

Fair Use and Copyright Overenforcement

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ABSTRACT: Economic analysis has long suggested that there are two distinct categories of cases in which the fair use defense, which permits the unauthorized reproduction and other use of copyrighted materials, should apply. First, fair use should apply when the transaction costs of negotiating with the copyright owner for permission to use exceed the private value of the use to the would-be user. Second, fair use should apply when the individual use is thought to generate some positive externality—such that the net social value of the use exceeds the value to the copyright owner of preventing the use—which in turn may exceed the value of the use to the individual user. Considerable anecdotal evidence, however, suggests that would-be users are often deterred from engaging in conduct that likely would fall within the ambit of fair use, due in part to concerns over incurring attorney’s fees and in part to the uncertainty and unpredictability of the fair use doctrine itself.

This Article presents a model of the private costs and benefits faced by would-be users of copyrighted materials in precisely those settings in which economic analysis suggests that the fair use doctrine 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 individual user’s use, the asymmetry between the individual user’s gain and the copyright owner’s loss may result in systematic copyright overenforcement. Put another way, the fair use doctrine suffers from an “appropriability” problem similar to that which is often cited as a justification for copyright protection itself. This Article then offers some observations on the likely effectiveness of six different types of fair use reforms.

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I. INTRODUCTION

A frequently voiced criticism of the U.S. copyright system is that it enables persons claiming copyright interests to “overclaim”—that is, to successfully assert rights over content, despite the fact that either (1) the content at issue is not subject to copyright protection at all, perhaps because it has fallen into the public domain, or because it comprises uncopyrightable facts, ideas, scenes à faire, or de minimis fragments of expression, or (2) a specific use of that content is permissible under, for example, the fair use doctrine.¹ Although some of the criticism is directed at courts’ alleged misapplication of the governing legal rules and standards, much of it has begun to focus on structural features that sometimes compel would-be users to give in to copyright owners’ expansive interpretations of the scope of the owners’ rights. Among these features are the potentially high costs of fending off even weak copyright infringement suits; endemic risk aversion on the part of all parties involved, including the providers of errors and omissions (“E&O”) insurance; and, relatedly, the often complex, fact-

1. See, e.g., PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), available at http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf; MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL (2005); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 883, 887–906 (2007); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1655–56 (2004). To be sure, criticism of the current regime is not universal. Some thoughtful commentators, such as Christopher Yoo, argue in favor of a relatively robust bundle of copyright rights on the ground that strong copyright rights induce the production of substitutes for existing works and thus tend to minimize deadweight loss. See generally Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007) [hereinafter Yoo, *Public Good Economics*]; Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004) [hereinafter Yoo, *Copyright and Product Differentiation*]. The premise of this Article—that various features of the current copyright regime can result in the systematic overenforcement of copyright rights—may result in very different policy recommendations from those advocated by Yoo. Even so, the model presented in Part III would appear to be valid, as a formal matter, even if one accepts Yoo’s thesis; the difference in policy emphases would flow from the very different weights Yoo and I might accord to the social benefits of copyright protection and to the positive externalities attributable to some unauthorized uses of purportedly copyrighted material.

I also note at the outset that the assertion of weak or nonexistent intellectual property (“IP”) rights is not limited to copyright or fair use doctrine in particular; patent and trademark owners, among others, may and sometimes do assert protection over subject matter that falls outside the scope of their IP rights as well. Thus, while the analysis presented herein is intended to assist in evaluating various reform measures relating to copyright, much of that analysis (including the mathematical model presented in Part III) could be adapted to evaluate other defenses or other IP rights. This Article’s emphasis on fair use may be viewed as merely one example of a more generally applicable framework.

specific, and hence relatively unpredictable nature of the governing standards themselves. In response, copyright scholars have suggested a variety of reforms, many of which are directed towards making the fair use doctrine more effective in accomplishing 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 often missing in the literature, however, is an appreciation of the many different reasons why fair use (and other copyright doctrines) sometimes crumbles in the face of expansive assertions of copyright rights; how these reasons relate to one another; and how various proposed reforms might alleviate some (but probably not all) of the underlying problems. Focusing principally on fair use as a doctrine that, in the opinion of many critics, often is underenforced in the presence of copyright overclaiming, this Article argues below that one reason fair use may fail to achieve its intended purposes is inherent in the doctrine itself: 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 with 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.² 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

2. Lydia Loren, Mark Lemley, and Brett Frischmann have all previously made the general point that, to the extent the use of another’s asset generates positive externalities that exceed the private value to the individual user, the owner of the asset may block the use, to the detriment of aggregate social welfare, if the value the owner expects to derive from so doing, though less than the increase in social welfare, exceeds the private value to the individual user. See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 48–56 (1997); see also Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 298 (2007); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 976–77 (2005); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1061–62 (2005). Gideon Parchomovsky and Kevin Goldman also make this point, and contend (as do I in Part II of this Article) that the uncertainty surrounding current fair use doctrine leads to the underutilization of the doctrine. See Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1485–86, 1497–1502 (2007). My discussion above, like that of Loren and of Parchomovsky and Goldman, focuses on fair use as one salient example of this general phenomenon.

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. 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, 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 other related problems and instead 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,³ devising alternative ways to compensate content producers,⁴ or limiting copyright rights to cases involving commercial exploitation.⁵

Part II presents a simple economic model of the fair use doctrine, and Part III presents a model 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 models suggest 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 complications further exacerbates the underutilization problem. Part IV then examines six different types of possible reforms, namely (1) increased reliance on liability rules as an alternative to the present reliance on fair use or injunctive relief; (2) changes to copyright damages rules; (3) increased use of penalties such

3. See LESSIG, *supra* note 1, at 248–56 (arguing that copyright owners should be required to publish their works or forfeit their copyrights prematurely). See generally Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485 (2004).

4. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 202–16 (2004) (proposing an equipment levy as a means of compensating content producers); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 74–83 (2003) (similar).

5. See JESSICA LITMAN, DIGITAL COPYRIGHT 180–83 (2001) (proposing a reformulation of copyright as an exclusive right to commercial exploitation); cf. Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 957–58 (2007) (stating that “the problem with fair use is not that the defense is too narrow, but that the rights to which it makes an exception are too broad” and that perhaps a better alternative would be to confine the copyright owner to the right to distribute copies to the public).

as the copyright misuse doctrine in response to bad faith efforts to block fair uses; (4) changes to the standards used for awarding attorney's 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. Part V concludes by arguing that although many of these reforms are desirable in moderation, their selective adoption may not bring about substantial 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

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.⁶ The model assumes that copyright in general gives

6. 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 1, at 1644–45 (similar). For the record, the four factors are set forth in Copyright Act section 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 behind the third factor is 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

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 (or both). The premise that copyright in general gives rise to net social benefits in turn may support a general rule that users who would like to copy or adapt copyrighted expression should negotiate with copyright owners for permission. When the value a potential user (U) expects to derive from a use (call this V_U) exceeds the value the owner (O) accords to excluding that use (call this V_O)—that is, when $V_U > V_O$ —a straightforward application of the Coase Theorem suggests that U and O will strike a bargain under which O will permit the use for a fee, absent transaction costs or other bargaining obstacles. Alternatively, when O values exclusion more than U 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 U and award damages. This result is optimal as long as the central assumptions underlying copyright are valid—that copyright entitlements in general confer a net social benefit and that V_U captures all or most of the social value of the use. Further analysis indicates, however, that users should be free to make unauthorized uses of copyrighted works in at least two instances.

A. THE TRANSACTION-COST RATIONALE

Initially, U should be permitted to engage in unauthorized use in cases in which the transaction costs of bargaining for use discourage U 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 U's expected cost of negotiating for the use.⁷ In the absence of fair use (or some other exception that would permit unauthorized use), the short-run result is

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, "Fairness of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 281–82 (2003) (arguing that "[c]ourts tend 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* note 1, at 1645 ("All 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."). But see Barton Beebe, *An Empirical Study of the U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 590–91 (2008) (disagreeing with Nimmer's assertion that "the factors 'tend to degenerate into post-hoc rationales for antecedent conclusions'" (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, at 13-206 (2007))). If nothing else, the malleability of the factors can lead to unpredictable results. See Nimmer, *supra*, at 287.

