore will not litigate when

$$(4) \quad \gamma < ((1/P_F) - 1)x.$$

To illustrate, suppose that $P_F = .75$ and $x = .6$. U will forgo use if $\gamma < 0.2$, that is, if O expects to derive more than 5 times as much value from U's nonuse as U expects to derive from the use, *even if* the social value of the use (V_S) exceeds V_O —as, here, it probably does, given the assumption that $P_F = .75$.³⁴ Put another way, in cases identical to this one, one would expect U to prevail three times out of four; in fact, though, U will forgo the use every time. Moreover, U's willingness to forgo use in some cases in which the fair use conditions are present is attributable exclusively to the asymmetry of the stakes: U simply has much less to gain than O has to lose. Note, however, that if it were possible to substitute social value V_S for V_U in the above equations—or if $V_U > V_O$ — γ would always exceed 1, and hence would always exceed $1 - x$, thus ensuring settlement in every case in which $P_F V_U - (1 - P_F)(xV_O) > 0$. Private and public benefits would be perfectly aligned. The fact that U would be paying for use in every case other than that in which $P_F = 1$ merely reflects the fact that the parties are bargaining in the shadow of the law; payment still might be problematic, however, if as Gordon suggests there are circumstances in which payment for what appears to be a normatively compelling use itself degrades the value of that use.

Another way of thinking about the matter, alluded to in Part I above, is that fair use may not adequately correct for a type of appropriability problem. Most often, the term “appropriability problem” refers to the difficulty the creator of a work of authorship (or an invention) faces in appropriating all or even most of the social value of her creation, once it is released to the public, due to the nonrivalrous nature of information and to the difficulties (given modern copying technology) of excluding others from it

³⁴ For example, suppose that $V_U = 100$ and $V_O = 600$. $\gamma = 1/6 < (4/3 - 1)x = 0.2$, thus deterring U from use. If U were to use without permission, her expected payoff would be $.75(100) - .25(.6)(600) = -15$.

once it has been made public.³⁵ Absent a corrective mechanism such as the institution of exclusive rights, the assumption goes, these problems will result in the underproduction of creative works.³⁶ Potential creators have no financial incentive, at any rate, to invest in the creation of works that promise substantial social returns but private returns that are less than the cost of the investment. (Of course, other incentives, including the sheer pleasure of creating, might suffice to induce creation and publication under some circumstances). What has gone unnoticed in the literature thus far is that, to the extent the fair use doctrine is intended to permit unauthorized uses that promise substantial social returns, it too suffers from an appropriability problem. The preceding analysis suggests that, under some circumstances, would-be users are unlikely to incur the risks associated with unauthorized use, even though the social value of their use would exceed the harm to the copyright owner.³⁷

That said, a few caveats are in order. The first is that it is difficult to know for certain how many real-life cases exist in which asymmetric stakes and lack of appropriability alone deter users from engaging in fair uses; the answer would depend in large part upon how frequently social value due to positive externalities outweighs O's perceived value from nonuse, which in turn must outweigh U's private value by a substantial multiple. Second, under the simplifying assumptions employed thus far, fair use underutilization does not appear to be a problem in the class of cases in which fair use is justified due to high transaction costs, rather than positive externalities. Realistically, the copyright owner probably never detects the use in most of these cases. In those in which it does detect the use after the fact, it could file suit but a settlement is likely in accordance with equation (3c). By hypothesis, in these cases $V_U > V_O$ and thus $\gamma > 1 > (1 - x)$. In the event settlement did not occur, U would prefer litigating to conceding and forgoing continued use, as long as $\gamma > ((1/P_F) - 1)x$. This condition is necessarily satisfied as long as P_F exceeds .5, and at even lower P_F depending on the value of x .

Once we factor into the analysis such variables as risk aversion, litigation costs, and asymmetric information, however, the potential for fair use to be underutilized becomes more substantial in both the positive externalities and transaction costs cases. To illustrate, consider next an extreme case in which $P_F = 1$ but $P_A = 0$. O, in other words, is certain to lose if the case proceeds to trial but it is willing to proceed nonetheless. Equation (1) reduces to

³⁵ See, e.g., Kenneth Dam, *The Economic Underpinnings of Patent Law*, 23 J. LEG. STUD. 247, 247 (1994).

³⁶ Even with the institution of exclusive rights, creators are unlikely to reap *all* of the social benefit of their creations. An appropriability problem remains, albeit one of lesser magnitude, and the production of new works may remain suboptimal. See, e.g., Christopher S. Yoo, *Copyright and Product Differentiation*, 79 NYU L. REV. 212, __ (2004). Measures designed to increase creators' ability to appropriate—to internalize the positive externalities of their work—nevertheless are likely to be counterproductive after some point, due in part to excessive transaction costs. See Frischmann & Lemley, *supra* note __, at __.

³⁷ In the model above, the private cost facing users was entirely dependent on the probabilistic nature of the fair use determination. More predictable fair use standards reduce but do not eliminate the problem, except in the extreme (and unrealistic) case in which P_F must be either 0 or 1. The presence of other private costs, including attorneys' fees and risk premia, exacerbate the problem.

$$(5) V_U - (1 - \alpha)C_U.$$

Note that $R_U = 0$, since there is no risk; the outcome if the case proceeds to trial is certain. U nevertheless forgoes use whenever $(1 - \alpha)C_U > V_U$. In the extreme case in which $\alpha = 0$ (meaning that each side necessarily bears its own attorneys' fees and costs), U forgoes use whenever its expected fees and costs exceed the expected value of the use. Alternatively, when $\alpha = 1$, U uses with impunity. Realistically, however, even in a system in which the losing party pays the prevailing party's fees as a matter of course, these fees likely would not include the initial cost of consulting with counsel, prior to commencement of litigation, whether the use is a fair use. α therefore will be < 1 , and so even this initial cost could deter U from use, depending on the magnitude of the relevant variables.

Of course, the preceding example depended upon O being able to credibly convince U that O would sue even if the suit was a sure loser. Although this may be possible in some instances, it is more likely that O can convey this message when U perceives that $P_F < 1$. As long as U perceives that $P_F < 1$, U realizes that it is possible for equation (2) to be positive, that is, that O foresees a positive payoff from litigating. More generally, recall that P_A is U's subjective probability that O will acquiesce. Thus,

$$(6) P_A = f(P_F, D, I, (1 - \beta)C_O, \alpha C_U, R_O), \text{ where}$$

$\partial P_A / \partial P_F, \partial P_A / \partial C_O, \partial P_A / \partial \alpha, \text{ and } \partial P_A / \partial R_O > 0$; and $\partial P_A / \partial D, \partial P_A / \partial I, \partial P_A / \partial \beta, \text{ and } \partial P_A / \partial C_U < 0$. Increases in $P_F, C_O, \alpha, \text{ or } R_O$ therefore tend to increase the probability that O will acquiesce, *ceteris paribus*, whereas decreases in any of these variables tends to decrease the probability of acquiescence. Increases in D, I, β, C_U also tend to decrease the probability of acquiescence, at least for $P_F < 1$, whereas decreases have the opposite effect. O therefore has an incentive to signal to U that $P_F, C_O, \alpha, \text{ or } R_O$ are relatively small and that $D, I, \beta, \text{ and } C_U$ are relatively large.

