

SAFE HARBORS IN COPYRIGHT
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Introduction

Copyright law can be frustratingly unpredictable. Some of its core principles—fair use, expression, originality, substantial similarity—defy definition.¹ Other essential elements of copyright—the duration of protection, for example—turn on facts that may be difficult or impossible for those regulated by copyright to discover.

These amorphous standards and factual uncertainties produce surprising legal consequences that undermine planning and investment in activities that may or may not infringe copyright.² Uncertainty is especially problematic where the regulated entities are risk averse, and where the activity chilled is socially valuable creativity, education, scholarship, or technological innovation.

Attempts at precision in copyright law pose their own problems, however. Crafting exact and predictable ex ante rules is complicated and error prone, especially in a context in which the wide variety of parties and factual circumstances makes it difficult to anticipate and resolve future controversies.

This essay explores how this familiar rule versus standard dilemma might be resolved with a hybrid approach: within the sea of a generally-applicable standard, those who navigate themselves into a “safe harbor” can qualify for relatively predictable rule-based immunity from (or at least limitations on) liability. Examples of this technique at work in copyright law include the “Classroom Guidelines” in the legislative history of the 1976 Copyright Act and the limitations on Internet Service Provider liability in section 512.

In theory, these safe harbor mechanisms are a neat compromise—offering both rules and standards to the diverse entities regulated by copyright and letting those entities sort themselves according to their degree of uncertainty and risk aversion. But in practice these provisions seem to channel too many users of copyrighted works into unnecessarily conservative behavior.

An alternative type of safe harbor would condition rule-like treatment not on especially conservative use of copyright works, but instead on other, affirmative steps that contribute to the copyright system as a whole. This approach—

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¹ See generally David Nimmer, *“Fairest of Them All” and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 266 (2003) (“Copyright law is built on such transcendental distinctions as the idea-expression dichotomy, substantial similarity, and finally, fair use.”).

² The uncertainty is a problem for copyright holders as well as users of copyrighted works. See generally R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423 (2005).

embodied imperfectly in some aspects of the Copyright Office’s recent report on orphan works—may be the most promising way to resolve copyright’s rule/standard dilemma.

I. Uncertainty costs in copyright

A. Sources of legal and factual uncertainty

Copyright presents the entities it regulates with both legal and factual uncertainty. Several key provisions of the Copyright Act employ vague principles and ad hoc standards. Other provisions are triggered by factual circumstances that can be maddeningly difficult to identify in practice.

For example, copyright protects the original expression within a copyrighted work, and not “any idea, procedure, process, system, method or operation, concept, principle or discovery.”³ But, as Judge Learned Hand observed, “[n]obody has ever been able to fix that boundary, and nobody ever can.”⁴ Similarly, the exclusive rights granted by copyright are limited by the notion of “fair use,” with fairness determined based on an ad hoc and open-ended analysis⁵ that is notoriously unpredictable.⁶ The key copyright notions of originality and substantial similarity are no clearer.

Other sources of copyright uncertainty stem from unascertainable facts. Whether a work is protected by copyright at all can depend on when the work was published, whether it was registered with the Copyright Office, whether that registration was properly renewed, and if and when its author died. But there is no comprehensive source of all of this information, without which it may be impossible to know whether or not copyright’s restrictions apply. Even if one is able to determine that a work is protected by copyright, it may not be clear who the copyright holder is—making it difficult to seek permission to make a use of the work that implicates copyright.

Another type of factual uncertainty infects the law of secondary liability for copyright infringement as applied to makers and distributors of technology that can be used for unauthorized reproduction (or other copyright-implicating use) of

³ 17 U.S.C. § 102.

⁴ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

⁵ To determine whether facially infringing activity is in fact permissible “fair use,” the Copyright Act directs judges to consider a nonexclusive list of factors: “the purpose and character of the use,” “the nature of the copyrighted work,” “the amount and substantiality of the portion used,” and “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.

⁶ See, e.g., David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006) (proposing non-binding fair use arbitration to limit uncertainty); Nimmer, *supra* n. ____; Wagner, *supra* n. ____; Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 606-07 (2001).

copyrighted works. A technologist may develop a new tool (an Internet server, a copy machine, a video cassette recorder, an MP3 player, etc.) without knowing in advance how exactly it will be used—and, in particular, whether it will be used to infringe copyright for which the technologist will be held secondarily liable. Although the relevant doctrines of secondary liability are ultimately only triggered if the technologist has knowledge of or control over the infringing activity, she may have to make important decisions about whether to invest in the technology and how to design it at an earlier point when the prospects for infringement are uncertain.

For now I am focusing my attention on uncertainty as it impacts potential defendants in copyright infringement lawsuits. But at least some of this uncertainty is also experienced by copyright holders. Vague doctrines define their rights, and unpredictable factual developments may impact how they and others can exploit their works in the future.⁷

B. The costs of copyright uncertainty

Legal and factual uncertainty is of course not unique to copyright law. Countless legal regimes have been declared impenetrable jungles or inescapable quagmires. But several features of copyright make its uncertainty especially—and increasingly—costly and troubling.