7. For simplicity, we can assume that the value to the owner of excluding the use is the net of the owner's cost of negotiating with the user. The transaction-cost rationale also would appear to be implicated when $V_U > V_O > V_U - TC_U$. It may be quite difficult for U to predict, however, when these latter conditions are present.

that U will either (1) forgo the use or (2) infringe.⁸ 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. O receives no royalty in either case, and he would have consented to the use in a transaction-cost-free world. Infringement in this type of case therefore might appear preferable to nonuse, insofar as infringement would have no negative ex ante impact on the incentive to create and publish (O is no worse off, remember), and U is better off. Once O discovers the use, however, he will be able, assuming that copyright rights are normally enforceable by injunctive relief and that no liability exception applies,⁹ to exercise his right to exclude U by means of an injunction. 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.¹⁰ 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. Parties could avoid these costs if unauthorized uses were permissible ex ante. In addition, a rule permitting unauthorized use economizes on the transaction cost of having to negotiate for permission and avoids any potential for strategic behavior or other obstacles that may hold up or deter a productive use. A rule permitting U’s unauthorized use therefore is superior to a rule that permits O to enjoin the use in cases in which $TC_U > V_U > V_O$.

Even so, this model does not indicate 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 $V_O > V_U$ or $V_U > TC_U > V_O$. 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.¹¹ Indeed, if fair use applies only in cases in which transaction costs are high, one might envision an ideal

8. *But see* LANDES & POSNER, *supra* note 6, at 117 (noting that some would-be users of small portions of a work might purchase a copy of the entire work, even if fair use did not excuse the use; even so, the transaction cost “would be very high: it would be the difference between the price of the book and the value to the copier of the chapter that he copied”).

9. *See infra* notes 13–16 and accompanying text; *see also infra* Part IV.A.

10. *See* REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 5 (2006) [hereinafter ORPHAN WORKS], available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

11. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295–96 (1996).

world in which transaction costs are reduced to zero, and fair use itself vanishes.¹²

Moreover, 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, intellectual property 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, and these actors may undervalue O's entitlement and undermine the incentive scheme. Additionally, compulsory licensing itself may discourage the private sector from developing superior transaction-cost-reducing institutions.¹³ U.S. copyright law, nevertheless, permits compulsory licensing in several discrete situations in which transaction costs are likely to be high,¹⁴ and perhaps one could argue in favor of an expanded role for compulsory licensing notwithstanding its potential drawbacks.¹⁵ For now, note only that fair use itself can be characterized as a type of compulsory licensing system, albeit one in which the cost of the "license" is zero. In theory, the fair use solution would be preferable to compulsory licensing for

12. 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, 579–80 (1998). *But see* Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 475–559 (1998) (disputing Bell's thesis).

13. See ROGER D. BLAIR & THOMAS F. COTTER, *INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES* 38–41 (2005). Perhaps these concerns can be exaggerated, however, particularly if liability rules have other virtues in comparison with property rules in a given context. See IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 133–35 (2005). I thank Rob Merges for directing my attention to Ayres's discussion of this point, and I note that Gibson also cites Ayres for the same point. See Gibson, *supra* note 1, at 945 n.249.

14. See 17 U.S.C. § 104A(d)(3) (2000) (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(c) (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(a) (providing for compulsory licensing for satellite retransmissions); *id.* § 122(a) (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).

15. See *infra* Part IV.A.

a price above zero whenever the allocable social costs of compulsory licensing would 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 parties or by society generally) would be inefficient whenever V_U , though greater than V_O , is less than \$10.¹⁶

B. THE POSITIVE-EXTERNALITIES RATIONALE

The other setting in which fair use should apply arises when the social value of the use (V_s) exceeds the amount by which O values preventing the use (V_o), which in turn exceeds U's expected value from the use (V_U); that is, $V_s > V_o > V_U$. One might view this situation as involving a special type of transaction-cost problem, because if transaction costs were zero, all of the members of society who valued the use (including U, whose individual value V_U makes up part, but only part, of V_s) could band together and reach an 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 refuting him. In such a case, Wendy Gordon has argued, the use is justified, rather than excused, and a rule that required *any* payment should be rejected on normative grounds.¹⁷ 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

16. See LANDES & POSNER, *supra* note 6, 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. 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, 194 (2003) [hereinafter, Gordon, *Excuse and Justification*]. 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.” *Id.* at 195, 196. 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”).

17. See Gordon, *Excuse and Justification*, *supra* note 16, at 154.

the individual values the good.¹⁸ For another, the use of WTP and WTA is premised on the assumption that the amount by which one values a given thing is commensurable in money.¹⁹ 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).²⁰ The conclusion that $V_s > V_o > V_u$ in a given setting, therefore, might reflect a collective judgment that social welfare 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.²¹

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.²² 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 possible manifestations of fair use specifically referenced in section 107 of the Copyright Act, such as educational uses and news reporting, may fall within this category.²³

18. For a good summary of the literature on endowment effects and related phenomena, see Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1232–42 (2003). For a more recent, skeptical assessment, see Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay—Willingness to Accept Gap, the “Endowment Effect,” Subject Misperceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 531–32 (2005).

19. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 654 (1998).

20. See Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 229–30 (2004).

21. 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, *Excuse and Justification*, *supra* note 16, at 176–87.

Note also that the copyright owner is not necessarily the same as the author of the work at issue. An author who has assigned her copyright to a publisher may prefer that the work be widely quoted, but unless she has negotiated some residual rights in advance, she will have no way of controlling her publisher's interest to the contrary. Thus, in some cases at least, the author's interest in widespread dissemination may be part of V_s .

22. A static analysis would probably uncover more such positive externalities than would a dynamic analysis that takes into account the possible negative effects of an overly expansive fair use exception upon the *ex ante* incentive to create and publish. Ideally, policymakers should take these potential dynamic effects into account as well, in determining whether on balance a specific use is likely to give rise to positive externalities. This qualification makes the analysis much more complicated, to say the least. See *infra* notes 49–54 and accompanying text.

23. See 17 U.S.C. § 107 (2000).

Externalities, however, 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, and this form of advertising is credible only if author and publisher permissions are not required.²⁴ 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, one might perceive reviews and other forms of criticism (including parodies) 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.²⁵

Other examples of unauthorized uses that from time to time might generate sufficient positive externalities to justify invocation of the fair use doctrine are not hard to imagine. For example, suppose that 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 profit-maximizing price for permission, the collective fee demanded may outweigh the value of the use, thus discouraging the use altogether.²⁶ Alternatively, suppose that 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

24. See LANDES & POSNER, *supra* note 6, at 117–18. 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.

25. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Market Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1631–32 (1982). More generally, forbidding certain uses might inhibit the flow of ideas and thus undermine the purpose of copyright itself. See, e.g., Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 384–87 (2005).

26. See Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453, 460–61 (2002).

competition may outweigh the value to both the copyright owner and to the copier, thus justifying a fair use right to reverse-engineer.²⁷

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 users found a way 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.²⁸ As another option, society could decide to subsidize the posited social value in other ways—as it already does to some extent through means like public education. And, as in the transaction-cost setting, nothing thus far necessarily leads to the conclusion that, when positive externalities are present, copyright owners should never receive *any* compensation for the use of their works. 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 induce positive-externality-generated uses to proceed even if it required U to pay some fee less than or equal to V_u . Teasing out what this value is might not be worth the effort, however. Moreover, as noted above, perhaps in some settings a rule requiring any payment would itself exert a negative effect upon the ways in which people value certain uses.²⁹

C. TRANSLATING THEORY INTO PRACTICE

The preceding theoretical discussion has elaborated upon two possible rationales, consistent with the premise that copyright entitlements in general produce net social benefits, for permitting unauthorized use of copyrighted works in certain discrete cases. Some commonly-agreed-upon applications of fair use in the real world seem to track the theoretical model quite closely. 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

27. See Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, 48 WM. & MARY L. REV. 483, 541–44 (2006). For other examples of situations in which the public interest in widespread access may weigh in favor of a finding of fair use, see, e.g., Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 188 n.15, 193–95 (2007).