With these additional factors taken into account, U may be deterred from use even in a paradigm case of probable fair use, in which $TC_u > V_U > V_O$ and P_F is very high. Consider, for example, a situation in which U wants to incorporate a paragraph from O's out-of-print book into U's own book; U is uncertain, however, whether O's book is still under copyright, does not know where to contact O, and does not know whether O still owns the copyright. U estimates that the cost of uncovering this information will be \$1,000, and that V_U is \$100. Finally, U cannot know what V_O is but reasonably concludes it is less than \$100. U nevertheless cannot be absolutely sure of the value of any of these variables, or that a court would determine their value with 100% accuracy, so rather than conclude that $P_F = 1$ she proceeds on the assumption that it P_F is, say, .8. U might seem to be in the clear, but she cannot completely rule out the possibility that O will detect her use ex post and file suit, hoping to exploit U's vulnerability after having incurred the cost of printing U's book. Depending on the values to be input into equation

(1), U might choose to forgo the use even under these seemingly auspicious circumstances.³⁸

IV. Six Different Types of Reforms

We are now ready to consider the effects of different possible reforms upon copyright enforcement and fair use. The following discussion concentrates on six, but there are undoubtedly more. To the extent that copyright overenforcement and fair use underutilization result from appropriability problems, for example, virtually any measures designed to increase users' ability to appropriate the social surplus of their uses would reduce these problems to some degree, though they may have other negative consequences.³⁹ Society can and probably should invest more in educating users about their fair use rights and in providing users with pro bono legal representation, as proposed by Hein and Beckles. Doing so would reduce some of the information asymmetry that may cause risk averse users in particular to avoid lawful uses of copyrighted works. What follows, however, is a discussion of six specific types of reform to copyright law itself that have been proposed or suggested, in one form or another, in recent copyright cases and scholarship. The first reform involves substituting a liability rule entitlement for fair use, on the one hand, or for a property rule entitlement, on the other, in some class of cases. The second also involves modifications to copyright remedies law, specifically as it relates to damages liability in cases in which the defendant's use is not fair and the plaintiff is entitled to injunctive relief. The third involves the imposition of sanctions upon plaintiffs who persist in the face of valid fair use defenses (or for that matter, other defense entitlements). The fourth involves modifying the rules relating to the recovery of attorneys' fees. The fifth involves measures designed to increase the accuracy of fair use determinations, and the sixth involves measures designed to increase the predictability of those determinations. I conclude that many of the measures have merit, but that their effects on fair use are likely to be limited.

A. Liability Rules

Following the familiar Calabresi/Melamed framework, in the present context I use the term "liability rule" to mean that the copyright owner is entitled to recover damages

³⁸ Suppose, for example, that U arbitrarily estimates that $P_A = P_F = .8$; and that she estimates that $\alpha = .5$, $\beta = .25$, $C_U = C_O = \$5,000$, $D = \$500$, and $E = \$500$. U's expected payoff from unauthorized use = $-644 - R_U < 0$, unless U is an extreme risk-lover. On these facts, U would forgo use because of the small potential for incurring costs that are disproportionate to the value of the use; risk aversion would make her even more likely to avoid the use.

³⁹ Book reviewers, for example, already do capture some of the surplus generated by their reviews, to the extent the original portions of the reviews themselves are subject to copyright protection. But it is unlikely they extract all of the value through typical pricing mechanisms, insofar as the ideas can be passed from one reader to with impunity and even physical copies of the review can be redistributed after the lawful first sale.

for copyright infringement, but not injunctive relief.⁴⁰ Under a liability rule system, the user has the option to breach and pay damages. Because the copyright owner cannot enjoin the user from using, as long as the user pays the applicable amount of damages, a liability rule regime functions as a type of compulsory licensing system. As noted above, Congress has authorized compulsory licensing of copyrighted works in some discrete circumstances—typically those in which, as the Calabresi/Melamed framework predicts, the transaction costs of coordinating use among multiple users would be high.⁴¹ For the most part, however, copyright rights are protected by a property-like entitlement, meaning that upon a finding of infringement the owner usually succeeds in obtaining an injunction (as well as damages to compensate for losses suffered prior to the entry of the injunction).⁴² The Supreme Court has cautioned, however, that injunctive relief is discretionary; successful copyright plaintiffs are not necessarily entitled to injunctive relief in every case.⁴³ But neither the Supreme Court nor the lower courts have elaborated much upon the circumstances under which courts may deny injunctive relief.

One possible reform of the current fair use regime might be to encourage courts to permit unauthorized uses to a greater extent than they currently do, but subject to the user's duty to pay compensation—in effect, adopting a liability rule regime for some class of unauthorized uses. At first blush, the suggestion that liability rules might play a useful role in responding to the problem of copyright overenforcement might seem paradoxical, insofar as the imposition of damages liability means that the plaintiff is entitled to prevail; by definition, it would seem, if damages are the appropriate legal response, then the unauthorized use cannot be fair. But there is a theoretical case to be made for the more widespread use of liability rules in this context. Recall from the preceding Part that there is likely to be a class of cases in which social value (V_S) exceeds V_O , which in turn exceeds V_U . In such cases, permitting the unauthorized use to proceed would appear to maximize social wealth. But there is a problem. Allowing an unauthorized use to proceed, without any duty to compensate the copyright owner, threatens to undercut copyright owners' incentives to produce, publish, or engage in other socially beneficial activities in the first place. One can imagine, for example, cases in which the decision to invest in producing a work is negatively impacted by the likelihood that all or most of the expected uses of the work would likely be deemed fair uses, under a framework that finds fair use whenever $V_S > V_O > V_U$. To be sure, policymakers might try to avoid this problem by acknowledging that social value (V_S) *includes* the long-run value of having an effective copyright incentive scheme in place. On this theory, V_S never would exceed V_O under circumstances in which fair use would substantially

⁴⁰ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, ____ (1972); cf. Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, ____ (1997).

⁴¹ See *supra* note ____.

⁴² See BLAIR & COTTER, *supra* note ___, at ____.

⁴³ See *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); see also *eBay Inc. v. MercExchange L.L.C.*, 126 S. Ct. 1837, ____ (2006).

undermine socially valuable incentives. Though hardly couched in these terms, the fair use analysis in some real-world cases might be viewed as consistent with this sort of analysis.⁴⁴ More generally, one might surmise that there would be many more cases in which V_s , properly defined to include the social value of preserving copyright incentives, exceeds V_o , which in turn exceeds V_u , if users were obligated to pay owners *something* for the use of the work. Requiring some payment, even if it is less than V_o , would undermine copyright owner incentives less than requiring no payment, and therefore might result in more unauthorized uses going forward under the criterion that $V_s > V_o > V_u$.

That said, the task of arranging matters such that the liability rule regime will increase social welfare is one that may not be easy to accomplish. On the one hand, the payment F to be made by the prospective user under such a system must be such that the use is still worth undertaking, that is, $V_u - F - TC$ must exceed 0. (Recall from the preceding Part that even when fair use *does* apply—i.e., the compulsory licensing “fee” is effectively zero— U may sometimes forgo the use rather than expose herself to even a small risk of liability. This risk may be even greater once attorneys’ fees are factored into the analysis.⁴⁵ The only reason to adopt a liability rule regime, in light of this countervailing effect, is that doing so may expand the universe of cases in which $V_s > V_o > V_u$, even if simultaneously it places some unauthorized uses out of reach of some users.) On the other hand, the payment must be large enough that copyright owner incentives are preserved. Of course, any payment less than V_o at least potentially weakens those incentives, though conceivably only to a small (and therefore perhaps acceptable) extent under some circumstances. In addition, one must take into account other potentially negative consequences of liability rules in this context. The liability rule option surely increases the administrative costs of the copyright system, for all of the reasons suggested above in the discussion of compulsory licenses.⁴⁶ Moreover, Gordon may be right that a rule requiring compensation in all cases in which positive externalities are present would either lead courts and legislatures to expand the scope of copyright rights, or would distort the creative process by commodifying acts of creative borrowing (or both).⁴⁷ And when the user has a strong normative reason (such as self-defense) to engage in the unauthorized use, requiring payment might be morally problematic, even if a rule permitting uncompensated use has a potential negative effect on incentives.⁴⁸ In

⁴⁴ Consider, for example, the reverse engineering cases. A finding of fair use is consistent with the premise that the social value of competition exceeds both the private value to the owner and the potential negative impact upon copyright incentives. This conclusion may well be correct, particularly if network effects are present. See Cotter, *supra* note __, at __. The opposite premise, that the harm to socially valuable incentives exceeds the social value of increased competition, would counsel against a finding of fair use (or other exemptions from copyright liability). See *id.* at __.

⁴⁵ See *infra* Part IV.D.