Copyright law regulates a wide range of people and entities—including individuals who may have few resources with which to acquire the expert advice that could reduce their legal uncertainty.⁸ This uncertainty is exacerbated by copyright holders' aggressive claiming and other sources of misinformation.⁹ Copyright's impact on unsophisticated and poorly-funded individuals is increasing as technology makes it inexpensive to make large-scale uses of

⁷ See Wagner, *supra* n. ____.

⁸ See, e.g., Brandt Goldstein, *Law Professors Help Filmmakers on "Fair Use,"* WALL STREET JOURNAL (Jan. 13, 2006) (quoting documentary filmmaker John Sorensen: "Much of our knowledge of the law is gossip, hearsay, and what we've learned coming up through the ranks"); Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 272-73 (2006) ("In gathering comments from its members on the orphan works problem, the College Art Association found that a lack of understanding about fair use allowances, lack of access to legal resources for information, 'uncertainties of the application of the fair use doctrine,' and a significant desire among many art publishers 'to eliminate the risk of an infringement suit entirely' rendered fair use an imperfect solution."). See generally Wagner, *supra* n. ____, at 107 ("Given the direct relationship between the level of uncertainty and the various costs involved in reducing that level of uncertainty, one can expect that parties who are best able to bring relevant resources to the table (money, expertise, time, etc.) to be more successful."); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing how legal advice can reduce the uncertainty produced by standards).

⁹ See generally William F. Patry & Richard A. Posner, *Fair Use & Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1654-58 (2004) (discussing problem of over-claiming by copyright holders).

copyrighted works¹⁰—uses that may or may not come within copyright’s uncertain reach.

Some of the people and entities regulated by copyright are likely to be risk averse, making uncertainty especially costly for them.¹¹ Conventional economic wisdom predicts that less wealthy individuals are more likely to be risk averse than rich individuals or institutions (especially publicly held corporations) that can spread the risks associated with many diverse activities.¹² In the copyright context, the evidence suggests that even large institutions—including motion picture studios, publishing companies, and universities—are unwilling to bear the risk associated with relying on fair use or other unpredictable copyright doctrines.¹³ Patricia Aufderheide and Peter Jaszi’s study on rights clearance for documentary films revealed that institutional gatekeepers are sometimes more risk averse than individual artists:

Working filmmakers by and large “know” that fair use is not a tool they can use. Those who are most familiar with the law are also aware that it is ultimately the gatekeepers and insurers who will decide whether they can use fair use, and that those entities, being risk-averse, regularly reject the claim. Gatekeepers usually can achieve their goal (e.g. a broadcast that engages an audience) without taking higher risks of legal liability. In sharp contrast, filmmakers talk about the loss to a society’s memory, to the historical record, to creative quality.¹⁴

¹⁰ See generally LAWRENCE LESSIG, *FREE CULTURE* 19 (2004); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 9 (2001); JESSICA LITMAN, *DIGITAL COPYRIGHT* 167, 180 (2001); Molly S. Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); Dan Hunter & F. Gregory Lastowka, *Amateur to Amateur*, 46 WM. & MARY L. REV. 951, 1018-19 (2004).

¹¹ See generally Kaplow, *supra* n. ___, at 605 (“[W]hen individuals are risk averse, their bearing of risk is socially undesirable. Because individuals tend to be less well informed concerning standards, they may bear risk under standards, which would favor rules.”).

¹² See generally A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 55 n. 31 (2d ed. 1989) (noting that it is “a standard assumption in the economic analysis of risk” that “the higher a person’s wealth, the less averse he is to a given size risk.”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (5th ed. 1998) (“Risk aversion is not a universal phenomenon....But economists believe, with some evidence...that most people are risk averse most of the time, though...the corporation may make people effectively risk neutral in many situations.”).

¹³ As Kenneth Crews describes: “For many educators . . . the new statute was uncomfortably vague, demanding analyses of four factors on which even the most seasoned copyright lawyers could not reach agreement. The legal interpretations and the possible legal liabilities were daunting to the teachers, librarians, and administrators who found themselves needing to make responsible decisions that, they hoped, were in conformity with the law. ...Moreover, difficult decisions about fair use are a steady reminder that erroneous decisions might expose instructors to legal liabilities.” Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 606-07 (2001).

¹⁴ PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* 24 (2004), available at <http://www.centerforsocialmedia.org/rock/index.htm>.

One explanation for risk aversion in copyright is that the downside risk is potentially huge. Consider the precedent set by *MP3.com v. Universal Music Group*,¹⁵ where the defendant was ultimately ordered to pay \$53.4 million in statutory copyright damages after it unsuccessfully raised a fair use defense of its innovative online music service.¹⁶ UMG's parent company Vivendi Universal subsequently acquired bankrupt MP3.com and sued the company's lawyers for malpractice—demonstrating how risky copyright law can be for lawyers as well as clients.¹⁷

Insurance is the classic mechanism for reducing the costs that uncertainty imposes on the risk averse.¹⁸ In another context, Kyle Logue has documented how some sophisticated tax-payers deal with legal uncertainty by buying insurance to shift the risk that their innovative transactions will receive unfavorable tax treatment.¹⁹ There is a similar market in creative industries for errors and omissions insurance that covers the risk of adverse copyright infringement claims.²⁰ But, as the Aufderheide and Jaszi report quoted above suggests, insurers are frequently not willing to bear the risk associated with relying on fair use and other unpredictable copyright doctrines.²¹ For example, independent filmmakers report that their insurers “take a dim view of ‘fair use,’” often insisting that filmmakers provide proof of express permission for any copyrighted work that appears in a film.²²

This combination of uncertainty, the possibility of huge liability, risk aversion, and lack of insurance for the risks associated with reliance on copyright's limiting

¹⁵ *UMG Recordings v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

¹⁶ See Jon Healey, *MP3.com Sues Former Copyright Counsel*, L.A. TIMES, Jan. 19, 2002, at 2.