28. See Frischmann & Lemley, *supra* note 2, at 258.

29. See *supra* note 16.

education is a public good).³⁰ Translating theory into workable practical standards, however, may not always be so easy. 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 many other cases. Courts and commentators have vigorously disagreed, for example, about whether satire and burlesque, “critical engagements,” and reverse engineering of software should or should not count as fair use.³¹ Moreover, since externalities are not directly measurable in any event, fair use tends to privilege certain uses (such as criticism and, its close cousin, parody) as having high social value.³² In this sense, fair use 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.³³ (Even with this caveat, however, most commentators agree that fair use is broader and more flexible than counterpart doctrines, such as the “fair dealing” exception, found in some other countries’ laws.³⁴) Fair use therefore 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

30. 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), *reprinted in* 1976 U.S.C.C.A.N. 5681, 5681–88.

31. For discussions of the contours of the debate, see Cotter, *supra* note 25, at 390–94 (discussing critical engagements, satire, and burlesque) and Cotter, *supra* note 27, at 541–44 (discussing reverse engineering of software).

32. The mere fact that one has engaged in such a use, however, does not give rise to a legal presumption of fair use. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

33. Law No. 2003-517 of Aug. 1, 2003, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Aug. 2, 2003, Art. L. 211-3, *translated at* http://195.83.177.9/upl/pdf/code_35.pdf; Urheberrechtsgesetz [Copyright Law], July 16, 1998, pt. 1, ch. 6 (F.R.G.) [hereinafter German Copyright Law], *translated at* http://www.wipo.int/clea/docs_new/pdf/en/de/de080en.pdf.

34. See Brian F. Fitzgerald, *Digital Property: The Ultimate Boundary?*, 7 ROGER WILLIAMS U. L. REV. 47, 94 (2001) (discussing commonwealth nations’ fair dealing doctrine). At least one recent Canadian case, however, interprets “fair dealing” in a manner that is somewhat closer to fair use than has been apparent in other fair dealing cases. See *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.).

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 an unsuccessful search to find O). 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:

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

where P_A is U's subjective probability that O will acquiesce in the use; V_U is the value that 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 $R \geq 0$.³⁵ Realistically, U may not stop to think about all of the possible contingencies. Additionally, 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 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:

35. 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 (or payout) below the actuarial value of litigating to judgment." 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) (citing NICHOLSON, *supra*, at 250).

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

where I is the value to O of obtaining an injunction forbidding U from future use.³⁶ 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). Expression (2) therefore can be rewritten as:

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

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

Based on the analysis presented in Part II, 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 expression (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 U to ask permission whenever $V_U - TC_U > V_O$. Third, the system would encourage U to forgo use when $V_O > V_S > V_U$.³⁷ 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 when $TC_U > V_U > V_O$ 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 first imagine. To illustrate, assume (unrealistically) that the parties have perfect information, that both are risk neutral, and that litigation is costless.³⁸ Under the conditions stated, expression (2) becomes $(1 - P_F)(D + I)$. In the extreme case, in which $P_F = 1$, expression (2) equals 0, and O will acquiesce. P_A therefore equals 1, and the left-hand side of expression (1) reduces to V_U . U engages in the unauthorized use of the work, as she should.

36. 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—this value will diminish if U prevails.

37. 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 $V_U > V_S$. With some exceptions, the First Amendment largely precludes courts from comparing social and private utilities in this fashion.

38. On these assumptions, C_O , C_U , and R_O are all zero. Note that, if the decisionmaker, like the parties, has perfect information, 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.

At any point at which $P_f < 1$, however, O's expected payoff as expressed in expression (2) is positive. This means that O is better off litigating than acquiescing. Under these circumstances, P_A is 0 and expression (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:

$$(3) (1 - P_f)(V_U + D + E) > F > (1 - P_f)(D + I)$$

Furthermore, if we make the plausible 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 $D + I = V_O \geq D + E$. $D + E$ therefore can be restated as some fraction of V_O , that is, as xV_O , where $0 \leq x \leq 1$, and expression (3) can be restated as follows:

$$(3a) (1 - P_f)(V_U + xV_O) > F > (1 - P_f)(V_O)$$

or

$$(3b) V_U > V_O(1 - x)$$

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

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

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 instead—though if so, this is likely due to defects in the available remedies. For example, suppose that $P_f = 0.75$, $V_U = 100$, $V_O = 200$, 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 (i.e., expression (1) reduces to $P_f V_U - (1 - P_f)xV_O$ or $0.75(100) - 0.25(80)$). O foresees a positive payoff of \$50 if he litigates ($0.25(200)$). 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 $x > 0.5$, U foresees a payoff of no more than \$50 if she litigates, which makes settling for a \$50 fee attractive.

An alternative outcome, depending on the values of the relevant variables, 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 $P_F = 0.75$ and $x = 0.6$. U will forgo use if $\gamma < 0.2$; that is, if O expects to derive more than five 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 $P_F = 0.75$.³⁹ 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 expressions (or if $V_U > V_O$), γ would always exceed 1. Hence, γ also would always exceed $1 - x$, thus ensuring settlement in every case in which $P_F V_U - (1 - P_F)(xV_O) > 0$. This would align private and public benefits. 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.⁴⁰

Another way of thinking about the matter, alluded to in Part I, 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 the work is released to the public, the creator may fail to recoup that value, due to the nonrivalrous nature of information and to the difficulties (given modern copying technology) of excluding others from the work once it has been made

39. 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 $0.75(100) - 0.25(0.6)(600) = -15$.

40. See Gordon, *Excuse and Justification*, *supra* note 16, at 154; Gordon, *Incentives*, *supra* note 16, at 87–89.

public.⁴¹ Absent a corrective mechanism such as the institution of exclusive rights (for example, a system of copyright), the assumption goes, this problem will result in the underproduction of creative works.⁴² Potential creators have no financial incentive, at any rate, to invest in the creation of works that promise substantial social returns but will only yield 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—for example, if the author could independently finance the venture.) Interestingly, 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 (albeit one that has attracted far less notice in the relevant literature than has the appropriability problem that is used to justify the institution of copyright rights in the first instance).⁴³ 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.⁴⁴

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

42. 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., Yoo, *Copyright and Product Differentiation*, *supra* note 1, at 256–57. 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 2, at 277–79.

43. As noted above, however, a few other commentators have spotted this issue before. See *generally* sources cited *supra* note 2.

44. 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 attorney's fees and risk premia, exacerbate the problem.

In a recent paper, James Gibson suggests another reason why fair use rights may tend to become narrower over time. See Gibson, *supra* note 1, at 898–900. Gibson argues that courts' consideration of whether a market exists for licensing the type of use the defendant has made, in connection with the fourth fair use factor, has a feedback effect. *Id.*; see also 17 U.S.C. § 107(4) (2000) (directing courts to consider “the effect of the use upon the potential market for or value of the copyrighted work”). Specifically, if a risk-averse user seeks a license at time t_1 , even though a license may not seem necessary as a matter of fair use law, another user's decision to bypass this licensing “market” at time t_2 may incline the court at time t_1 to conclude that the use is not fair. See Gibson, *supra* note 1, at 898–900. In my view, to the extent the second user relies on the transaction-cost rationale for fair use, this “rights accretion” makes sense: the existence of a feasible licensing market at time t_1 may be evidence that the transaction costs of licensing at time t_2 were not insurmountable. To the extent the assertion of fair use relies on the externalities rationale instead, however, the second user's bypassing of the licensing market should not be dispositive.