⁴⁶ See *supra* text accompanying notes __.

⁴⁷ See *supra* note __.

⁴⁸ See Gordon, *Excuse and Justification*, *supra* note __, at 188 (citing Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 330-31 (1996)).

light of these obstacles, it is not surprising that few courts to date have acted upon the Supreme Court's suggestion that damages liability may be a sufficient remedy for some classes of copyright infringement.

Nevertheless, there are at least two types of cases in which a liability regime conceivably might be an improvement over the current state of the law. The first consists of cases in which the defendant wishes to make a derivative work based upon the plaintiff's copyrighted work. Current law provides the defendant with little bargaining power in such situations, even if the derivative work is a radical improvement over the underlying work.⁴⁹ Application of the liability rule option might encourage more such uses that promise high social value, without unduly dissipating the incentive to invest in the creation and publication of underlying works; it also might resolve much of the tension between the owner's copyright rights and the derivative work author's First Amendment interest in freedom of speech.⁵⁰ Indeed, adoption of the liability rule option for unauthorized derivative works might go a long way, all by itself, toward solving the overenforcement problem. But there are some substantial counterarguments to consider. Encouraging users to create unauthorized derivative works, subject to a duty to pay damages, might not affect the incentive to create most types of underlying works,⁵¹ but it could have an impact on *some* works, particularly works of entertainment that are expected to generate substantial spinoff revenue.⁵² And there are other reasons as well why according copyright owners the exclusive right to enjoin unauthorized derivative works might be beneficial, among them the reduction of congestion externalities and other coordination problems⁵³ and concern over copyright owners' "moral rights."⁵⁴

⁴⁹ See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1063-65 (1997).

⁵⁰ See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, __ (2002); Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT OFF. SOC'Y U.S.A. 513, __ (1999); John Tehranian, *Whither Copyright? Transformative Use, Free Speech and an Intermediate Liability Proposal*, __ BYU L. REV. __, __ (2005); see also Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, __ (2002) (arguing that according copyright owners a right to recover the derivative author's profits attributable to the underlying work would be consistent with the First Amendment, but that compensatory damages and injunctive relief are not); Maureen O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, __ (2000) (arguing in favor of a patent fair use doctrine, under which fair users would be required to pay compensation).

⁵¹ See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1204 (1996).

⁵² See 2 PAUL GOLDSTEIN, COPYRIGHT § 5.3, AT 5:81 (2002). The normative question of whether encouraging such spinoffs is good or bad policy depends upon one's vision of the good society. See Cotter, *supra* note __, at __. In addition, permitting the unauthorized creation of derivative works that might substitute for the underlying work would tend to undermine incentives to produce underlying works. To the extent a derivative work transforms the underlying work, the substitution effect is reduced but perhaps not eliminated altogether. See *Ty, Inc. v. Publications Int'l Inc.*, 292 F.3d 512, __ (7th Cir. 2002).

⁵³ In theory, if too many users want to prepare derivative works based upon the same underlying work, the market for such derivative works may become prematurely saturated, leaving consumers worse off than they would be if the owner of the underlying work could coordinate production of derivative works. For

Under the liability rule option, there also would be some increase in litigation costs devoted to the issue of whether a given use adapts or transforms the underlying work, or merely copies it. Ultimately the question of whether to adopt a liability rule in the case of unauthorized derivative works comes down to how much weight to accord the intangible First Amendment interest in permitting users to express themselves through the adaptation of others' expressive works; the more salient that interest appears to be, the less relevant the potential negative consequences appear. In the near term, however, the odds of this rule being widely adopted appear (to me, at least) to be small.

The second class, consisting of cases in which copyright owners refuse to license the reproduction of their works for political, ideological, or religious reasons, may be a more feasible candidate for the liability rule solution. To illustrate, consider the facts of *Worldwide Church of God v. Philadelphia Church of God, Inc.*,⁵⁵ a case that I have previously written about at some length.⁵⁶ A religious organization that owned the copyright to a work it no longer believed to be divine revelation refused to license the work's republication to a breakaway sect that intended to use the work for religious purposes, including proselytization.⁵⁷ The refusal to license may have significantly affected the defendant's ability to practice its religion, assuming that—as is sometimes the case with respect to religious texts, in the minds of believers—no paraphrased text would be an adequate substitute for the original.⁵⁸ And yet a judgment declaring the

example, the first film version on a novel may exhaust public demand for a second film version (for a time, at least), even if the first film is of lower quality than some hypothetical authorized alternative version would have been. Or perhaps no one will invest in making a film version, out of fear that other versions that may be in the works will divide the market so that no one makes a profit. An exclusive right to prepare derivative works may increase social wealth by preventing the negative effects of such copyright races—but the evidence is far from clear. Theoretical and empirical studies of the analogous phenomenon of patent races point in different directions. See BLAIR & COTTER, *supra* note __, at __ (reviewing literature). And one can certainly come up with anecdotal evidence (e.g., the spate of Jane Austen-inspired films and television programs in the later 1990s) to the contrary. Perhaps the most one can say with confidence is that an exclusive right to prepare derivative works is most likely to be welfare-enhancing when the derivative work at issue is one that requires large fixed costs (such as a feature-length movie) and for which demand is relatively finite.

⁵⁴ A translation, for example, is a type of derivative work. See 17 U.S.C. § 101 (definition of “derivative work”). A translation that inaccurately communicates the message intended by the author of an underlying work could be viewed as undermining the integrity of the underlying work, see MILAN KUNDERA, TESTAMENTS BETRAYED: AN ESSAY IN NINE PARTS pt. 4 (Linda Asher tr. 1995), and the exclusive right to prepare derivative works as vindicating interests similar to those that are the subject of moral rights laws in other countries. See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, __ (1997). Kundera himself no longer permits translations into his native Czech of the more recent work he has authored in French. [CITE]

⁵⁵ 227 F.3d 1110 (9th Cir. 2000).

⁵⁶ See Cotter, *supra* note __, at __.

⁵⁷ See *Worldwide Church of God*, 227 F.3d at __.

⁵⁸ See Cotter, *supra* note __, at 361-62 (providing examples).

defendant's use to be fair might be problematic too, given that the defendant intended to make and distribute thousands of copies of the original, in its entirety; were the copyright owner to have another change of heart at some point down the road, it might find the market for the work exhausted by the defendant's copies. In such a case, therefore, a liability rule might be preferable to either fair use or no use, insofar as it permits the user to engage in protected acts of uncensored speech or religion while still preserving some degree of copyright protection for the owner. Similar cases might arise whenever a defendant has a compelling need to access a specific text in order to make its point most effectively.⁵⁹ But the number of such cases is likely to be small. Some cases that might seem to fall within this fact pattern, at first blush, may not appear so promising upon further reflection.⁶⁰ Moreover, routine inquiry into copyright owner motives in every case would be intrusive and, in most circumstances, unnecessarily costly, given that access to a work's underlying ideas as expressed in a paraphrase should in most instances suffice. Nevertheless, courts should consider applying liability rules in the small class of cases in which copyright owners threaten to turn the copyright system on its head by using copyright as a tool of censorship rather than for promoting robust debate.

A third possibility would simply be for courts to weigh the equities of injunctive relief on a case-by-case basis, as they are now instructed to do in the context of patent infringement suits.⁶¹ This may be a desirable rule, but unless the cases begin denying injunctive relief on a large scale and the cases begin to sort themselves out with some predictability, it is likely to have little impact on users' ex ante decisions to use or to refrain from use. And unless courts adopt the liability rule option for derivative works, as discussed above, the range of cases in which injunctive relief will be denied following a finding of infringement is likely to be quite limited. Thus, despite its theoretical

⁵⁹ One might think of such cases as involving "partial merger." The merger doctrine states that copyright protection does not subsist when the ideas in a given work merge with its expression, that is, when there is only one way or small number of ways of expressing those ideas. [CITES] As stated, the doctrine obscured several normative issues, such as what "counts" as an idea, and how many ways of expressing it are "small." But one thing that does seem reasonably clear is that courts apply the doctrine only when the need to access the text *in haec verba* is (more or less) universal. The doctrine does not apply when most users could get by with a paraphrase, even though for some class of users access to the exact text is necessary. See Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 386-87 (2005). In this type of case, courts should consider accommodating the latter class through fair use or, perhaps better, by means of a liability rule.