¹⁷ See *id.*

¹⁸ See POLINSKY, *supra* n. ___, at 56; POSNER, *supra* n. ___, at 105-06.

¹⁹ Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339 (2005).

²⁰ See generally MICHAEL C. DONALDSON, CLEARANCE AND COPYRIGHT: EVERYTHING THE INDEPENDENT FILMMAKER NEEDS TO KNOW, 198-216 (2d ed. 2003).

²¹ See Aufderheide & Jaszi, *supra* n. ___. See generally Melvin Simesky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 327 (1999) (“On an application for E & O insurance, the applicant is likely to be required to identify any pre-existing works incorporated into the applicant's work, certify that it has performed certain clearance procedures and obtained appropriate licenses, and represent that it is not aware of any potential claims.”).

The nonprofit organization Public Knowledge recently organized independent filmmakers to explain their predicament on Capital Hill. As Gigi Sohn recounts, “[e]ach filmmaker had a story to tell about how the inability to find a copyright holder led them either to forgo using an orphan work or to take an enormous risk — under current law, if an artist uses an orphan work and the copyright holder reappears, the artist could be liable for the full panoply of damages under the Copyright Act, which could amount to tens of thousands of dollars. Obviously, small artists like independent filmmakers cannot afford to take such a risk, in large part, as Winnie Wong explained, ‘Errors & Omissions’ insurers will not insure a filmmaker who might be subject to a huge financial liability. Without that insurance, filmmakers cannot get their film distributed.” Gigi Sohn, *Indy Filmmakers Go to Washington* (June 8, 2006), <http://www.publicknowledge.org/node/439>.

²² LAWRENCE LESSIG, FREE CULTURE 98 (2004) (quoting filmmaker Jon Else).

doctrines produces undesirably conservative behavior by some would-be users of copyrighted works: filmmakers who seek permission for even de minimus use of copyrighted works (and extract those works when permission is not forthcoming), educators who avoid providing copies of key sources to their students, historians who omit photographs and quotations from their books; etc.²³ When these cautious would-be users of copyrighted works forgo even non-infringing uses of copyrighted works they lose whatever benefits would have accrued to them from that use. But the more troubling cost of copyright over-deterrence is the loss of the public benefits—positive externalities—associated with creativity, scholarship, and education.²⁴

II. The alternative of ex ante rules

Although all of the factors just discussed contribute to the costs imposed by copyright uncertainty, the unpredictability of key copyright doctrines is at the heart of the dilemma. An obvious approach to the problem would therefore be to make copyright more predictable by replacing its vague and ad hoc standards with clear rules that specify in advance exactly what behavior amounts to copyright infringement (and what doesn't).

But as the familiar literature on rules and standards documents, rules come with their own disadvantages. Simple rules ("drive 55-miles per hour" is a classic example) are likely to be under- and over-inclusive. That is, they will forbid behavior that is consistent with the underlying norm (driving 70 mph on a deserted road to escape an approaching hurricane), while allowing behavior that is inconsistent with the norm (driving 55 mph in an ice storm). Complex rules (drive 55 except when x, y, and z, etc.) take account of additional circumstances and thus reduce the problem of over- and under-inclusion. But it can be difficult and costly to draft a rule that accounts for all imaginable contingencies.²⁵

²³ [Examples to be added.]

²⁴ See POSNER, *supra* n. ___, at 556 (explaining that deterrence of legitimate activities is "particularly significant when the legitimate activity deterred by the vague prohibition is more valuable socially than privately"); see also Logue, *supra* n. ___, at 373-74 ("Besides this general cost of risk-bearing associated with legal uncertainty, there is another cost as well. Legal uncertainty can induce taxpayers, especially risk-averse taxpayers, to over-comply with the law in various ways. . . . All of these types of over-compliance constitute social waste and can even produce distributional inequities insofar as the effects of the legal uncertainty and differential risk-bearing are unfairly distributed across taxpayers.").

Similarly, the prospect of under-deterrence could undermine incentives to create and distribute copyrighted works in the first place because of the fear they will be copied in a way that undermines the market. The problems uncertainty poses for copyright holders is a topic for future research.

²⁵ Kaplow, *supra* n. ___, at 590-96 (describing the relationship between complexity and over- and under-inclusiveness); *id.* at 600-01 (discussing the difficulty of formulating rules in some contexts); Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267 (1974) (discussing costs of rule formulation).