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 to this question 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 because of 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 expression (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 0.5 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 the extreme case in which $P_F = 1$, but $P_A = 0$. In other words, O is certain to lose if the case proceeds to trial, but is willing to proceed nonetheless. Expression (1) reduces to:

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

Note that U's risk premium⁴⁵ $R_U = 0$, 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 attorney's fees and costs), U forgoes use whenever her 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 about whether the use is a fair use. Therefore, α 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 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

45. See *supra* note 35 and accompanying text.

message when U perceives that $P_F < 1$. As long as U perceives that $P_F < 1$, U realizes that it is possible for expression (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:

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

where increases in P_F , C_O , α , or R_O tend to increase the probability that O will acquiesce, *ceteris paribus*, while decreases in any of these variables tend to decrease the probability of acquiescence. Increases in D , I , β , or 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 , α , or R_O are relatively small and that D , I , β , 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 \$1000 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, 0.8. U might seem to be in the clear, but she cannot completely rule out the possibility that O will detect her use *ex post*, file suit, and hope to exploit U's vulnerable situation, having incurred the cost of printing U's book. Depending on the values put into expression (1), U might choose to forgo the use, even under these seemingly auspicious circumstances.⁴⁶

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 such reforms, but there are undoubtedly more. To the extent that copyright overenforcement and fair use underutilization result

46. Suppose, for example, that U arbitrarily estimates that $P_A = P_F = 0.8$ and that $\alpha = 0.5$, $\beta = 0.25$, $C_U = C_O = \$5000$, $D = \$500$, 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.

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.⁴⁷ Or perhaps society should invest more in educating users about their fair use rights and in providing users with pro bono legal representation, as proposed by Heins and Beckles.⁴⁸ 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 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, specifically as they relate to damages liability in cases in which the defendant's use is not fair and the plaintiff is entitled to injunctive relief (in addition, possibly, to damages). 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 attorney's 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 they are likely to have only limited effects on fair use.

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 monetary, but not injunctive, relief for copyright infringement.⁴⁹ Under a liability-rule system, the user has the option to breach and pay damages.⁵⁰ 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

47. 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 one reader can pass ideas to one another with impunity and even physical copies of the review can be redistributed after the lawful first sale.

48. See HEINS & BECKLES, *supra* note 1, at 57.

49. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–06 (1972); cf. Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 870–71 (1997).

50. See Calabresi & Melamed, *supra* note 49, at 1105–06.

noted above, Congress has authorized compulsory licensing of copyrighted works in some discrete circumstances—typically those in which the transaction costs of coordinating use among multiple users would be high, as the Calabresi–Melamed framework predicts.⁵¹ For the most part, however, the copyright regime protects those rights using 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).⁵² The Supreme Court has cautioned, however, that injunctive relief is discretionary; successful copyright plaintiffs are not necessarily entitled to injunctive relief in every case.⁵³ But neither the Supreme Court nor the lower courts have elaborated much upon the circumstances under which courts may deny injunctive relief in copyright cases.⁵⁴

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 the uses to the user's duty to pay compensation—in

51. See *supra* notes 13–14 and accompanying text.

52. See BLAIR & COTTER, *supra* note 13, at 29–30.

53. See *N.Y. 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, 1840 (2006).

54. Following the Supreme Court's decision in *eBay*, 126 S. Ct. 1837 (2006), courts have begun to apply the traditional four-factor test for determining whether to award injunctive relief in patent and copyright actions. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007) (stating that, post-*eBay*, copyright owners may show irreparable harm based upon evidence such as of loss of market share, reputational harm, the defendant's inability to pay a damages award, or the vulnerability of the plaintiff's works to future infringement); *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 439–44 (E.D. Tex. 2006) (concluding that the patentee was not entitled to injunctive relief because, inter alia, it did not face irreparable harm from the loss of market share or brand-name recognition attributable to Microsoft's inclusion of infringing software in its Windows operating system; the infringing software was but a small component of the operating system; and Microsoft's inability to use the infringing software pending a design-around would have left Windows itself vulnerable to infringement). But even post-*eBay* there appear to be very few copyright cases in which courts have declined to award the prevailing plaintiff injunctive relief. The only two cases of which I am aware both involved the rather specialized world of architectural copyrights. See *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 542–47 (4th Cir. 2007) (declining to enjoin the defendant from selling or leasing infringing house, but ordering the return of infringing plans); *Allora, LLC v. Brownstone, Inc.*, Civ. No. 1:07CV87, 2007 WL 1246448, at *4–8 (W.D.N.C. Apr. 27, 2007) (declining to enjoin the defendant from completing three houses already under construction, but enjoining the infringing use of the copyright in advertising). Perhaps future courts will be less willing to award injunctive relief, however, in cases such as *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1996), in which the plaintiff obtained an injunction against the exhibition of an already released film, based upon the defendant's having based three short scenes in the film on the plaintiff's drawing. It seems unlikely that the plaintiff in *Woods* faced a loss of future market share or reputation, and the plaintiff's work comprised but a small portion of the defendant's film. See *id.* at 65.

effect, adopting a liability-rule regime for some class of unauthorized uses. 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 that 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 of the use (V_s) exceeds the amount by which O values preventing the use (V_o), which in turn exceeds U's expected value from the use (V_u); that is, $V_s > V_o > V_u$. 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.⁵⁵ One can imagine, for example, cases in which the decision to invest in producing a work would be negatively impacted by the likelihood that courts would deem all or most of the expected uses fair uses under a framework that finds fair use whenever $V_s > V_o > V_u$.⁵⁶ 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 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.⁵⁷ More generally, one might surmise that there would be many

55. Conceivably, it also may reduce the incentive on the part of users to develop their own institutions for internalizing externalities. See *infra* Part V.

56. Of course, one might resort to the same type of argument used above to justify fair use in the context of high transaction costs—namely, that the copyright owner is no worse off if fair use proceeds, because absent fair use the user will not succeed in bargaining for permission to use the work. As long as $V_o > V_u$, U will not voluntarily pay O enough to induce O to relent. A rule permitting U to use whenever the positive social externalities of the use exceed V_o nevertheless might have a greater likelihood of discouraging O from investing in creation and publication *ex ante* than would a rule permitting unauthorized use when $TC_u > V_u > V_o$; the former rule might be more susceptible to erroneous application, if nothing else. If so, an overly expansive fair use doctrine may undermine dynamic efficiency.

57. Consider, for example, the reverse-engineering cases. A finding of fair use is consistent with the premise that the social value of competition (including the dynamic aspect of competition, insofar as it encourages future innovation) 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 27, at 530, 541–42. 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 542–44. In a related vein, in some instances fair use also may

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, $V_u - F - TC_u$ must exceed 0.⁵⁸ On the other hand, the payment must be large enough to preserve copyright owner incentives. Of course, any payment less than V_o potentially weakens those incentives, though conceivably only to a small (and therefore perhaps acceptable) extent.

In addition, one must take into account other potentially negative consequences of liability rules. The liability-rule option increases the administrative costs of the copyright system, for all of the reasons suggested above in the discussion of compulsory licenses.⁵⁹ 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 distort the creative process by commodifying acts of creative borrowing (or both).⁶⁰ And when the user has a strong normative reason 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.⁶¹ In light of these obstacles, it is

frustrate copyright owners' efforts to price discriminate. Professor Picker presents a simple thought experiment to illustrate the point. See Posting of Randal S. Picker to The University of Chicago Law School Faculty Blog, More Google Print: Fair Use and Inefficient Bundling, http://uchicagolaw.typepad.com/faculty/2005/11/more_google_pri.html (Nov. 11, 2005). Whether this consequence is viewed as positive or a negative depends upon the welfare consequences of price discrimination, which can be ambiguous. See Cotter, *supra* note 27, at 545–49 (citing sources).

58. 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 attorney’s fees are factored into the analysis. See *infra* Part IV.D. The only reasons 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 it simultaneously places some unauthorized uses out of reach of some users and may render outcomes more predictable and, consequently, more affordable for some users.

59. See *supra* text accompanying note 13.

60. See *supra* note 16.

61. See Gordon, *Excuse and Justification*, *supra* note 16, at 188 (citing Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 330–31 (1996)).

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.⁶²

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.⁶³ Application of the liability-rule option might encourage more uses that promise high social value without unduly dissipating the incentive to invest in the creation and publication of underlying works.⁶⁴ This regime 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.⁶⁵ Indeed, adoption of the liability-rule option for unauthorized derivative works might go a long way, 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,⁶⁶ but it could have an impact on *some* works, particularly works of entertainment that are expected to generate substantial spinoff revenue.⁶⁷ And there may be other reasons

62. See *supra* notes 53–54 and accompanying text.

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

64. See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1215–16 (1996) (arguing that the right to prepare derivative works typically does not provide a strong incentive for the creation of new works).

