

A THEORY OF DE MINIMIS AND A PROPOSAL FOR ITS APPLICATION IN COPYRIGHT

By Andrew Inesi[†]

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I. INTRODUCTION

Copyright, perhaps more than any other area of the law, invites trivial violations. Everyday activities such as photocopying a magazine cartoon, snapping a photograph of a public sculpture, or singing “Happy Birthday” at a restaurant exemplify the frequency with which copyright can be violated in minor ways.¹ In the past, these infringements generally went unheeded, either because the copyright owner was unaware of the violation or felt a legal dispute was not worth the effort. In recent years, however, an increasing number of trivial copyright violations have made it to court, and new technological and political developments are likely to accelerate this trend.

This increase in litigation of trivial copyright violations is problematic for three reasons. First, the social cost of adjudicating trivial copyright disputes often outweighs the maximum possible benefit. Court costs alone can be orders of magnitude larger than the social reward, direct or indirect, that would result from adjudication. Second, strict enforcement of copyright for trivial violations rarely furthers, and often contravenes, the purpose of copyright: promotion of creativity. Third, courts have not taken a consistent approach to adjudicating trivial violations: a few hold that liability extends even to the most innocuous violations, while most find a way to privilege trivial violations using one of several different doctrinal tools. Unfortunately, these tools, most notably fair use and substantial similarity, have at times been stretched beyond recognition to achieve the courts’ desired results.

One obvious solution to the dangers posed by trivial copyright litigation is *de minimis non curat lex*, a legal maxim commonly used to privilege trivial violations in other areas of the law. However, the maxim has rarely been used as an independent defense to copyright infringement. Rather, *de minimis* has been largely limited to an ambiguous role within other copyright doctrines. Moreover, even this limited role is subject to debate, as exemplified by the recent Sixth Circuit opinion in *Bridgeport Music, Inc. v. Dimension Films*.²

This Article argues that *de minimis* can and should play a more prominent role in copyright. It begins, in Part II, with a study of *de minimis* generally (i.e., outside of copyright). Given its prominence as a centuries-old interpretive aid, *de minimis* has received surprisingly little theoretical attention. While it is clear that courts use the maxim to dismiss cases of minor importance, there is no consistent set of principles to guide its applica-

1. See discussion *infra* Section IV.B.

2. 401 F.3d 647 (6th Cir. 2004).

tion. Working from both case law and various conceptions of de minimis's purpose, Part II proposes a theoretical framework for de minimis and a two-step guide to its application. It is argued that this theory explains most de minimis holdings, and provides insight into the seemingly disparate justifications given for those holdings.

Part III shifts the focus to copyright, where the maxim has played a more complex role. In particular, de minimis has been used in three separate areas of copyright: (i) as part of substantial similarity analysis; (ii) as part of fair use analysis; and (iii) as a separate defense (henceforth "classic de minimis"). As if this multiplicity of uses were not sufficiently confusing, Part III will explain that within each of these areas, the role of the maxim is often unclear.

Part IV suggests two simple changes that courts can make to ensure that de minimis lives up to its considerable potential in copyright. First, courts must be clear regarding the function the maxim plays in their decisions. In effect, this means de minimis should be used only colloquially, if at all, in substantial similarity and fair use. Second, classic de minimis should be reinvigorated as a viable defense for trivial copyright infringements. The need for such a defense, always great, is growing as new technologies and attitudes increase the likelihood of legal disputes over trivial copyright violations. Further, there are theoretical and practical reasons to favor classic de minimis over fair use, its most likely doctrinal rival. Indeed, the clarity and consistency of fair use is likely to be improved by proper use of de minimis. Part IV concludes with a discussion of how and under what circumstances de minimis should apply in copyright, a discussion that mirrors the analysis from Part II.

II. DE MINIMIS OUTSIDE COPYRIGHT: A THEORETICAL APPROACH

A. Introducing De Minimis

De minimis non curat lex is commonly translated as "the law does not concern itself with trifles."³ Often shortened to "de minimis," other English-language formulations of the maxim include "the law doth not regard trifles,"⁴ and "the law cares not for small things."⁵ Although there is some

3. BLACK'S LAW DICTIONARY 443 (7th ed. 1999); *see also* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997).

4. Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 538 (1947) (quoting THOMAS BRANCH, PRINCIPIA LEGIS ET ÆQUITATIS 36 (William Waller Henning ed., T.H. White, 1st Am. from 4th London ed. 1824)).

debate regarding which definition is most accurate,⁶ and considerable question about what qualifies as a trifle,⁷ the basic meaning of the maxim is clear: the law will not resolve petty or unimportant disputes.