Drafting comprehensive rules is especially difficult where the regulated activity, and the regulated entities, are heterogeneous. Any attempt will either be too blunt (causing unacceptable over- and under-inclusion) or too byzantine (anticipating every possibility but with huge costs in terms of drafting and complexity).²⁶ Where, by contrast, the regulated behavior and entities are relatively homogeneous, the flexibility and context-sensitivity of ad hoc standards is less necessary and crafting a rule that avoids over- and under-inclusiveness by preemptively addressing exceptional cases is easier to do.²⁷

The copyright context features heterogeneous actors and disputes. Potential infringers of copyright include commercial book publishers, church choir directors, computer software engineers, teenage music lovers, etc. Infringing activities (and defenses) are similarly varied. No set of ex ante rules could possibly ensure that all of these different people and behaviors are regulated in a way that serves copyright's ultimate purpose of promoting creativity and access to creative works.²⁸ Instead, judges engage in detailed consideration and weighing of various factors, attempting to strike copyright's "delicate balance" between protecting exclusive rights that incentivize creativity and ensuring that the public (and, in particular, new generations of creators) have meaningful access to creative works.²⁹

As frustrating and unpredictable as this weighing process can be, it is often cited as a deliberate and essential feature of copyright. When Congress codified fair use in the 1976 Copyright Act, the accompanying report declared that "no generally applicable definition [of fair use] is possible, and each case raising the question must be decided on its own facts."³⁰ The Supreme Court subsequently

²⁶ Kaplow, *supra* n. _____. at 564; Ehrlich & Posner, *supra* n. ____, at 270.

²⁷ Kaplow, *supra* n. ____, at 564; Ehrlich & Posner, *supra* n. ____, at 270.

²⁸ [Add comparison to codified "fair dealing" rules.]

²⁹ On copyright's delicate balance, see, e.g., *Stewart v. Abend*, 495 U.S. 207, 228 (1990) ("Moreover, although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").

³⁰ Patry & Posner, *supra* n. ____, at 1645 ("[T]he fair use defense is flexible. Judges made it and judges can adapt it to changed conditions. . . . Interest-group pressures are a second consideration in favor of a judicially contoured fair use defense because such pressures play a greater role in legislation than adjudication, especially at the federal level, where judges have secure tenure. And because the interest-group pressures exerted by copyright owners and by

stressed the flexibility of fair use: “[t]he doctrine is an “equitable rule of reason” which ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”³¹ And David Nimmer summarizes: “As much as transparency gains in allowing advance planning of one’s affairs, more is lost by sacrificing the ability to achieve justice...For these reasons, Congress has deliberately sacrificed transparency in the interest of equity.”³² Unfortunately, the quest for justice in individual litigated cases may be producing injustice and imbalance for those who operate in the opaque shadow of copyright law.

III. Hybrids and safe harbors

A. Rule/standard hybrids

Copyright law operates in a dynamic and diverse environment in which it would be difficult to articulate comprehensive ex ante rules to govern every possible dispute. Yet the uncertainty produced by copyright’s vague ad hoc standards is especially costly to at least some of the entities regulated by copyright and to the society that loses the benefits of legal but nonetheless stifled activities in the arts, scholarship, technology, and education.

As the rules versus standards literature acknowledges, the choice between rules and standards need not be either/or.³³ Legal regimes can combine elements of rules and standards in various ways.³⁴ For example, legislators might try to predict how different types of regulated entities are likely to react to different types of legal frameworks, imposing on heterogeneous populations a mixed legal regime that applies rigid rules to some and flexible standards to others. Even a crude rule might produce better results than a vague standard for a risk averse

public-domain publishers are asymmetric, the pressures for and against an expansive conception of copyright (and a concomitantly diminished scope for a fair use defense) do not cancel out.”).

³¹ *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citation omitted).

³² David Nimmer, *Codifying Copyright Comprehensively*, 51 U.C.L.A. L. REV. 1233, 1275 (2004).

³³ See, e.g., Kaplow, *supra* n. ___, at 600 (“The choice between rules and standards is one of degree. Deciding solely on the relevant criteria in advance may save costs for both individual actors and adjudicators, while providing individuals some guidance. Also, adopting presumptions or ruling certain options in or out might be possible. The extent to which such approaches are desirable will depend on the anticipated frequency of behavior with the relevant common elements.”); Ehrlich & Posner, *supra* n. ___, at 268 (suggesting that “[t]he problem of underinclusion can be solved by backing up the rule with a standard”).

³⁴ Logue discusses a mixed approach in the tax context: “Under such a mixed system, which is not terribly different from what we have today, the anti-avoidance standard provides deterrence relatively cheaply by closing loopholes retroactively; but it does so without producing nearly as much overall complexity as does the prospective rule-based approach.” Logue, *supra* n. ___, at 368.

Joseph Liu suggests that a mixed regime may be appropriate for copyright. Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 140-47 (2004) (discussing copyright’s mix of broad property rights and narrow industry-specific rules).

entity easily over-deterred by uncertainty. That same rule might unnecessarily cabin the behavior of a less risk averse entity or one better able to obtain the advice or insurance that could reduce its exposure to uncertainty and risk. Unfortunately, the relevant characteristics—legal sophistication, risk aversion—may be difficult for legislators to observe and measure accurately in advance. An alternative is to create a mixed regime that somehow allows regulated entities to sort themselves.