65. See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 899–904 (2002); Hon. Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y U.S.A. 513, 521–23 (1999); John Tehranian, *Whither Copyright? Transformative Use, Free Speech and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1226–27; see also Lemley, *supra* note 27, at 192–93 & n.46 (arguing that, in cases involving transformative but non-fair uses, providing copyright owners with appropriate compensation, but not control over the infringing work, would avoid enjoining the publication of inseparable, noninfringing material); Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1203 (2000) (arguing in favor of a patent fair use doctrine, under which fair users would be required to pay compensation); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 16–21 (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).

66. See Sterk, *supra* note 64, at 1216.

67. 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 25, at 398–401. In addition, permitting the unauthorized creation

why according copyright owners the exclusive right to prepare derivative works may be beneficial, including the reduction of congestion externalities and other coordination problems⁶⁸ and concern over copyright owners' "moral rights."⁶⁹ 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.

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. Publ'ns Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002).

68. 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 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 13, at 112–13. And one can certainly come up with anecdotal evidence (e.g., the spate of Jane Austen-inspired films and television programs in the late 1990s) to the contrary. Indeed, some commentators have argued that a principal virtue of the exclusive right to prepare derivative works is that it suppresses what would otherwise be excessive competition among similar derivative works. *See generally* Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005). 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.

69. A translation, for example, is a type of derivative work. *See* 17 U.S.C. § 101 (Supp. 2005) (defining a "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* 101–20 (Linda Asher trans., 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, 1 (1997). Kundera himself no longer permits translations into his native Czech of the more recent work he has authored in French. *See* Jacques Méliitz, *English-Language Dominance, Literature, and Welfare* (Ctr. for Research in Econ. & Statistics ("CREST"), Working Paper, Apr. 2000), available at <http://www.crest.fr/pageperso/melitz/lit100.htm>; *see also* Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 756 (2005) ("[W]orks themselves may be less desirable for consumption if their meanings are altered.").

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.*,⁷⁰ a case that I have previously written about at some length.⁷¹ A religious organization that owned the copyright to a work it no longer believed to be divine revelation refused to license the text's republication to a breakaway sect that intended to use the work for religious purposes, including proselytization.⁷² The refusal to license may have significantly affected the defendant's ability to practice its religion, assuming that in the minds of its believers no paraphrased text would be an adequate substitute for the original.⁷³ And yet a judgment declaring the defendant's use to be fair might be problematic, 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 exercise its rights to free speech and 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.⁷⁴ But the number of such cases is likely to be small. Some

70. *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000).

71. See Cotter, *supra* note 6, at 364–86. In a recent paper, Mark Lemley presents an interesting argument that, in cases in which the copyright plaintiff successfully asserts that a use is not fair because the defendant could have paid for and obtained a license from the plaintiff, the defendant should be permitted to continue the use upon payment of the licensing fee. See Lemley, *supra* note 27, at 195. A plaintiff's dissatisfaction with this result would suggest that the plaintiff's opposition to the use is "a front for what is really an interest in forbidding the use and foregoing licensing revenue." *Id.* To the extent that a successful assertion of the fair use defense turns on the feasibility of licensing *ex ante*, this suggestion makes sense if, as Lemley asserts, "it is a simple exercise for a court to assess damages in such a case." *Id.* The extent to which other considerations, however, including the social value of the use and the validity of the plaintiff's interest, if any, in moral-rights-like protection, see *id.* at 195 n.65, are relevant, the substitution of a liability for a property rule presents further, though perhaps not insurmountable, difficulties. See *supra* notes 49–62 and accompanying text.

72. See *Worldwide Church of God*, 227 F.3d at 1113.

73. See Cotter, *supra* note 6, at 360–62 (providing examples).

74. 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 a small number of ways of expressing those ideas. See, e.g., *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 539 (3d Cir. 1986). As stated, the doctrine obscured several normative issues, such as what "counts" as an idea and how many ways

cases that might seem to fall within this fact pattern at first blush may not appear so promising upon further reflection.⁷⁵ 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 suffice in most instances. 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.

Another possibility would simply be for courts to weigh the equities of injunctive relief on a case-by-case basis, as the Supreme Court instructs them to do in the context of patent-infringement suits.⁷⁶ This may be a desirable rule, but unless the courts begin denying injunctive relief frequently enough that the cases begin to sort themselves out with some predictability, it may have little impact on users' ex ante decisions to use or to refrain from use. Thus, despite its theoretical 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

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 Cotter, *supra* note 25, at 386–87. In this type of case, courts should consider accommodating the latter class through fair use or, perhaps better, by means of a liability rule.

75. Consider, for example, the decision by the National Science Association and the National Science Teachers Association 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, <http://www.wired.com/news/print/0,1294,69512,00.html>. Granick describes intelligent design theory as "junk," but she also characterizes the refusal to license as akin to other efforts by copyright owners to "squelch speech" and suggests the possible applicability of copyright misuse. See *id.* In my view, however, neither fair use nor the 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 that Granick's discussion does not touch upon. Otherwise copyright entitlements become indistinguishable from compulsory licenses.

76. See *eBay Inc. v. MercExchange L.L.C.*, 126 S. Ct. 1837, 1841 (2006); see also *supra* notes 53–54 and accompanying text.

guesses wrong about a fair use or free expression defense.⁷⁷ (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 a 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?⁷⁸

Assuming that the details are worked out, the effect of the Heins and Beckles recommendation would eliminate the variable D from expressions (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 expression (1), the impact increases 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, 0.30—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 0.50, for example, the effect of the rule increases U's payoff by only 0.25D. 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.⁷⁹ 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 $(1 - P_F)D$ is relatively low, *ex ante*, the impact on incentives is likely to be minimal too. The reduction or elimination of statutory damages, if not all damages, in cases involving good-

77. HEINS & BECKLES, *supra* note 1, at 56, 57.

78. Heins and Beckles suggest their proposal would be an extension of 17 U.S.C. § 504(c)(2) (2000), discussed *infra* at text accompanying notes 79–81. See HEINS & BECKLES, *supra* note 1, at 58 n.31.

79. 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) (first sentence). Where the "infringer sustains the burden of proving . . . that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court . . . may reduce the award of statutory damages to a sum of not less than \$200." *Id.* (second sentence). 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 13, at 74–83.

faith fair use defenses therefore might constitute a (moderately) useful reform. It also 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.⁸⁰ This exemption could be extended to other users.⁸¹

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 attorney's fees) in such cases. In terms of expression (2), one could add another variable S (for sanction), such that O's decision to acquiesce depends upon whether:

$$(2b) (1 - P_f)(D + I - (1 - \beta)C_o) - P_f(\alpha C_u + C_o + S) - R_o > 0$$

In theory, one might think of S as a sort of "reverse multiplier" intended to deter invalid assertions of copyright rights.⁸² For example, if one assumed

80. See HEINS & BECKLES, *supra* note 1, at 58–59 n.31 (citing 17 U.S.C. § 504(c)(2) (third sentence)). The third sentence of § 504(c)(2) 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. 17 U.S.C. § 504(c)(2) (third sentence). There appear to be no reported decisions construing this sentence, though, as Nimmer and 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 NIMMER & NIMMER, *supra* note 6, § 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." 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 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779.

81. 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 80 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; see also ORPHAN WORKS, *supra* note 10, at 115, 127 (recommending, inter alia, eliminating statutory damages for infringement of qualifying orphan works).

82. 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

that O would succeed in deterring the assertion of a valid fair use defense three times out of four, and that each 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 in 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 possible proxy 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 court renders the patent unenforceable until the misuse is purged (that is, until its effects dissipate).⁸³ Several courts have applied the misuse doctrine in the copyright context as well, holding unenforceable the copyrights that those courts deemed the copyright holder to have used "in a manner violative of the public policy embodied in the grant of a copyright."⁸⁴ 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 alleged act of misuse did not affect the defendant itself.⁸⁵ Perhaps the misuse doctrine could play a more important role in preventing copyright owners

breaches a legal duty—thus conferring upon himself an illicit benefit, or causing the plaintiff an unwanted harm, of \$X. If the plaintiff detects the breach 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).

83. *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001 (Fed. Cir. 1986) (quoting *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 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 Prods. Co. v. Fanner Mfg. Co.*, 328 F.2d 265, 279 (6th Cir. 1964).

84. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990); see also *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 783–84, 793–94 (5th Cir. 1999); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 517–20 (9th Cir. 1997).

85. See Cotter, *supra* note 27, at 539–40. 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. See *id.*; Thomas F. Cotter, *Misuse*, 44 HOUS. L. REV. 901, 961–62 (2007); Mark A. Lemley, Comment, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CAL. L. REV. 1599, 1614–20 (1990).

from overreaching—as even Judge Posner, a quondam critic of the misuse doctrine, has come to believe.⁸⁶

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 an ex ante good-faith basis for O to conclude that the use was not fair.⁸⁷ For another, if S is too large, S may have the unintended consequence of overdetering legitimate exercises of copyright rights. 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 option is to institute a standing requirement, thus preventing courts from finding misuse without receiving adequate input from the parties whom the challenged conduct most directly affects.⁸⁸ 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 option is 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

86. *Compare* *Assessment Techs., LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003), with *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982). In *Assessment Technologies*, Judge Posner stated:

The 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.

Assessment Technologies, 350 F.3d at 647. In his earlier opinion in *USM Corp.*, Judge Posner expressed more skeptical thoughts on misuse: "Our 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." *USM Corp.*, 694 F.2d at 512.

87. For empirical evidence of hindsight bias in patent law, see generally Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391 (2006).

88. See Cotter, *supra* note 27, at 539–40; Cotter, *supra* note 85, at 961–62.

unenforceable.⁸⁹ In terms of expression (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 O could not enforce the copyright at all. Thus, this modified scheme 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.

An alternative to applying the misuse doctrine 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.⁹⁰ 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 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.⁹¹ 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.⁹² 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 (as it currently exists or as suitably reformed) 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

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

90. See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1037–38 (2006).

91. 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.

92. See *infra* Part IV.F.

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 small 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.⁹³

D. ATTORNEY’S 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.”⁹⁴ In *Fogerty v. Fantasy, Inc.*, the Supreme Court construed this language to mean, first, that in copyright cases courts should award attorney’s fees in an even-handed manner—rather than pursuant to a “dual standard” under which prevailing plaintiffs presumptively are entitled to fee awards—but prevailing defendants are awarded fees only when the plaintiff’s claim is frivolous or in bad faith.⁹⁵ Second, the Court interpreted the statute to mean that awards of attorney’s fees are discretionary, not automatic, in copyright litigation.⁹⁶ It therefore rejected the argument that Congress intended to displace completely the so-called American rule, under which each party bears its attorney’s fees, with the English rule, under which the losing party is required to pay the prevailing party’s attorney’s fees.⁹⁷ 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.”⁹⁸ Subsequent decisions

93. 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 90, at 1296. I confess to having doubts that the proposed mandate would amount to a major priority for the federal government, however.

94. 17 U.S.C. § 505 (2000).

95. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

96. *Id.*

97. *Id.*

98. *Id.* at 535 n.19 (quoting *Lieb v. Topstone Indus. Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)).

from the lower federal courts focus largely on the objective good or bad faith of the losing party.⁹⁹

At first glance, 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, is 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 may undermine important social policies if, for example, a victory for the party that otherwise would have prevailed would have given rise to positive social externalities.¹⁰⁰ By contrast, the English rule may discourage the pursuit of some relatively weak claims and defenses but increase the pursuit of relatively small-stakes claims or defenses; at the same time, 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 conclude that in the present context the English rule would be preferable to the American rule for two reasons. First, by discouraging litigation over

99. See 4 NIMMER & NIMMER, *supra* note 680, § 14.10[D][3][b], at 14-203 to -204. As Nimmer and Nimmer state:

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.

Id.

100. 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.

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 attorney's fees are nonexistent. Second, the American rule potentially could deter some copyright *plaintiffs* from coming forward with valid 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.¹⁰¹

The preceding analysis is consistent with some observations made by Judge Posner in *Assessment Technologies, LLC v. WIREdata, Inc.*¹⁰² 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,"¹⁰³ 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 at the other extreme the claim or defense was frivolous and the prevailing party obtained no relief at all, the case for awarding him attorneys' 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 attorneys' 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 prospect of such an award, the party might be forced into a nuisance settlement or deterred altogether from exercising his rights.¹⁰⁴

101. See John J. Donohue III, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1099–1102, 1118 (1991) (arguing that, if transaction costs were zero, then adopting either the American or English rule would have no effect on the rate of settlement; but that the English rule is, in general, likely to be the more efficient rule).

102. *Assessment Techs. LLC v. WIREdata, Inc.*, 361 F.3d 434, 436–37 (7th Cir. 2004).

103. *Id.* at 436.

104. *Id.* at 436–37 (internal citations omitted); see also Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371, 397 (1996) ("[I]f there is an excessive incentive to

As Nimmer and Nimmer observe, 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."¹⁰⁵ 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 attorney's fees for sufficiently high values of P_F , while prevailing plaintiffs generally would not obtain fee awards as long as they obtained "generous damages . . . or injunctive relief of substantial monetary value."¹⁰⁶ In terms of the expressions above, for values of P_F in excess of some critical amount, $\alpha = 1$ and $\beta = 0$, thus reducing expression (1) to $P_A V_U + (1 - P_A)[P_F(V_U) - (1 - P_F)(C_U + D + E)] - R_U$ and expression (2) to $(1 - P_F)(D + I - C_O) - P_F(C_U + C_O) - R_O$. Without the prospect of liability for one's own or one's opponent's attorney's fees deterring the assertion of legitimate fair use rights, users would be more likely to use and owners would be more likely to acquiesce, all other things being equal.

It seems likely that the adoption of a one-sided English rule, 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 who are willing to take their cases in exchange for the prospect of a court-ordered fee down the road. And users 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."¹⁰⁷ 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.¹⁰⁸ Overall, reform is

sue in the absence of fee shifting, then the ideal fee-shifting rule would impose a net expected cost on the plaintiff in the marginal case.")

105. 4 NIMMER & NIMMER, *supra* note 6, § 14.10[D][3][b], at 14-209.

106. *Assessment Techs.*, 361 F.3d at 436.

107. 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 attorney's fees.

108. 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 as well: a court that

probably desirable, but even a one-sided English rule may not prevent copyright overenforcement in a large number of cases.

E. INCREASING ACCURACY

Another set of proposed reforms is directed towards increasing the accuracy of fair use determinations.¹⁰⁹ Assuming that fair use determinations are not one-hundred percent 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, then copyright rights either will 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, conversely, if the parties 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 below, 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 from asserting valid fair use rights.¹¹⁰ 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.

has found that a use is not fair might accord an inappropriately low ex ante value to P_F and award fees to the prevailing plaintiff under an even-handed approach.

109. I use the term "accuracy" here to mean "correctness in light of the relevant policies." A decision that fails to find fair use when $TC_U > V_U > V_O$ or $V_S > V_O > V_U$, or that finds fair use when these conditions are not present, is therefore inaccurate in the sense used above. Put another way, measures that increase accuracy are synonymous with measures that reduce the risk of error.

110. See *infra* Part IV.F.

There are nevertheless several obvious problems to consider. One is that there is no clear evidence that the amount of either systematic or 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 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 positive returns. Exactly what this would mean in the present context, however, or how one might attempt to quantify that point, is unclear.

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 the burden of proof with respect to at least some of the factors relating to fair use to copyright plaintiffs, rather than allocating that burden to defendants.¹¹¹ 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, potential problems exist. The most obvious is that allocating the burden of disproving fair use to copyright owners is likely to result in a corresponding increase in the number of false positives—that is, the number of cases wrongly decided in favor of fair use.

111. See *infra* notes 112–15 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. See *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003).

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 be at issue in every case. (It is possible, however, 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 the expected increased costs might deter some copyright owners from asserting valid infringement 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.¹¹² For example, Kenneth Crews argues that when the user copies an 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.¹¹³ More generally, Matthew Africa argues in favor of allocating to the copyright owner the burden with respect to fair use factor four of 17 U.S.C. § 107—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 information regarding the feasibility of licensing than do defendants.¹¹⁴ 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

112. *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 must 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 her 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 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). *See also* Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 239–45 (2006) (critiquing Lunney's proposed case-by-case cost-benefit analysis as impractical and speculative).