⁶⁰ Consider, for example, the decision by the National Science Association (NAS) and the National Science Teachers Association (NTSA) to refuse permission to the State of Kansas to include its science education standard manuals in the state science curriculum, after the state authorized the teaching of intelligent design theory as an alternative to evolution. See Jennifer Granick, *Evolutionists Are Wrong!*, WIRED NEWS, Nov. 9, 2005, available at <http://www.wired.com/news/print/0,1294,69512,00html>. Granick describes intelligent design theory as "junk," but she describes the refusal to license as akin to other efforts by copyright owners to "squell speech" and suggests the possible applicability of copyright misuse. See *id.* In my view, however, neither fair use nor misuse doctrine should condemn the refusal to license in this instance, absent evidence that the state is unable to obtain adequate substitutes from other sources, or to create its own—a matter than Granick's discussion does not touch upon. Otherwise copyright entitlements become indistinguishable from compulsory licenses.

⁶¹ See *eBay*, 126 S. Ct. at ____.

attractiveness, the liability rule option may wind up playing only a limited role in freeing socially beneficial unauthorized uses from copyright owner control.

B. Damages

A second set of possible reforms involves modifying some aspects of damages law so as to encourage more defendants to assert the fair use defense. Heins and Beckles, for example, propose that “the law should not impose money liability on anybody who reasonably believed her copying was fair,” that is, “to eliminate money damages against anybody who reasonably guesses wrong about a fair use or free expression defense.”⁶² (Presumably the unsuccessful defendant would still be enjoined from future infringement.) Heins and Beckles’s use of the word “reasonably” suggests some sort of objective good faith standard (i.e., that the user had reason to believe that P_F was relatively high), though in theory one could apply subjective standard (e.g., that U believed, innocently but incorrectly, her use to be fair) or some combination of the two. Either alternative would require further elaboration, however. For example, does U act in subjective good faith if she conducts no pre-use investigation of applicable law? If not, how much investigation is necessary? If the standard is objective good faith, how high must P_F be?⁶³

Assuming that the details are worked out, the effect of the Heins and Beckles recommendation would be to eliminate the variable D from equations (1) and (2), in an appropriate case, thus marginally encouraging U to engage in unauthorized use and O to acquiesce. But the effect would likely be attenuated in many cases. In terms of equation (1), the impact is to increase U’s expected payoff only in the amount of $(1 - P_A)(1 - P_F)D$. If P_F must exceed some critical level—say, .30—for the use to be deemed good faith, and if P_A is (as suggested above) in part a function of P_F , the impact of the rule is doubly muted. On the arbitrary but not implausible assumption that P_A and P_F both equal .50, for example, the effect of the rule is to increase U’s payoff by only .25D. Of course, if D is high enough even a sliver of D can be large in absolute terms. Statutory damages for nonwillful copyright infringement, after all, can range from \$750 to \$30,000 for each work infringed.⁶⁴ (On the other hand, reducing the copyright owner’s projected payoff in the amount of $(1 - P_F)D$ could conceivably have a negative impact on incentives—though again, if the reduction kicks in only when P_F is relatively high, and accordingly $(1 - P_F)D$ relatively low, ex ante, the impact on incentives is likely to be minimal too.) The

⁶² HEINS & BECKLES, *supra* note __, at 56, 57.

⁶³ Heins and Beckles suggest their proposal would be an extension of existing 17 U.S.C. § 504(c)(2), discussed *infra* at text accompanying note __. See HEINS & BECKLES, *supra* note __, at 58 n.31. The case law applying this section appears sparse. [CITES]

⁶⁴ See 17 U.S.C. § 504(c)(1). For willful infringement, the upper amount can be as high as \$150,000. See *id.* § 504(c)(2). Given the difficulty of proving actual damages in the form of lost profits or royalties, or defendant’s profits attributable to the infringement, it is possible (though by no means certain) that awards of statutory damages are necessary to preserve the copyright incentive scheme (i.e., to ensure that copyright owners ultimately are no worse off as a result of having their works infringed). See BLAIR & COTTER, *supra* note __, at __.

reduction or elimination of statutory damages, if not all damages, in cases involving good faith fair use defenses therefore might constitute a (moderately) useful reform. And it would not entail a radical rewrite of the act. As Heins and Beckles note, the act already exempts nonprofit educational institutions, libraries, and archives from liability for statutory damages for the good faith but unsuccessful assertion of fair use.⁶⁵ The exemption could be extended to other users.⁶⁶

C. Sanctions

Another possibility would be to discourage plaintiffs from asserting copyright claims in the face of strong fair use defenses, by imposing some type of sanctions against plaintiffs (over and above attorneys' fees) in such cases. In terms of equation (2), one could add another variable S (for sanction), such that O's decision to acquiesce depends upon whether

$$(2b) \quad (1 - P_F)(D + I - (1 - \beta)C_O) - P_F(\alpha C_U + C_O + S) - R_O > 0.$$

In theory, one might think of S as a sort of "reverse multiplier" intended to deter invalid assertions of copyright rights.⁶⁷ For example, if one assumed that O would succeed in deterring the assertion of a valid fair use defense three times out of four, and that each

⁶⁵ See *id.* § 504(c)(2), last sentence (cited in HEINS & BECKLES, *supra* note __, at 58 n.31). The sentence also exempts public broadcasters from statutory damages for public performances of nondramatic literary works and for reproductions of transmission programs embodying performances of such works. See *id.* There appear to be no reported decisions construing this sentence, though as Nimmer & Nimmer observe the language appears to contemplate that the defendant's conduct "must not only be in good faith, but must also be reasonable." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 14.04[B][2][b], at 14-76 (2006). The House Report accompanying the 1976 Copyright Act also states, without explanation, that in applying this sentence "the burden of proof with respect to the defendant's good faith should rest on the plaintiff." H.R. REP. NO. 94-1476, at 163 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5779.

⁶⁶ The Copyright Act also permits statutory damages to be reduced to as little as \$200 in cases in which the plaintiff omitted copyright notice from the work the defendant copied. See 17 U.S.C. § 504(c)(2), second sentence; *id.* § 401(d) ("If a notice of copyright . . . appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the *last* sentence of section 504(c)(2)") (emphasis added). As noted *supra* at note 41 and accompanying text, the *last* sentence of § 504(c)(2) extends an additional good faith defense to only a limited class of users. The act also forbids statutory damages altogether, thus relegating the plaintiff to the (usually) more uncertain realm of lost profits or restitutionary awards, when the plaintiff fails to register his copyright within three months from the earlier of first publication or infringement. See *id.* § 412. [NOTE ALSO ORPHAN WORKS PROPOSAL.]

⁶⁷ Law and economics literature makes extensive use of the multiplier concept in the context of damages awarded to plaintiffs. A common example is that of a defendant who breaches a legal duty--thus conferring upon himself an illicit benefit, or causing the plaintiff an unwanted harm, of \$X. If the breach is detected on average only 1/y of the times it occurs, the optimal damages award is yX. An award of actual damages or restitution (X) would provide no disincentive to commit the breach. For an overview of the literature, see Thomas F. Cotter, *An Economic Analysis of Enhanced Damages and Attorney's Fees for Willful Patent Infringement*, 14 FED. CIR. B.J. 291, 308-14 (2004).

successful deterrence by O brought him \$100 in profit, O's expected gain (abstracting from other costs) would be \$300. If on the one occasion on which O was unsuccessful in deterring the fair use he would be assessed a \$300 penalty, his expected gain ex ante would be \$0; he would no longer have an incentive to deter fair uses. Realistically, however, it is difficult to perceive how a court could craft a deterrent penalty with such precision.