De minimis has a long legal history. It first became known in civil law at least as early as the fifteenth century, and there are earlier recorded instances of de minimis being applied in fact if not in name.⁸ Initially applied only in cases of waste,⁹ English courts began to use de minimis in a variety of situations in the sixteenth century.¹⁰ De minimis was first included in a collection of legal maxims early in the nineteenth century, and since that time “use of the maxim has increased steadily in all courts and the field of its application has steadily broadened.”¹¹

Courts today apply de minimis to a wide variety of legal disputes, “including contract, tort, civil, and criminal matters.”¹² While some courts have claimed that the maxim does not apply in certain legal areas, including constitutional disputes,¹³ real property disputes,¹⁴ and criminal disputes,¹⁵ there are counterexamples in each of these areas,¹⁶ and no real

5. *Porter v. Rushing*, 65 F. Supp. 759, 760 (W.D. Ark. 1946).

6. See *Veech & Moon*, *supra* note 4, at 538 (discussing the merits of using the verb “regard” when translating de minimis non curat lex).

7. See generally Jeff Nemerofsky, *What is a “Trifle” Anyway?*, 37 GONZ. L. REV. 315 (2001/2002).

8. See *Veech & Moon*, *supra* note 4, at 538.

9. For example, one fourteenth century court held the removal of five trees “too trifling for us to adjudge it waste.” Anon, Y.B. 8 Edw. 2, East. 11, Case I (1315), reprinted in 41 SELDEN SOCIETY 121 (1924), quoted in *Veech & Moon*, *supra* note 4, at 540.

10. *Veech & Moon*, *supra* note 4, at 540-42.

11. *Id.* at 539.

12. *Nemerofsky*, *supra* note 7, at 324.

13. See, e.g., *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) (stating that “[a] violation of constitutional rights is never de minimis”); *Nettles v. Griffith*, 883 F. Supp. 136, 144 (E.D. Tex. 1995) (quoting *Lewis*, 848 F.2d at 651).

14. See, e.g., *Reeves v. Jackson*, 184 S.W.2d 256, 258 (Ark. 1944) (“The maxim *de minimis non curat lex* is never applied to the positive and wrongful invasion of another’s property.”); *Wartman v. Swindell*, 25 A. 356, 357 (N.J. 1892) (“The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied.”).

15. See, e.g., *Hessel v. O’Hearn*, 977 F.2d 299, 303 (7th Cir. 1992) (“The law does not excuse crimes or torts merely because the harm inflicted is small.”).

16. For a counterexample in the constitutional context, see *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (noting that “even in the field of constitutional torts *de minimis non curat lex*”) (emphasis added). In the criminal context, see for example, *State v. Smith*, 480 A.2d 236 (N.J. Super. Ct. 1984) (holding the theft of three pieces of bubble gum to be de minimis). In the real property context, see, e.g., *Yeakel v. Driscoll*, 467

consensus in any of them. As recently noted by the Supreme Court, “the venerable maxim *de minimis non curat lex . . .* is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.”¹⁷

Given the prominence of de minimis as a defense to legal violations of all kinds, surprisingly little scholarship has focused on the maxim, and, more importantly, on the questions of how and under what circumstances it is applied. The most ambitious attempt to explain de minimis decision-making, which is over fifty years old, describes several factors that influence courts’ de minimis decisions, but does not fit those factors into a broader theoretical framework.¹⁸ More recent de minimis scholarship is largely limited to descriptions of cases in which the maxim has been used.¹⁹

The difficulty of discerning theoretical patterns in de minimis case law may explain this lack of scholarship. Courts have relied upon a number of different justifications for their de minimis decisions,²⁰ and justifications that play a prominent role in some cases are ignored in others. The fact-intensive nature of de minimis determinations exacerbates this theoretical confusion, which can make it difficult to extrapolate from one case to others.²¹ Additionally, since de minimis cases involve matters that are, by

A.2d 1342, 1344 (Pa. Super. Ct. 1983) (refusing to order removal of a firewall that encroached several inches onto the plaintiff’s property).