B. An introduction to safe harbors

Regulatory “safe harbors” are rule/standard hybrids that seem to promote this type of self-sorting. The term safe harbor is typically used to describe a narrow exception from a generally-applicable regulation, where a regulated entity has some control over whether it falls within the exception. Peter Swire helpfully summarizes the technique:

The basic form of a safe harbor allows a regulated entity to choose between compliance with either a standard or a rule. The typical pattern is to have a general, usually vague, standard that restricts activity by the regulated entity. A second, more specific, rule is then promulgated, which provides the “safe harbor” by specifying activity that will be deemed to meet the general standard. This rule makes the activity per se legal, although weaker versions are possible that give the activity less complete protection. In terms of the metaphor, the regulated entity faces a threatening storm of regulatory action. It can take its chances on the trackless deeps of the ocean, or seek shelter instead in the certainty of a safe harbor.³⁵

This choice between “trackless deeps” and “the certainty of a safe harbor” is left in part to the regulated entities themselves—thus allowing them to sort themselves according to their willingness and capacity to mitigate or tolerate the risks associated with legal uncertainty. Thus safe harbors provide a sort of public insurance against regulatory risk.³⁶ By doing whatever is required to qualify for

³⁵ Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 369 (1993). Swire discusses the relationship between safe harbors and heterogeneity in the regulated population, suggesting that safe harbors may be especially appropriate “where members of the regulated population vary widely in their estimates of the costs of meeting the uncertain standard. Some entities will judge operation under a vague standard as too risky, and will have a strong preference (i.e. be willing to pay a premium) for complying with the objective criteria of a rule. A safe harbor will satisfy the preferences of these entities that are averse to regulatory risk or are relatively less able to estimate their likelihood of being sanctioned for violating the standard. The standard will remain available for other entities that do not wish to meet the safe harbor or otherwise have lower perceived costs of complying with the standard.” *Id.*, at 375.

³⁶ Logue makes this point in the tax context when discussing the IRS’s practice of creating safe harbors through “private letter rulings.” “The primary means in the past of dealing with . . . uncertainty for risk-averse taxpayers has always been the private letter ruling. In general, if a taxpayer follows certain technical filing procedures, the Service will issue a ruling directly to the

the safe harbor, the regulated entity is basically paying a risk premium.³⁷ Just as a risk-averse entity might pay an insurance company to bear some of its risk, regulated entities pay in various ways for the benefit of operating in a less uncertain regulatory environment.³⁸

Safe harbors are ubiquitous across diverse fields of law, including tax, securities, food safety, and environmental protection.³⁹ And they are increasingly appearing in copyright law as well.

C. Safe harbors in copyright

Although vague standards form the core of the Copyright Act, the periphery is populated by a growing collection of rule-like exceptions and variations. Some of these provisions operate as safe harbors, in that they offer relatively clear regulatory relief that can be achieved at the option of the regulated entity.

For example, section 512 is commonly referred to as the “ISP safe harbor.”⁴⁰ It limits Internet service providers’ liability for the infringing activities of subscribers and others who might transmit or store infringing material on an ISP’s system. Only certain ISP functions are immunized, and to qualify for limited liability ISPs have to satisfy a number of prerequisites. For example, in order to qualify for immunity from damages⁴¹ based on a user’s storage of infringing material on an ISP’s system, an ISP must comply with 512’s “notice and take-down” scheme, which requires expeditious removal or disabling of allegedly infringing material upon receipt of a notification from the copyright holder or its agent.⁴²

Another copyright safe harbor is described in the so-called “Classroom Guidelines” that appear in the legislative history of the 1976 Copyright Act.⁴³ In advance of passage of the 1976 Act, members of Congress urged educators, authors, and publishers to meet “in an effort to achieve a meeting of the minds as

taxpayer that explains how it will apply the law to the particular transaction described in the ruling request....If a favorable ruling is issued by the Service, the taxpayer may generally rely upon it. In that sense, then, a favorable letter ruling is akin to purchasing tax law uncertainty insurance from the government.” Logue, *supra* n. ___, at 407.

³⁷ Willingness to pay a premium for reducing risk is the standard definition of risk aversion. POLINSKY, *supra* n. ___, at 55.

³⁸ The less risky environment might also make it easier to acquire private insurance to bear the risk that remains, especially if the behavior that qualifies the regulated entity for the safe harbor is easily observable by insurers.

³⁹ See Swire, *supra* n. ___, at 369-71 (describing examples). [Additional examples to be inserted.]

⁴⁰ [Commentary on 512.]

⁴¹ Injunctive relief is partially limited as well. 17 U.S.C. § 512(c), (j).

⁴² 17 U.S.C. § 512(c). [Commentary on notice and take-down regime.]