But it may be possible to apply other doctrines as a rough proxy for such a sanction. One possibility is copyright misuse. The misuse doctrine originated in patent law, as an analogue to the common law doctrine of unclean hands. In the patent context, if the defendant in an infringement case can prove that the patent owner has misused its patent, by "impermissibly broaden[ing] the 'physical or temporal scope' of the patent grant with anticompetitive effect," the patent is rendered unenforceable until the misuse is purged (that is, until its effects dissipate).⁶⁸ Several courts have applied the misuse doctrine in the copyright context as well, holding unenforceable copyrights that were deemed to have been used "in a manner violative of the public policy embodied in the grant of a copyright."⁶⁹ Interestingly, most decisions hold that there is no standing requirement with respect to the misuse doctrine; in other words, a defendant may raise the misuse defense even if the defendant itself was not affected by the alleged act of misuse.⁷⁰ Critics, including myself, have questioned this aspect of the misuse doctrine as well as the application of the doctrine in some of the case law.⁷¹ It is conceivable, however, that in an appropriate case misuse doctrine may have a role to play in preventing copyright owners from overreaching—as even Judge Posner, a quondam critic of misuse, has come to believe.⁷²

⁶⁸ *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001 (Fed. Cir. 1986) (quoting *Blonder-Tongue Labs., Inc. v. University of Ill. Fdn.*, 402 U.S. 313, 343 (1971)). The case law is surprisingly vague about exactly when purgation occurs. *See, e.g.*, *B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 498 (1942); *Preformed Line Prod. Co. v. Fanner Mfg. Co.*, 328 F.2d 265, 279 (6th Cir. 1964).

⁶⁹ *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990); *see also Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 783-84, 793-94 (5th Cir. 1999); *Practice Mgt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 517-20 (9th Cir. 1997).

⁷⁰ *See Cotter, supra* note __, at __.

⁷¹ *See id.* at __; Mark A. Lemley, Comment, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CAL. L. REV. 1599, 1614-20 (1990).

⁷² *Compare Assessment Techs., LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) (stating that "[t]he argument for applying copyright misuse beyond the bounds of antitrust . . . is that for a copyright owner to use an infringement suit to obtain property protection, here in data, that copyright law clearly does not confer, hoping to force a settlement or achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process") (Posner, J.), *with* Judge Posner's more skeptical thoughts on misuse as expressed in *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 512 (7th Cir. 1982) (stating that "[o]ur law is not rich in alternative concepts of monopolistic abuse; and it is rather late in the day to try to develop one without in the process subjecting the rights of patent holders to debilitating uncertainty").

In the present context, a finding of misuse can be thought of as a type of penalty S —equal to the value of the forgone revenue from exploitation of the copyright, until the misuse is purged—which the copyright owner will incur in the set of cases in which its opposition to U 's proposed use is deemed to be sufficiently egregious. As $P_F \rightarrow 1$, presumably, the probability that O 's opposition is in good faith declines. In practice, however, application of the misuse doctrine to deter unwarranted opposition to fair uses might be problematic. For one thing, hindsight bias might infect a court's determination as to whether there was a good faith basis, *ex ante*, for O to conclude that the use was not fair.⁷³ For another, if S is too large it may have the unintended consequence of overdetering legitimate exercises of copyright rights; and this hardly seems an idle possibility, given that a finding of misuse renders the copyright unenforceable as to the entire world until the misuse is purged. A variety of reforms to the misuse doctrine nevertheless might ameliorate some of these potential negative consequences. One might be to institute a standing requirement, thus preventing courts from finding misuse without receiving adequate input from the parties most directly affected by the challenged conduct.⁷⁴ In the present context, a standing requirement would prevent a court from finding misuse based upon a defendant's assertion that the plaintiff enforced its copyright too aggressively with respect to some third party. Another might be to alter the consequences of misuse. Kathryn Judge, for example, has argued that courts could penalize misusing copyright owners by substituting liability rule for property rule protection, rather than by rendering copyrights unenforceable.⁷⁵ In terms of equation (2), O would still suffer some penalty S if its copyright effectively became subject to a compulsory license, but it would be a lesser penalty than if the copyright could not be enforced at all and thus might be less prone to overdetering the legitimate assertion of copyright rights. But even so, it is unlikely that courts would find copyright misuse unless the assertion of rights is very weak, that is, unless P_F is quite high to begin with. A greater role for the misuse doctrine may be salutary but, as suggested above, only an incremental improvement over the current regime.

Another possibility might be to create some new cause of action for the assertion of copyright rights in the face of a valid fair use defense. In a related context, Jason Mazzone has argued in favor of creating a civil cause of action for falsely claiming copyright in public-domain works, which he analogizes to a form of false advertising.⁷⁶ Expanding this proposed new tort to cover cases in which the owner of a valid copyright prevents a user from validly exercising her fair use rights, perhaps by threatening

⁷³ For empirical evidence of hindsight bias in the patent case, see Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871684.

⁷⁴ See Cotter, *supra* note __, at __. In a forthcoming paper, however, I discuss whether the proposed standing requirement should be somewhat looser than the analogous antitrust injury/standing requirement in antitrust law.

⁷⁵ See Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 950-51 (2004).

⁷⁶ See Jason Mazzone, *Copyfraud*, __ NYU L. REV. __, __ (2006).

litigation, might seem logical; but in fact it would give rise to many problems. One is administrative. Mazzone's proposal may be plausible in the context of false assertions of copyright in public domain works, because the issue of whether a work has fallen into the public domain is usually easy to determine.⁷⁷ Fair use determinations, by contrast, are often quite difficult to predict, unless the law moves in the direction of a more bright-line approach as discussed below.⁷⁸ Alternatively, if the new cause of action were limited to cases in which the defendant's entitlement to use was sufficiently clear and one-sided, it seems doubtful that the new tort would provide much additional deterrent value beyond that which is already potentially available under the misuse doctrine or the standards relating to the recovery of attorney's fees. In effect, the new claim would change misuse from an affirmative defense to an affirmative claim; but who besides a copyright defendant would be likely to litigate an affirmative claim for copyright misuse? A user who forgoes a use that clearly would have been fair (and therefore is not a defendant in a copyright infringement suit) seems a singularly poor candidate for such a role. To prove causation, she would have to show that the copyright owner dissuaded her from the use but not from subsequently suing the copyright owner in tort. In addition, to obtain a meaningful damages remedy, she would have to present some nonspeculative basis for calculating the value of the forgone use--no mean feat in light of her earlier decision to forgo use in spite of (as assumed) almost certain victory. Despite some superficial resemblance to Mazzone's thoughtful proposal with respect to public-domain works, creating a new tort for victims of false assertions of no-fair-use probably would add little to the current mix of policies.⁷⁹

D. Attorneys' Fees

Section 505 of the Copyright Act states that "the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs."⁸⁰ In *Fogerty v. Fantasy, Inc.*,⁸¹ the United States Supreme Court construed this language to mean, first,

⁷⁷ This is not to say that it is always easy to determine whether a work is copyrightable. Reasonable minds may differ on the question of whether a work manifests sufficient originality with respect to expression, selection, or arrangement to qualify for copyright protection; or whether the merger or scenes à faire doctrine applies. And there can even be cases in which it is unclear whether a copyrighted work *has* fallen into the public domain: for example, where it is unclear whether the author forfeited his copyright by publishing his work prior to March 1, 1989, without copyright notice. What Mazzone rightly targets, however, is the assertion of copyright in the entirety of a work that is clearly within the public domain, based upon the claimant's addition of some small amount of arguably copyrightable expression, selection, or arrangement.

⁷⁸ See *infra* Part IV.E.

⁷⁹ Mazzone himself does not argue in favor of such a cause of action, but rather for vesting a federal agency with authority to "investigat[e] patterns of interference with fair use and bring[] actions to recover fines." Mazzone, *supra* note __, at __. I confess to having doubts that the proposed mandate would amount to a major priority for the federal government, however.

⁸⁰ 17 U.S.C. § 505 (2000).