17. *Wis. Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). The specific question posed in the case was whether Wrigley’s Wisconsin business activities were sufficient to support imposition of state tax. The statutory provision in question prohibited a state from taxing the income of a party whose only business activities in the state were order solicitations. *Id.* at 223. Justice Scalia, writing for the court, ruled that Wrigley would qualify for the protection of the provision even if it had engaged in business activities other than solicitation of orders, so long as those activities were de minimis. *Id.* at 231-32. The court concluded, however, that Wrigley’s business activities in Wisconsin, which included replacement of stale gum by sales representatives and storage of gum, were not de minimis. *Id.* at 233. It should also be noted that there remains considerable debate concerning what constitutes a Congressional “contrary indication,” such that de minimis would no longer apply. *See, e.g., Alabama v. Bozeman*, 533 U.S. 146, 153-54 (2001) (suggesting that use of command words such as “shall” in the relevant statute militates against application of de minimis).

18. *See generally* Veech & Moon, *supra* note 4.

19. *See generally* Nemerofsky, *supra* note 7.

20. *See generally* Veech & Moon, *supra* note 4; *see also infra* notes 183-187 and accompanying text.

21. As one pair of scholars puts it, de minimis cases cannot “be readily reconciled, and, since identical fact situations rarely occur, there is seldom direct precedent to be applied in a new case.” Veech & Moon, *supra* note 4, at 544.

definition, of trivial importance, many courts dismiss the relevant claims without extensively documenting their reasoning.²² Worse, several courts have made mistakenly broad pronouncements regarding the applicability of *de minimis* to certain subject areas.²³ In sum, *de minimis* case law seems both contradictory and confusing; it is no wonder that one court called *de minimis* “an exercise of judicial power, and nothing else.”²⁴

Aggravating this confusion is the fact that courts and commentators use the term “*de minimis*” in two very different ways. First is the use described above: *de minimis* as a defense to minor legal violations—an abbreviation of “*de minimis non curat lex*.” Second, courts sometimes use “*de minimis*” more informally, as an adjective meaning trifling, unimportant, or insufficient.²⁵ This second use of *de minimis* is not surprising given the literal meaning of the term.²⁶ However, it can be confusing, and courts sometimes fail to clearly distinguish between the two uses of *de minimis*.²⁷ This confusion has not caused significant problems in most areas of the law. In copyright, however, confusion between the two uses of *de minimis* has wreaked jurisprudential havoc, as will be demonstrated in Part III.

Despite these problems, there is a common theoretical thread to *de minimis* jurisprudence, albeit one that is difficult to extrapolate from the cases alone. As detailed in the following sections, basic economic analysis, when applied to common formulations of the purpose of *de minimis*, yields a theory for how courts wishing to implement that purpose should

22. See, e.g., *Raymon v. Alvord Indep. Sch. Dist.*, 639 F.2d 257, 257 (5th Cir. 1981) (stating that the claim in question was “trifling” but nowhere mentioning *de minimis*).

23. See *supra* notes 11-14 and accompanying text.

24. *State v. Park*, 525 P.2d 586, 592 (Haw. 1974), quoted in *Nemerofsky, supra* note 7, at 341.

25. See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655, 2670 (2005) (Kennedy, J., concurring); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.34 (1999) (“[I]t is worth noting that if limited fund certification is allowed in a situation where a company provides only a *de minimis* contribution to the ultimate settlement fund . . .”); *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003) (“[A prisoner alluded to] some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal.”).

26. See BLACK’S LAW DICTIONARY, *supra* note 3, at 443 (translating *de minimis* as “trifling; minimal”); *De minimis*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/De_minimis (last visited Apr. 11, 2006) (translating *de minimis* as “about minimal things”).

27. For example, the Supreme Court recently noted that Congress has the power to regulate conduct that collectively has a significant effect on interstate commerce even if individual instances of the conduct in question have a “*de minimis* character.” *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005).

make de minimis decisions. This theory, it is argued, helps to explain de minimis case law—both the decisions made and the factors considered.