⁴³ 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).

to permissible educational uses of copyrighted material.”⁴⁴ The resulting negotiations yielded guidelines on classroom use of books and periodicals. Music publishers and educators agreed on corresponding guidelines for classroom use of music.⁴⁵ The Guidelines take the form of safe harbors, purporting “to state the minimum and not the maximum standards of educational fair use under Section 107,” and indicating that the “statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107.... There may be instances in which copying which does not fall within the guidelines...may nonetheless be permitted under the criteria of fair use.”⁴⁶ Although not incorporated into the Copyright Act itself, the Guidelines were included in the House Report, which explained that “[t]he Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers.”⁴⁷

In addition to these legislative safe harbors, the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*,⁴⁸ adopted a partial safe harbor from secondary liability for distributors of copying technology that has substantial non-infringing uses.⁴⁹ Such judicially-crafted safe harbors raise interesting questions of institutional competence that are beyond the scope of this draft.⁵⁰

D. Objections to copyright safe harbors

The safe harbors in the Copyright Act are controversial. Both the Classroom Guidelines and section 512 have been criticized for encouraging educators and ISPs to adopt overly conservative practices that unnecessarily stifle educational fair uses and internet communications.⁵¹ This later set of criticisms is of particular concern where safe harbors are intended to mitigate the over-deterrence caused by unpredictable standards. The safe harbor cure may be worse than the disease.

Although the Classroom Guidelines themselves and the commentary about them in the House Report are explicit in identifying the guidelines as minimum

⁴⁴ H.R. Rep. No. 94-1476, at ____ (1976).

⁴⁵ Guidelines for Educational Uses of Music, H.R. Rep. No. 94-1476, at 70-71.

⁴⁶ H.R. Rep. No. 94-1476, at ____ (1976).

⁴⁷ H.R. Rep. No. 94-1476, at ____ (1976).

⁴⁸ 464 U.S. 417 (1984).

⁴⁹ *Id.* at 442 (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”).

⁵⁰ See Brief for Professors Peter S. Menell, David Nimmer, Robert P. Merges, and Justin Hughes as Amici Curiae Supporting Petitioners, *MGM v. Grokster*, 543 U.S. 1032 (No. 04-480), reprinted in 20 BERKELEY TECH. L.J. 509, 520-26 (2005), available at http://www.eff.org/IP/P2P/MGM_v_Grokster/050125_Menell.pdf.

⁵¹ Judicial reliance on the Classroom Guidelines is also widely criticized because of their uncertain status as mere legislative history.

standards that do not represent the limit of fair use, “rights holders, content users, and even courts have shown a deplorable tendency to act as though the guidelines defined the outer limits of fair use.”⁵² In the early 1980s, New York University and several individual faculty members were sued for copying beyond the bounds of the Guidelines. In the resulting settlement, NYU agreed to adopt the Guidelines as its internal copying policy.⁵³ Publishers threatened other universities with lawsuits if they did not do likewise, leading to further adoption.⁵⁴ As Robert Gorman observes, “[t]he chilling effect on faculty members inclined to invoke broader fair use permissions is evident.”⁵⁵

Of course, the unpredictability of the fair use standard also has a chilling effect. It is possible that the Guidelines benefit educational copying by giving assurances to educators who would otherwise forgo classroom copying altogether out of uncertainty about the copyright implications. But it is also possible that adoption of the guidelines constrained behavior by educators who otherwise would have been willing to bear the risk associated with relying on the full extent of fair use.

There is a similar empirical question about the effect of section 512 on the behavior of Internet Service Providers. The ISP safe harbors have been criticized for prompting ISPs to remove or disable material that is not in fact infringing, in order to comply with the notice and take down requirements for safe harbor status. Alfred Yen worries, for example, that “ISPs will become increasingly conservative and routinely comply with the [512] safe harbor because the certain cost of compliance is preferable to the unknown, yet potentially significant, costs imposed by underlying law. This result might seem desirable because it gives ISPs certain relief from liability while protecting the interests of content providers. However . . . the result leads to the overaggressive enforcement of copyright against subscribers who have in fact committed no infringement.”⁵⁶

⁵² Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 57 (2001). [Add additional documentation, including sources cited at Burk & Cohen n. 47.]

⁵³ Robert A. Gorman, *Copyright Conflicts on the University Campus*, 47 J. COPYRIGHT SOC’Y U.S.A. 291, ____ (2000) (describing the dispute).

⁵⁴ Eric D. Brandfonbrener, *Fair Use and University Photocopying: Addison-Wesley Publishing v. New York University*, 19 U. MICH. J.L. REFORM 669, ____ (1986); see also Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 162-63 (1998) (“[D]ue to uncertainty, and the fear of litigation, educational fair use is becoming circumscribed by the Guidelines because educational institutions increasingly urge or require faculty members to comport with them.”); Gregory K. Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101, 108 (1999) (“[T]o universities and other institutions hoping to avoid litigation by establishing fair use standards, the Guidelines -- the only ‘standard’ available for a fact-specific legal standard -- became an attractive choice. Some institutions have transformed them from a suggested minimum to the de facto maximum allowed use.”).

⁵⁵ Gorman, *supra* n. ___, at ____.

⁵⁶ Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1891 (2000).

As with the Classroom Guidelines, the concern is that the safe harbor will prompt overly conservative behavior on the part of regulated entities, resulting in harm to society as those entities forgo or stifle non-infringing uses of copyrighted material. Again, the criticism points to an empirical question: which legal command (the unpredictable standard or the conservative safe harbor) will lead to more over-deterrence? Although a safe harbor seems like a way to solve the problem of over-deterrence caused by uncertain legal standards imposed on risk averse entities,⁵⁷ it is possible that offering the safe harbor alternative will result in a net loss of legitimate and socially beneficial behavior that falls between the conservative rule and the outer bounds of the standard the rule is intended to clarify.