⁸¹ 510 U.S. 517 (1994).

that in copyright cases courts should award attorney’s fees in an even-handed manner--rather than (as under the federal civil rights statutes) pursuant to a “dual standard” under which prevailing plaintiffs are presumptively entitled to fee awards but prevailing defendants are awarded fees only when the plaintiff’s claim is frivolous or in bad faith.⁸² Second, the Court interpreted the statute to mean that awards of attorney’s fees are discretionary, not automatic, in copyright litigation.⁸³ It therefore rejected the argument that Congress intended to displace the so-called American Rule, under which each party bears its attorneys’ fees, with the English Rule, under which the losing party is required to pay the prevailing party’s attorneys’ fees.⁸⁴ Instead, it suggested that courts consider factors such as “frivolousness, motivation, objective unreasonableness . . . and the need in particular circumstances to advance considerations of compensation and deterrence.”⁸⁵ Subsequent decisions from the lower federal courts focus largely on the objective good or bad faith of the losing party.⁸⁶

At first blush, the analysis set forth in the preceding Part might seem to suggest that adoption of either the American or the English Rule would have an ambiguous effect on fair use enforcement. Under the American Rule, $\alpha = \beta = 0$, so that U’s expected payoff from unauthorized use reduces to $P_A V_U + (1 - P_A)[P_F(V_U - C_U) - (1 - P_F)(C_U + D + E)] - R_U$ and O’s payoff from nonacquiescence reduces to $(1 - P_F)(D + I - C_O) - P_F C_O - R_O$. Each party shoulders its own fees but incurs no risk of having to pay the other side’s fees in the event of a loss. Alternatively, under the English Rule, α and β approach 1, though as noted above they are unlikely to actually equal 1. As α and β approach 1, U’s expected payoff approaches $P_A V_U + (1 - P_A)[P_F(V_U) - (1 - P_F)(C_U + C_O + D + E)] - R_U$ and O’s approaches $(1 - P_F)(D + I - C_O) - P_F(C_U + C_O) - R_O$.

A more careful analysis, however, suggests some nuances. One strength of the American Rule is that it encourages parties who can finance their own fees to vindicate their perceived rights. Among its potential weaknesses, however, are that it discourages litigation when the individual stakes of winning (for either plaintiff or defendant) are too small to justify the expense. Discouraging litigation economizes on administrative costs but also may undermine important social policies, if for example a victory for the party

⁸² See *id.* at 534.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.* at 535 n.19.

⁸⁶ See 4 NIMMER & NIMMER, *supra* note ___, § 14.10[D][3][b], at 14-203 to -204:

Post-*Fogerty* cases awarding fees to prevailing defendants still tend to focus on the plaintiff’s bad faith motivation . . . ,hard ball tactics . . . or objective unreasonableness Conversely, they tend to deny attorney’s fees to prevailing defendants when the plaintiff’s claims were neither frivolous nor motivated by bad faith. By the same token, there is typically no award of fees in cases involving issues of first impression or advancing claims that were neither frivolous nor objectively unreasonable.

that otherwise would have prevailed would have given rise to positive social externalities.⁸⁷ The English Rule in turn may discourage some relatively weak claims and defenses, and increase the incentive to pursue relatively small-stakes claims or defenses, but it also increases the variance of possible outcomes and thus may overdeter risk-averse would-be litigants. Based upon the analysis presented in the preceding Part, one might therefore conclude that in the present context the English Rule would be preferable to the American Rule, for two reasons. First, by discouraging litigation over relatively small stakes, the American Rule tends to deter the exercise of valid fair use rights; as established above, defendants' incentives to assert these rights are weaker than is socially optimal even in the hypothetical world in which attorneys' fees are nonexistent. Second, the American Rule potentially could deter some copyright *plaintiffs* from coming forward with valid but small-stakes claims. On the other hand, the English Rule may exert some countervailing inhibitory effect upon risk-averse plaintiffs or defendants, by increasing the variance of possible outcomes. This effect would tend to be smaller, however, if the merits of the claim or defense at issue are relatively certain to begin with.

The preceding analysis is consistent with some observations made by Judge Posner in *Assessment Technologies, LLC v. WireDATA, Inc.*⁸⁸ Characterizing “the strength of the prevailing party’s case and the amount of damages or other relief the party obtained” as the “two most important considerations,”⁸⁹ Judge Posner suggests:

If the case was a toss-up and the prevailing party obtained generous damages, or injunctive relief of substantial monetary value, there is no urgent need to add an award of attorneys’ fees. But if the at the other extreme the claim or defense was frivolous and the prevailing party obtained no relief at all, the case for awarding him attorney’s fees is compelling. As we said with reference to the situation in which the prevailing plaintiff obtains only a small award of damages, ‘the smaller the damages, provided there is a real, and especially a willful, infringement, the stronger the case for an award of attorneys’ fees [W]e go so far as to suggest, by way of refinement of the *Fogerty* standard, that the prevailing party in a copyright case in which the monetary stakes are small should have a presumptive entitlement to an award of attorney’s fees.’” When the prevailing party is the defendant, who by definition receives not a small award but no award, the presumption in favor of awarding fees is very strong. For without the

⁸⁷ Some defendants, for example, may settle rather than incur the cost of litigating a nuisance suit to victory, thus encouraging other potential defendants to engage in compliance beyond the level that the law requires. Alternatively, some plaintiffs may not bother to enforce their rights, thus encouraging other potential defendants to undercomply with impunity.

⁸⁸ 361 F.3d 434 (7th Cir. 2004).

⁸⁹ *Id.* at 436.

prospect of such an award, the party might be forced into a nuisance settlement or deterred altogether from exercising his rights.⁹⁰

As David Nimmer observes, Judge Posner’s remark concerning prevailing defendants “turns on its head the old dual approach, which favored awards for prevailing plaintiffs over those to prevailing defendants.”⁹¹ Indeed, it would be only a small step from Judge Posner’s proposal to what might be termed a “one-sided English Rule,” under which prevailing copyright defendants would be awarded their attorneys’ fees—and prevailing plaintiffs would not, assuming they obtained “generous damages . . . or injunctive relief of substantial monetary value”—for sufficiently high values of P_F . In terms of the equations above, for values of P_F in excess of some critical amount, $\alpha = 1$ and $\beta = 0$, thus reducing equation (1) to $P_A V_U + (1 - P_A)[P_F(V_U) - (1 - P_F)(C_U + D + E)] - R_U$ and equation (2) to $(1 - P_F)(D + I - C_O) - P_F(C_U + C_O) - R_O$. Users would be more likely to use and owners to acquiesce, all other things being equal, without the prospect of attorneys’ fees deterring the assertion of legitimate fair use rights.

It seems likely that adoption of a rule of this nature, assuming its consistency with *Fogerty*, would achieve some modest success in terms of discouraging the overenforcement of weak copyright claims. But its significance should not be exaggerated. For the rule to have the desired effect in a large number of cases, users must be aware of their rights and confident they will be able to find attorneys, if necessary, who are willing to take their cases in exchange for the prospect of a court-ordered fee down the road. And they must be willing to litigate, if necessary, all the way through the end of trial; as Michael Meurer observes, “[t]he prospect of recovering attorney’s fees after trial has no value to a defendant who goes bankrupt before trial, and perhaps little value to a defendant who suffers financial distress because of trial cost and delay.”⁹² Moreover, to the extent P_F remains relatively unpredictable, risk averse users may still shy away from exercising fair use rights to which they are entitled.⁹³ On balance reform is probably desirable, but even a one-sided English Rule may not prevent copyright overenforcement in a large number of cases.

E. Increasing Accuracy

⁹⁰ *Id.* at 436-37 (citations omitted).

⁹¹ 4 NIMMER & NIMMER, *supra* note ___, § 14.04[D][3][b], at 14-209.

⁹² Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 537-38 (2003). Meurer’s article does not discuss fair use as such, but he makes some interesting recommendations for reducing the anticompetitive assertion of IP rights through such means as restricting the availability of preliminary injunctions and modifying existing law to make it easier for defendants to obtain summary judgment, as well as by awarding attorneys’ fees.