113. *See* Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 68 (1999).

114. *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, 1178 (2000).

freedom of speech.¹¹⁵ 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 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. The liability-rule option¹¹⁶ might be a simpler alternative, although it gives rise to potentially difficult problems relating to the quantification of damages.

On balance, Africa's proposal would have relatively general applicability and might be easier for some courts to swallow than the Lange–Lange Anderson proposal.¹¹⁷ But once again I would caution not to overestimate its impact. Although a plaintiff's inability to prove the feasibility of ex ante licensing would resolve some marginal fair use cases in favor of defendants, plaintiffs probably would succeed in proving the feasibility of licensing in a great many cases. Indeed, if James Gibson is correct that licensing opportunities proliferate due to risk aversion and other factors, and thus tend over time to reduce the scope of fair use, the Africa proposal may not make much difference at all in the long run, absent additional reform to the way in which courts evaluate licensing evidence.¹¹⁸ Courts' willingness to consider the *reason* for the defendant's bypassing an existing licensing market, however, as Gibson recommends, might increase accuracy if courts can identify positive-externality-generating uses and accord less weight to bypassed licensing markets in those types of cases.¹¹⁹

115. David Lange & Jennifer Lange Anderson, Copyright, Fair Use, and Transformative Critical Appropriation 1 (working paper), *available at* <http://www.law.duke.edu/pd/papers/langeand.pdf>.

116. *See supra* Part IV.A.

117. Africa himself believes the change would probably have to be accomplished legislatively, however. Africa, *supra* note 114, at 1178.

118. *See supra* note 44.

119. *See* Gibson, *supra* note 1, at 948–49; *see also* Wendy J. Gordon, *The “Why” of Markets: Fair Use and Circularity*, 116 YALE L.J. POCKET PART 371, 372 (2007), <http://yalelawjournal.org/images/pdfs/547.pdf> (stating that a defendant should have “no fair use claim if market institutions are the proper locus for allocating the use, and if the particular market is working well,” but that the fair use claim “should prevail (1) if the use is one that is of a general type not well allocated through markets, or (2) if the particular market is deeply flawed”).

F. INCREASING PREDICTABILITY

A final set of proposed reforms is directed toward decreasing the notorious unpredictability of fair use determinations.¹²⁰ In terms of the expressions 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 firms¹²¹—one result would be to decrease users' private costs of asserting valid fair use rights. Greater predictability also would likely 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 sub-issues that one would need to litigate, for example, by displacing a multifactor test with a bright-line rule.

One way to achieve more predictability would be to substitute predictable fair use rules for the relatively unpredictable, but flexible, standards that currently hold sway. An arbitrary reform 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.¹²² Alternatively, one could adopt a slightly more flexible rule that x seconds or y lines are presumptively fair uses, but provide plaintiffs an opportunity to rebut the presumption.¹²³ Various guidelines for the use of copyrighted works in education, such 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, already function in this manner to

120. See, e.g., Nimmer, *supra* note 6, at 287 (“[T]he 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 2* (working paper) (2006), available at <http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/VanHouweling.pdf> (describing fair use determinations as being “based on an ad hoc and open-ended analysis that is notoriously unpredictable”).

121. See, e.g., Jeremy Bulow, *The Gaming of Pharmaceutical Patents*, in 4 *INNOVATION POLICY AND THE ECONOMY* 145, 162 (Adam B. Jaffe et al. eds., 2004) (“[B]asic capital market theory would say that if the litigation risk is nonsystematic and the firms’ managers act as fiduciaries for well-diversified stockholders, then the firms should be risk-neutral regarding the litigation.”); cf. Gibson, *supra* note 1, at 893–94 (stating that copyright owners also are likely to be risk averse, in part due to constraints imposed by errors and omissions insurers).

122. Gibson raises this possibility, using almost precisely the same example. See Gibson, *supra* note 1, at 937. Parchomovsky and Goldman also propose fair use minima along these lines. See Parchomovsky & Goldman, *supra* note 2, at 1511.

123. Mazzone recommends a rule of this nature. See Mazzone, *supra* note 90, at 1090–93.

some extent.¹²⁴ Although these guidelines lack the force of law, courts and copyright holders generally view adherence to these guidelines as falling within fair use.¹²⁵

The downside of increasing predictability 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 as well). Despite these concerns, 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 uses such as parody, criticism, reporting, and (in Germany) “free uses” that appear similar to the American concept of transformative uses.¹²⁶ 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, then, the rules are hardly bright-line at all. To my knowledge, no country’s statute adopts the true bright-line approach

124. 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), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681–88; see also GUIDELINES FOR EDUCATIONAL USES OF MUSIC, H.R. REP. NO. 94-1476, at 70–71 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5684; BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 14 (1998), *available at* <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf>; EDUC. MULTIMEDIA FAIR USE GUIDELINES DEV. COMM., FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA (1996), *available at* <http://www.ccumc.org/system/files/MMFUGuides.pdf>.

125. See Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 33 n.69 (2003). A related recommendation might involve the adoption of industry-wide “best practices” that recognize the utility of a relatively broad fair use exception. See AUFDERHEIDE & JASZI, *supra* note 1, at 30 (proposing the adoption of “models of ‘best practices’ for the incorporation of preexisting copyrighted materials by documentary filmmakers, based on collective discussions by distinguished creators of the ways in which they actually do and reasonably could use such materials” and suggesting that “[t]he imprimatur of leading professional associations on such models would provide crucial legitimacy”). This approach might succeed in avoiding some of the problems I flag in the text above with respect to copyright guidelines.

126. See German Copyright Law, *supra* note 33, pt. 1, ch. 4, §. 24(1) (“An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work.”). “Free use” is said to be analogous to “transformative use” under U.S. law. J.A.L. STERLING, WORLD COPYRIGHT LAW § 10:23, at 449–50 & n.27 (2d ed. 2003).

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.¹²⁷

Yet another problem with rules that would displace fair use standards is that they are likely to reflect interest-group bias. A frequently voiced complaint concerning the educational guidelines referenced above, for example, is that they largely reflect the interests of the content owners who drafted them.¹²⁸

Perhaps a better option would be to combine the bright-line and traditional approaches in a third alternative consisting of fair use minima, or 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, not minima—from which users depart at their peril.¹²⁹ If safe harbors transform into de facto rules, they may reduce uncertainty at too high a cost in terms of overenforcing copyright rights. To counteract this trend, Molly Van Houweling proposes 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, policymakers could permit users 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.¹³⁰ In this manner, safe harbors could become less one-sided in favor of copyright owners, 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

127. *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).

128. *See* Bartow, *supra* note 125, at 34–37; Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 602 (2001).

129. *See* Bartow, *supra* note 125, at 33 n.69; Crews, *supra* note 128, at 611–12. Parchomovsky and Goldman, on the other hand, argue that fair use minima need not become de facto maxima, if the minima are enacted into law; as they note, the guidelines mentioned in the text above lack the force of law. *See* Parchomovsky & Goldman, *supra* note 2, at 1489. They also argue that even relatively stringent minima—for example, a rule defining the taking of the lesser of three hundred words or fifteen percent of a literary work of more than one hundred words as per se fair use—would have substantial positive consequences in the real world. *See id.* If they are right, my conclusion in the text above that any positive effects of safe harbors would be “modest” may understate the effects of such reforms.

130. *See* Van Houweling, *supra* note 120, at 14.

accommodate owner interests to a greater extent than does the conventional fair use option and to enable more socially valuable uses to go forward.¹³¹ Whether legislators can develop and implement safe harbors similar to the orphan-works safe harbor mentioned above remains to be seen. To the extent such safe harbors would make copyright owners even slightly worse off than 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.