E. Reducing the social cost of safe harbors

The type of safe harbor discussed above is (relatively) clear, but constraining. The regime provides a type of public insurance against the risk of an uncertain legal standard; the price it exacts is compliance with a rule that is more restrictive than the standard would be. If the entities that pay that price otherwise would have been deterred altogether from, say, making educational copies or hosting subscriber material on their internet servers, then the safe harbor regime is an improvement over the underlying standard in terms of encouraging socially beneficial activity. But critics have raised the possibility that these safe harbor regimes also prompt unnecessarily conservative behavior by less risk-averse entities that would otherwise have been willing to bear the risk associated with acting in the shadow of the vague standard. The security of the safe harbor may benefit those entities enough that they are willing to pay the “price” of constraining their behavior—even though in theory the more permissive standard upon which they would have been willing to rely is still operational. This private calculus does not account for the social loss of positive spillovers from the forgone activities that fall between the conservative rule and the more permissive standard.⁵⁸ In short, the voluntary sorting by degree of risk-aversion that the safe harbor facilitates may be somewhat skewed from a societal perspective, channeling too many regulated entities into the clear but constraining rule.

There may be a way to get the benefits of copyright safe harbors without imposing this social cost. Instead of conferring safe harbor status on entities who choose to satisfy a rule that represents a conservative interpretation of the underlying standard, that status could be granted in exchange for some other type of behavior that promotes the ultimate goals of the copyright system.⁵⁹ To mix metaphors, the safe harbors described above require reining in; this alternative

⁵⁷ Cf. Molly Shaffer Van Houweling, *Communications’ Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L.J. 97, 120-21 (2005) (raising the possibility that regulatory pre-clearance of copying technology could encourage innovation if it provided a safe harbor from secondary liability).

⁵⁸ [Contrast other safe harbor regimes where prompting conservative behavior is less of a problem—e.g. FDA food safety standards.]

⁵⁹ [Insert examples of a similar approach in tax law and other fields.]

requires horse trading. The horse trading safe harbor combines the features of rule/standard duality and self-sorting described above, with the additional benefit that the self-sorting mechanism does not constrain socially desirable behavior.

Some features of a recent reform proposal by the U.S. Copyright Office illustrate both the promise and potential perils of the horse trading safe harbor approach. The Copyright Office recently undertook a study on “orphan works”—works whose copyright holder cannot be identified and/or located for purposes of seeking permission to use the work.⁶⁰ The report was prompted by a concern that lack of effective notice of the copyright status of a work and lack of information about the identity and location of the rights-holder can result in under-use of a valuable resource. As the Copyright Office report puts it: “[A] productive and beneficial use of the work is forestalled—not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license—but merely because the user cannot locate the owner.”⁶¹

Fair use might apply to some uses of orphan works, but not with enough certainty to satisfy risk averse potential users. A constraining safe harbor could resolve some of this uncertainty—providing, for example, that it will always be fair use to make a noncommercial derivative using less than 10% of a work whose copyright owner is unknown. But such an approach might unnecessarily channel users into using only 10% of works when more extensive use would be desirable and within the bounds of fair use.

Instead, the Copyright Office report recommends a different type of safe harbor. It would limit the remedies available to copyright holders in cases in which the defendant had performed a “reasonably diligent search” and was still unable to locate the copyright owner. In addition, use of the orphan work would have to be accompanied by attribution to the author and copyright owner “if such attribution is possible and is reasonably appropriate under the circumstances.”⁶² The Report explains that “the user, in the course of using a work for which he has not received explicit permission, should make it as clear as possible to the public that the work is the product of another author, and that the copyright in the work is owned by another.”⁶³

This proposal is subject to various objections, some of which I discuss below. But for now note the promising way in which it deploys a horse trading safe harbor. A user of an orphaned work can opt-in to the relative clarity of the limited liability regime not by constraining her use of the work (constraint that

⁶⁰ REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 15 (2006), *available at* <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁶¹ *Id.* at 1.

⁶² *Id.* at ____.

⁶³ *Id.* at ____.

could harm both the user and the public), but instead by performing affirmative acts (search and attribution) that serve the overall goals of copyright.

Encouraging reasonable searching for copyright holders is likely to yield information and create channels of communication that will benefit copyright holders, users, and the copyright system as a whole. No one benefits from the current uncertainty over the copyright status of orphan works. The safe harbor's search requirement will encourage both would-be users of copyrighted works and copyright holders themselves to develop improved mechanisms for investigating copyright status and provenance.⁶⁴

Similarly, the attribution requirement encourages users to provide information that serves copyright's overarching purposes. First, attribution is valuable to some authors; the knowledge that even if one's work becomes orphaned it will carry attribution may preserve incentives for creativity for them.⁶⁵ Second, attribution—like reasonable search—will yield information that could ultimately reduce transaction costs and help the copyright system work more smoothly.