⁹³ On the other hand, a court that has found a use to be fair might overestimate what the value of P_F was ex ante. This hindsight bias would work to the benefit of defendants. To the extent hindsight bias exists, however, it could work in the opposite direction too: a court that has found a use not to be fair might accord an inappropriately low ex ante value to P_F and award fees to the prevailing plaintiff under an even-handed approach.

Another set of proposed reforms is directed towards increasing the accuracy of fair use determinations. Assuming that fair use determinations are not 100% accurate under the current state of affairs—that courts sometimes enter judgment for copyright plaintiffs when $TC_u > V_U > V_O$ or $V_s > V_O > V_U$, and sometimes enter judgment for defendants when these conditions do not hold—measures designed to increase accuracy might seem desirable for several reasons. The most obvious is that accuracy is good in and of itself, insofar as judicial errors frustrate sound copyright policy and undermine confidence in the legal system. If instead courts systematically err in favor of one party or the other, copyright rights will either be over- or underenforced. Systematic over- or underenforcement will in turn influence the parties' expectations. If the parties believe that courts systematically err in favor of copyright plaintiffs, P_F is lower than it should be (and if they believe that courts systematically err in favor of copyright defendants, P_F is higher than it should be). All other things being equal, some defendants will too readily forgo use (or, if P_F is higher than it should be, some plaintiffs will too readily acquiesce). On the other hand, if courts err more or less randomly without systematic bias in favor of plaintiffs or defendants, one might expect the errors to roughly cancel each other out over time, thus resulting in neither over- nor underenforcement in the long run. Random errors do affect predictability, however; and as discussed in the following section, the greater the variance associated with P_F , the more likely a risk-averse party will be willing to compromise a claim for less than its actuarial value. If copyright defendants are on average more risk averse than copyright plaintiffs, a substantial probability of random error may deter them asserting valid fair use rights.⁹⁴ Additional investments in accuracy therefore may improve not only the courts' actual performance, but also the parties' perceptions of that performance, and thus lead to outcomes that are more in line with sound copyright policy.

There are nevertheless several obvious problems to consider. One is that there is no clear evidence that courts *do* systematically err in favor of either copyright plaintiffs or defendants, or that the amount of random error is high. To be sure, many fair use opinions have attracted withering criticism from copyright scholars; but this hardly proves that the heavily-criticized decisions are wrong in some objective sense, or that the pro-plaintiff errors are more numerous or more weighty than the pro-defendant errors. Another problem is that measures designed to increase the accuracy of fair use determinations necessarily entail additional costs. These costs might include such items as more extensively educating judges in the law and economics of fair use, demanding that they take more time to sift through the evidence, or requiring the parties to provide more extensive proof relating to the fair use factors. Just how much society should invest in promoting more accurate fair use determinations is impossible to determine in the abstract. Presumably it makes sense to invest in greater accuracy only up to the point at which the investment is expected to bring in positive returns; exactly what this would mean in the present context, however, or how one might attempt to quantify that point, is unclear.

⁹⁴ See *infra* Part IV.F.

Some suggested reforms nevertheless are intended to increase the accuracy of fair use determinations. One type of reform that has been championed from time to time involves reallocating to copyright plaintiffs the burden of coming forward with evidence relevant to fair use, rather than allocating that burden to defendants.⁹⁵ Reallocating the burden in this manner should result in more decisions favorable to defendants, all other things being equal, insofar as (1) in a case in which the relevant factual evidence is ambiguous, one would expect courts to decide against the party bearing the burden; and (2) defendants may lack access, at reasonable cost, to evidence relevant to some of the fair use factors, and therefore would tend to lose if they bore the burden of proof. More precisely, one would expect a burden-shifting reform to raise P_F and C_O to some degree, and to decrease C_U . All other things being equal, this should encourage more users to exercise their fair use rights and more owners to acquiesce; if fair use generally is an underutilized defense, this result might seem positive.

As with the other reforms, however, there are potential problems. The most obvious is that allocating to copyright owners the burden of disproving fair use is likely to result in a corresponding increase in the number of false positives, that is, of cases wrongly decided in favor of fair use. Whether the increase in false positives would outweigh the decrease in false negatives is far from clear. Litigation costs also may be higher under such a regime, because fair use would henceforth be at issue in every case.⁹⁶ (It is possible, however, though far from certain, that this increase would be offset by plaintiffs' lower costs of access to some of the relevant evidence, as discussed below, and by the larger number of cases that would be disposed of on fair use grounds.) A related problem is that some copyright owners may be overdeterred from asserting valid infringement claims, as a result of the expected increased costs of asserting those claims. At the margin, some negative impact on incentives is a possible outcome if the system proves to be unduly burdensome.

These risks might be minimized, however, by only selectively shifting the burden with respect to evidence that is more likely to be within the copyright owner's control, or only in cases in which it is *prima facie* likely that the conditions for fair use are present. Most of the proposals relating to burden shifting adopt this selective approach.⁹⁷ For example, Kenneth Crews argues that when the user has copied an

⁹⁵ See *infra* notes ___ and accompanying text. Note that fair use is a mixed question of fact and law. In general, the defendant has the burden of producing evidence of the facts relevant to a finding of a fair use. The court is then charged with drawing the correct legal inferences based on those facts. [CITES]

⁹⁶ [IS THERE EMPIRICAL EVIDENCE ON HOW OFTEN FAIR USE IS AT ISSUE UNDER THE CURRENT REGIME? PRESUMABLY IT IS PLEADED IN ALMOST EVERY CASE]

⁹⁷ *But see* Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1000, 1023 (2002) (proposing that, as part of a fair use balancing test, a court first “determine whether the copyright owner has shown [by a preponderance of the evidence] that some meaningful likelihood of [actual or] future harm to the work’s market value exists”; second, whether the owner has “demonstrate[d], by a preponderance of the evidence, that the use at issue will reduce both the revenues and the output of creative works at the margins”; and third, to consider “whether, on balance, society would be better or worse off by allowing the use to continue”) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After*

unpublished manuscript and produces evidence that the owner had neither the intention of publishing the manuscript herself, nor any substantial privacy interest in restricting publication, a rebuttable presumption should arise that the use is fair.⁹⁸ More generally, Matthew Africa argues in favor of allocating to the copyright owner the burden with respect to fair use factor four—the effect of the use on the market for or value of the copyright work—on the ground that copyright owners typically have better access to this information than do defendants.⁹⁹ And David Lange and Jennifer Lange Anderson argue in favor of a rebuttable presumption of fair use in all cases involving transformative uses, reasoning that this approach better accommodates the user’s First Amendment interest in freedom of speech.¹⁰⁰ Put another way, in cases involving transformative uses, the cost of fair use false positives is less than the cost of false negatives insofar as the latter threaten to undermine important free speech values. The defendant, however, would still bear the initial burden of demonstrating that the use is transformative. But since all derivative works, not only those that amount to fair uses, are necessarily transformative, copyright owners in effect would bear the burden of disproving fair use in every case in every case involving the unauthorized preparation of a derivative work. One risk would be that, since the dividing line between copies and derivative works is often unclear, copyright owners in effect would bear the burden of disproving fair use in a large number, perhaps the majority, of copyright infringement cases. Judge Kozinski’s liability rule option¹⁰¹ might be a simpler alternative, although it gives rise to potentially difficult problems relating to the quantification of damages.

A second possible reform would be to delegate the fair use determination to some external expert decisionmaker, outside the context of litigation. Perhaps in some discrete settings this option would be the only one feasible way to attain effective utilization of fair use rights.¹⁰² Alternatively, as David Nimmer has recently proposed, one could mandate some form of court-assisted ADR to assist owners and users to resolve potential fair use

Eldred, 44 *Liquormart*, and Bartnicki, 40 *HOUS. L. REV.* 697, 719-22 (2003) (arguing that allocating the burden to the defendant violates the First Amendment); cf. Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 *TUL. L. REV.* __, __ (forthcoming 2006) (critiquing Lunney’s proposed case-by-case cost-benefit analysis as impractical and speculative)

⁹⁸ See Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 *ARIZ. ST. L.J.* 1, __ (1999).