A second possible reform would be for legislators to delegate the fair use determination to some external decision maker, outside the context of litigation, on the theory that (1) the external decision maker would be able to render a fair use opinion more quickly and cheaply than could a court, and (2) the opinion, even if not binding on the parties, would in many cases be a good predictor of how a court would rule, and thus might discourage the losing party from proceeding further. (In terms of the model, the opinion would, again, reduce the variance associated with the probability of a court determining the use to be fair.) Several recent proposals take this form. Dan Burk and Julie Cohen, for example, have proposed a system, in the context of digital rights management, that 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.¹³² They argue that, absent such a system, technology often will prevent users from exercising their fair use rights, because potential fair users will not be able to gain access to the works in the first place.¹³³ This proposal, favorably discussed in a recent report prepared for the World Intellectual Property Organization,¹³⁴ may be the only feasible way to safeguard fair use rights within the specific context the authors address. David Nimmer and Michael Carroll have recently proposed analogous systems applicable to a broader range of potential fair users (i.e., not limited to works access to which is restricted by technological measures).¹³⁵

131. See *supra* Part IV.A.

132. Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J. L. & TECH. 41, 65–66 (2001).

133. *Id.*

134. NIC GARNETT, STANDING COMM. ON COPYRIGHT & RELATED RIGHTS, WORLD INTELLECTUAL PROP. ORG., AUTOMATED RIGHTS MANAGEMENT SYSTEMS AND COPYRIGHT LIMITATIONS AND EXCEPTIONS 73–76 (2006), available at http://www.wipo.int/edocs/mdocs/ccr/en/ccr_14/ccr_14_5.doc.

135. See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 12–15 (2006).

Nimmer's proposal contemplates a form of court-assisted ADR to help resolve potential fair use issues in advance of litigation,¹³⁶ while Carroll's proposal would involve the creation of a Fair Use Board within the Copyright Office.¹³⁷ A party intending to use another's work without permission could request a pre-use advisory opinion on fair use from the Board, much like a request for an Internal Revenue Service private letter ruling or a Securities and Exchange Commission no-action letter.¹³⁸

All of these latter proposals may have merit, but it is important not to oversell them. Most obviously, although the delay and expense incident to these pre-use proceedings may be less than the delay and expense incident to litigation, it is still delay and expense. The proposals therefore do relatively little to relieve the burden with respect to uses that are time sensitive or which reflect relatively little private value to the individual user.¹³⁹ In the worst-case scenario, the proposed pretrial procedures would simply add another layer of expense, especially if plaintiffs proceed to litigation regardless of the pretrial outcome—though perhaps over time courts would tend to defer to Fair Use Board decisions.¹⁴⁰

But there are other potential problems. As Carroll also notes, courts may disfavor users who bypass the pretrial procedure, in which case the availability of the procedure could unnecessarily raise costs in some cases.¹⁴¹ And it is not inconceivable that a larger body of fair use precedent could lead to less, rather than more, predictability. As Gibson suggests, the sheer variety of factual circumstances in which fair use questions may arise could generate more noise than predictability; alternatively, a larger number of bad precedents could render the outcome of future disputes more predictable but wrong.¹⁴²

Concededly, it is probably impossible to know in advance of adopting such a system whether these negative effects would predominate. Even the potential existence of negative effects, however, may make it difficult to displace the inertial status quo. Potential users may see little gain in lobbying

136. Nimmer, *supra* note 135, at 12–15. One might debate whether this reform goes more to accuracy, or cost reduction, or predictability, or even some combination thereof.

137. See Carroll, *supra* note 135, at 1124–28.

138. *Id.*

139. See Burk & Cohen, *supra* note 132, at 59–60 (discussing the decrease of spontaneous uses).

140. *But see* Carroll, *supra* note 135, at 1141 (expressing doubt that appellate courts would unduly defer and viewing the appellate courts' expected independence from the Fair Use Board as a strength of his proposal).

141. See *id.* at 1138; see also Justin Hughes, *Introduction to David Nimmer's Modest Proposal*, 24 CARDOZO ARTS & ENT. L.J. 1, 7 (2006) (similar).

142. See Gibson, *supra* note 1, at 942.

for reforms like those espoused by Nimmer and Carroll, and owners most likely can be expected to oppose it.

V. CONCLUSION: WHERE TO GO FROM HERE

Construed as an instrument for overcoming market failures due to high transaction costs, the fair use doctrine is manageable, if imperfect, and perhaps could be brought more into conformity with the social optimum through some package of modest reforms, such as the introduction of defendant-biased fee shifting. Once we view fair use as an instrument for inducing positive externalities as well, however, the doctrine as currently structured is both inherently flawed and not readily susceptible to demonstrable improvement. The doctrine is flawed because, as noted above, even absent many real-world imperfections, users would be unlikely to generate the socially optimal amount of positive externalities, given their inability to appropriate the value of those externalities. That flaw, in turn, may be ineradicable for two reasons. First, the posited externalities themselves are so disperse and amorphous—comprising social benefits relating to education, democratic governance, free speech, and competition, just to name a few—that it is difficult to perceive how to quantify (or falsify) them, even in theory. Second, the question of how to balance these hypothetical social benefits against the social cost of undercutting copyright incentives—the magnitude of which is similarly unquantifiable—is probably no more answerable than other familiar philosophical chestnuts such as “Why is there something rather than nothing?” or “What is it like to be a bat?”¹⁴³ Put another way, the structural problems endemic to fair use identified in this paper suggest that it may be unrealistic to expect the doctrine, either in its current incarnation or in combination with some package of reforms, to induce the optimal amount of positive-externality-generating uses or even some reasonable approximation thereof.

One possible response to this dilemma would be to ignore the positive externalities altogether and confine fair use to the small range of cases in which transaction costs loom large on the ground that it borders on the meaningless to talk about externalities that can be neither quantified nor falsified. Perhaps, as Yoo suggests, we should rely upon copyright to provide an incentive for the production of substitutes and not worry as much about lack of access to specific works.¹⁴⁴ The problem with this approach is that it contravenes the intuition, shared by many if not all observers, that a culture in which permissions are required in all cases other than those involving excessive transaction costs is undesirable. Quoting another’s work for

143. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* ch. 2 (1981); Thomas Nagel, *What Is It Like to Be a Bat?*, 83 *PHIL. REV.* 4 (1974).

144. See Yoo, *Public Good Economics*, *supra* note 1, 637–44.

purposes of critiquing that work is probably the most obvious example of a use that *presumably* gives rise to substantial externalities, even if those externalities cannot be quantified. More generally, if controversially, creativity itself may be stymied if creators are unable to reflect the world around them, including its cultural manifestations. For the individual creator of a new multimedia work, the appropriation of a few seconds of a motion picture, or of a few lines from a song or poem, may well be *le mot juste*. But even if this view is correct, it provides little insight on how to resolve the fair use dilemma. Some of the reforms discussed above, such as the introduction of a liability-rule entitlement for the production of derivative works, are unlikely to be politically feasible anytime soon. Others, such as damages caps for good-faith, but erroneous, assertions of fair use rights, may produce benefits, but those benefits are likely to be quite modest. Adopting an entire package of small reforms, by contrast, may have substantial aggregate impact, but also risks overshooting the mark. A court (or Fair Use Board) that is too eager to assume the existence of substantial positive externalities risks undermining copyright entitlements, and hence incentives, altogether.

It may be that, in some instances, the principal value of economic analysis is that it can help clarify what we do not—and maybe cannot—know. Here that value manifests itself by suggesting that *if* unauthorized uses of copyrighted materials sometimes give rise to large positive externalities, fair use is a highly imperfect tool for generating those social benefits. Moral, political, and artistic intuitions, however, may play a larger role than economics in judging whether those externalities exist, how important they are and whether some specific package of reforms is likely to lead us closer to or farther from their attainment.¹⁴⁵ Moreover, to the extent one believes the current system is already far removed from that ideal state, a more effective approach may be to avoid marginal tinkering with fair use altogether and to consider more fundamental reforms instead. Such reforms might take the form of amendments to the copyright laws themselves, as suggested in the Introduction, or maybe users themselves can devise new means to internalize the externalities that their uses generate, and thus better align private and social benefits. It might be fruitful to devote attention to imagining what these new ways might be and whether new approaches could account for externalities that are not so easily quantified. Whatever the ultimate resolution may be, perhaps the time has come to recognize that fair use can only do so much to stem the tide of copyright overenforcement.

145. Cf. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960) (“As Frank H. Knight has so often emphasized, problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.”).