There are at least four potential problems with this particular application of the horse trading safe harbor mechanism, however. First, as with the copyright safe harbors discussed above, it is conceivable that an orphan work safe harbor could be misinterpreted as representing the outer limits of acceptable unauthorized use of copyrighted works, undermining claims of fair use in cases in which the copyright holder was locatable. The Copyright Office report clearly disavows this view, but we have seen similar misinterpretation in the Classroom Guidelines context.

Second, the safe harbor may not provide enough clarity to be helpful to the risk averse. The proposal does not specify what counts as a "reasonably diligent search," and the liability limitations still leave open the possibility that a user will be liable for "reasonable compensation." Several commentators have therefore urged Congress to adopt orphan works provisions that offer more clarity and provide a firm cap on damages.⁶⁶

Third, it may not be entirely accurate to describe the orphan works proposal as horse trading as opposed to constraining. From the point of view of a user who searches for and finds a copyright holder, the safe harbor may appear constraining—it offers her no security unless she constrains her behavior by finding another work to use that is truly orphaned. Just as educators may distort and constrain their legitimate behavior in order to fall within the safe harbor of the Classroom Guidelines, would-be users of copyrighted works could forgo fair and otherwise legitimate uses of non-orphaned works because it is safer to use only

⁶⁴ [Insert description of various registry proposals by Public Knowledge and others.]

⁶⁵ [Insert discussion of attribution's importance to open source software and Creative Commons.]

⁶⁶ [Insert commentary]

orphans. Frankly, though, the prospect of pro-orphan channeling seems far-fetched. The more realistic concern is the one mentioned above—that people will misinterpret the orphan works provision to suggest that when a work is not orphaned it may never be used without authorization.

Fourth, the security provided by this safe harbor may be least available to the risk-averse entities who need it most. Again, the proposal does not offer any definition of “reasonable search.” If performing a search that ultimately satisfies this standard is difficult and/or expensive, it may be beyond the reach of the unlaywered and poorly-financed individuals who are least able to deal with the existing risks and uncertainties of copyright law. It does little good to use a safe harbor to provide security to the risk-averse if that security is a luxury that the most risk-averse are least able to afford.

Ideally, a horse trading safe harbor adopted to provide certainty to (and induce socially beneficial behavior by) risk averse entities would be provided at a price that neither unnecessarily constrained legitimate uses of copyrighted works nor imposed prohibitive expenses of other kinds. Elsewhere, I have made a proposal that arguably fits this model: suggesting a presumption of fair use for creative users of copyrighted works who themselves forgo the potential monetary benefits associated with copyright.⁶⁷ Take, for example, a filmmaker who incorporates copyrighted music and footage into her film, but then waives her own copyright, making the resulting work available for free reproduction and further adaptation. The presumption would decrease (although not eliminate) the risk and uncertainty of relying on fair use in exchange for a contribution to the public domain—expansion of which serves copyright’s ultimate purpose of promoting progress in knowledge and creativity.

There are potential problems with this solution too. For one thing, a presumption is a weak form of safe harbor that may not offer enough security for the risk averse. Also, it is possible that the proposed mechanism would reduce incentives for copyright holders whose work is used without authorization and for the derivative work authors who are encouraged by the regime to forgo some of the benefits of copyright. Once again, the question is in part an empirical one about whether the users who get the protection of the safe harbor otherwise would have been deterred altogether or would have borne the risk associated with relying on the statute’s vague standards. But for purposes of thinking about legal design, the promising feature to note is that the price for increased certainty under the proposal is something to which a risk averse user—even a poorly-financed and unlaywered amateur—has access.

⁶⁷ Van Houweling, *Distributive Values in Copyright*, *supra* n. ____, at ____.

Conclusion

Copyright is an unusually challenging field for legal and institutional design. The powerful public interests on both sides of most copyright debates make it critical for copyright law and the institutions that support it to strike an accurate balance between exclusive rights that encourage creativity and public rights that ensure that the fruits of creativity ultimately benefit society as a whole. But the type of careful fact-specific analysis deployed to strike that balance in individual cases can produce paralyzing uncertainty. This is a familiar rule versus standards dilemma, but the public benefits of the activities regulated by copyright and the increasingly heterogeneous nature of the regulated entities and disputes make it particularly thorny.

In this essay I have suggested that copyright seems a prime candidate for a “safe harbor” approach that combines rules and standards and lets regulated entities select their own treatment based on their willingness to deal with legal uncertainty. But I have also raised a concern—based in part on experience to date with limited copyright safe harbors—that safe harbors that provide clarity in exchange for constrained use of copyrighted works may channel users of copyrighted works into unnecessarily conservative behavior.

The ideal safe harbor for copyright might therefore be one that exacts a different price for the benefit of legal certainty. Instead of requiring constrained use of copyrighted works, a safe harbor could be triggered by some affirmative contribution to the copyright system. The Copyright Office’s orphan works proposal offers a glimmer of this idea; I offer another proposal that illustrates it as well. I hope in further research to elaborate on this idea, to draw on examples from other fields of law, and to describe and assess additional ways it might be implemented in copyright. In addition, this focused attention on the types of safe harbors that are especially promising in the copyright context may provide the basis for a larger taxonomy of various types of safe harbors across the broader regulatory landscape.