⁹⁹ See Matthew Africa, Comment, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 *CAL. L. REV.* 1145, ____ (2000).

¹⁰⁰ David Lange & Jennifer Lange Anderson, *Copyright, Fair Use, and Transformative Critical Appropriation*, at __, available at <http://www.law.duke.edu/papers/pd/langeand.pdf>.

¹⁰¹ See *supra* notes __ and accompanying text.

¹⁰² See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 *HARV. J. L. & TECH.* 41, 65-66 (2001) (proposing a system, in the context of digital rights management, which would combine “fair use defaults based on customary norms of personal noncommercial use” with a right to apply for permission to engage in greater fair use to a trusted third party intermediary; and arguing that, absent such a system, technology often will prevent users from exercising their fair use rights).

issues outside of litigation.¹⁰³ But the downsides are apparent: the administrative costs incidental to funding the external decisionmaker or arbitrator and, depending on how quickly the decisionmaker can be expected to render a decision, a reduction in the incidence of spontaneous uses.¹⁰⁴ At best the resort to external decisionmakers might enable fair use in some additional cases in which the stakes are sufficiently high for the end user to tolerate the expense and delay necessary to obtain a pretrial decision. It would not be a panacea by any means, and could in some instances even make users worse off, to the extent the costs of pretrial determination are not recoverable and the pretrial determination itself does not preclude subsequent litigation.

F. Increasing Predictability

A final set of reforms would be directed toward decreasing the notorious unpredictability of fair use determinations.¹⁰⁵ In terms of the equations above, increasing predictability reduces the variance associated with P_F and thus reduces both R_U and R_O . If we assume that users typically are more risk averse than owners—a generalization that may well be untrue in many cases, but which is consistent with the intuition that the relevant class of users consists in large part of individuals, while the relevant class of owners is made up of firms¹⁰⁶—one result would be to decrease users’ private costs of asserting valid fair use rights. Greater predictability also would probably reduce the cost of litigation (C), because predictability reduces information asymmetries that can induce parties to litigate based upon differing estimates of the likely outcome at trial. It also can reduce the number of issues or subissues that one would need to litigate over, for example by displacing a multifactor test with a bright-line rule.

One way to achieve more predictability would be by substituting relatively predictable fair use rules for the relatively unpredictable, but flexible, standards that currently hold sway. An arbitrary example would be a rule that appropriating x seconds of music, or y lines of text, is always and necessarily a fair (or *de minimis*) use. Alternatively, one could adopt a more flexible rule that x seconds or y lines are presumptively fair uses, but still provide plaintiffs an opportunity to rebut the presumption.¹⁰⁷ Various guidelines for the use of copyrighted works in education, such

¹⁰³ David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 *CARDOZO ARTS & ENTER. L.J.* 111, __ (2006).

¹⁰⁴ See Burk & Cohen, *supra* note __, at __; see also Justin Hughes, *Introduction to David Nimmer’s Modest Proposal*, 24 *CARDOZO ARTS & ENTER. L.J.* 1, __ (2006) (raising other questions).

¹⁰⁵ See, e.g., Nimmer, *supra* note __, at 287 (“the problem with the four [fair use] factors is they are malleable enough to be crafted to fit either point of view”); Molly Shaffer Van Houweling, *Safe Harbors in Copyright*, at 2 (describing fair use determinations as being “based on an ad hoc and open-ended analysis that is notoriously unpredictable”) (footnotes omitted), available at <http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/VanHouweling.pdf>

¹⁰⁶ [DISCUSS]

¹⁰⁷ Mazzone recommends a rule of this nature. See Mazzone, *supra* note __, at __.

as the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, promulgated in 1976 by the Ad Hoc Committee of Copyright Law Revision and the Authors League of America,¹⁰⁸ already function in this manner to some extent. Although these guidelines lack the force of law, adherence to them generally is viewed as falling within fair use and is unlikely to provoke litigation.¹⁰⁹

The downside of increasing predictability also should be apparent. The principal drawback is that predictability is only tangentially related to accuracy; outcomes could be predictably wrong. To the extent flexibility is essential to achieving accurate outcomes, predictable rules undermine sound policy. Of particular concern to users is the possibility that rules will be underinclusive of the various uses that might be consistent with either of the two rationales for fair use (though rules could be overinclusive, to the detriment of copyright owners, too). And yet many countries appear to prefer a relatively bright-line approach to the vagaries of our fair use doctrine (or the analogous but typically less expansive “fair dealing” doctrine applied in countries within the British Commonwealth). France and Germany, for example, have no fair use or fair dealing exception, but they include within their copyright statutes a long list of lawful unauthorized uses such as parody, criticism, reporting, and (in Germany) “free uses” that appear similar to the American concept of transformative uses.¹¹⁰ But even in these countries, the exceptions are not absolute. Courts must still determine whether a parody takes more than is necessary to achieve its purpose, or if a use is sufficiently transformative to avoid condemnation; in practice, the rules are hardly bright-line at all. To my knowledge, no country’s statute adopts the true bright-line approach suggested above (e.g., “appropriating x seconds of music is always permitted”), presumably because such an approach leaves judges with too little discretion to tailor their decisions to the facts of a particular case.¹¹¹ Yet another problem with rules that would displace fair use standards is that they are likely to reflect interest group bias. A complaint frequently voiced concerning the educational guidelines referenced above, for example (which are not technically rules but often seem to function as rules) is that they largely reflect the interests of the content owners who drafted them.¹¹²

¹⁰⁸ 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), *as reprinted in* 1976 U.S.C.C.A.N. 5659, __; *see also* Guidelines for Educational Uses of Music, H.R. REP. NO. 94-1476, at 70-71 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, __; CONFU Fair Use Guidelines on Educational Multimedia, [CITE].

¹⁰⁹ [CITES]

¹¹⁰ [CITES]

¹¹¹ *But see* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1666-67 (2004) (arguing that U.S. courts could improve the predictability of fair use decisions by recognizing recurring patterns in which uses are likely to be fair).

¹¹² *See* Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO L.J. 602, __ (2001).

Perhaps a better option would be to combine the two approaches in a third alternative consisting of fair use minima (safe harbors) and the more nuanced fair use standard for cases falling outside the safe harbors. In theory, the educational guidelines come close to embodying this approach, though they are often criticized not only as reflecting the interests of their drafters but also for having become de facto rules—statutory maxima, as opposed to minima—from which users depart at their peril.¹¹³ On this view, safe harbors in practice may reduce uncertainty at too high a cost in terms of overenforcing copyright rights. To counteract this trend, Molly Van Houweling proposes in a recent paper that policymakers should explore the possibility of reducing the “cost” of safe harbors by conditioning the harbors’ applicability upon users’ engaging in some form of activity that promotes the goals of copyright—for example, by permitting them to use “orphan” works (even in cases that might not fall within the traditional contours of fair use) upon showing that they made a reasonably diligent search for the copyright owner, and properly attributed the work to that owner.¹¹⁴ In this manner, safe harbors could in theory become decoupled from their inherent conservative bias by providing copyright owners with *something*—in the example, an assurance of diligence and a guarantee of attribution—in return for a more expansive permission to use. Functionally the proposal is akin to the liability rule option, in that it seeks to accommodate owner interests to a greater extent than does the conventional fair use option, and in this way to enable more socially valuable uses to go forward. Whether other functionally similar safe harbors can be developed remains to be seen. To the extent they make copyright owners even slightly worse off than they are under the present system, the feasibility of legislative adoption appears questionable, even if on balance they would increase social value. And unless safe harbors are adopted in a wide variety of settings, their contribution to social value is likely to be modest, even if on balance positive.

[The remainder of the paper will discuss the effectiveness and feasibility of some package of these reforms, or whether other fundamental reforms should demand priority.]

¹¹³ See *id.* at __; [OTHER CITES].

¹¹⁴ See Van Houweling, *supra* note __, at __.