B. Factors Commonly Considered by Courts Applying De Minimis

As the above discussion suggests, there is a great deal of variety in de minimis jurisprudence. This section introduces de minimis case law and begins analysis of it.²⁸ Building on work begun by Max Veech and Charles Moon,²⁹ the discussion is organized around the factors most commonly considered by courts applying de minimis: the size and type of the harm, the cost of adjudication, the purpose of the rule or statute in question, the effect of adjudication on the rights of third parties, and the intent of the infringer.³⁰

1. The Size and Type of the Harm

The first and most important de minimis factor is the size of the harm done by the relevant legal violation. In its most straightforward incarnation, this factor is used to dismiss claims for small dollar amounts, such as a prisoner's claim for \$1.05 in compensation for confiscated newspapers,³¹ or a motorist's claim for the return of \$20.35 paid for highway tokens.³² However, small monetary damages alone do not guarantee a de minimis holding. The de minimis defense was denied in a case involving illicit sales of \$75.87,³³ as well as in a criminal action resulting from the theft of \$.35 worth of candy.³⁴ Similarly, it is not possible to fix an amount of monetary damages above which de minimis cannot apply: some courts have applied the maxim when the amount in controversy is large in an ab-

28. For purposes of clarity, it should be emphasized at the outset that this Section is not intended to exhaustively describe either de minimis case law or every factor ever considered therein. Rather, it has two purposes. First, it is intended to provide an introduction to typical de minimis fact patterns. Given the difficulty of defining what qualifies as a trifle, some familiarity with case law is essential for a full understanding of the maxim. Second, examination of the factors most important to de minimis decision-making helps to bring some order to the case law, and sets up the theoretical discussion of Section II.C.

29. See generally Veech & Moon, *supra* note 4.

30. This list is related to, but different from, the list provided by Veech and Moon. Their factors were: the purpose of the rule in question, intent, the size of the harm (they called it "value"), mutuality, and practicality. The practicality factor is not included herein because it is little more than a proxy for de minimis itself. The mutuality factor, on the other hand, does not appear to be significant in modern de minimis case law. See Veech & Moon, *supra* note 5, at 545-60.

31. Northern v. Nelson, 448 F.2d 1266, 1266 (9th Cir. 1971).

32. Schlichtman v. N.J. Highway Auth., 579 A.2d 1275, 1277 (N.J. Super. Ct. 1990).

33. Repp v. Webber, 914 F. Supp. 80, 83-84 (S.D.N.Y. 1996).

34. Commonwealth v. Moses, 504 A.2d 330, 332 (Pa. Super. Ct. 1986).

solute sense, but small in a relative sense. In *Industrial Ass'n of San Francisco v. United States*, for example, the Supreme Court held that a controversy over a few thousand dollars was de minimis when compared with total economic activity of over \$100,000,000.³⁵ More recently, the Ninth Circuit held that \$32,000 was de minimis when compared to a total unsecured debt of \$4,000,000.³⁶

Damages that are difficult to measure can also contribute to a de minimis ruling. In *Swick v. City of Chicago*, the Seventh Circuit held de minimis a police officer's claim that he suffered a denial of due process when placed on leave. The court based its holding largely on the difficulty of measuring the officer's injury.³⁷ Another court argued that a lawsuit alleging a First Amendment violation based on the inclusion of a painting of the Madonna on a postage stamp, deserved dismissal under a de minimis treatment.³⁸ One court even implied that difficulty of measurement is more important to a de minimis ruling than is the size of the harm,³⁹ though this view seems to be a minority position.⁴⁰ Regardless, it is clear that difficult-to-measure damages alone are insufficient to justify a de minimis ruling.⁴¹

2. The Cost of Adjudication

A second common de minimis consideration is the cost of adjudication. For example, when a man sued a company for tricking him into

35. 268 U.S. 64, 84 (1925).

36. *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 655-56 (9th Cir. 1997).

37. *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993) (holding that the function of de minimis "is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society . . .").

38. *Protestants & Other Ams. United for Separation of Church & State v. O'Brien*, 272 F. Supp. 712, 713 (D.D.C. 1967).

39. *Hessel v. O'Hearn*, 977 F.2d 299, 303 (7th Cir. 1992) (De minimis "has little or no proper application to cases in which the monetary cost of the loss is, though tiny, readily determinable.").

40. For counterexamples, see *supra* notes 29 and 31 and accompanying text.

41. For example, one court held that there is no de minimis defense for inadvertently driving a short distance into Pennsylvania with a suspended license, given the state's strong, though difficult to measure, interest in preventing drunk driving. *Commonwealth v. Guthrie*, 616 A.2d 1019, 1020-21 (Pa. 1992). Similarly, several courts have held that there are no de minimis violations of certain safety-related regulations. See, e.g., *Turner Commc'n Corp. v. Occupational Safety & Health Review Comm'n*, 612 F.2d 941, 944-45 (5th Cir. 1980); *338 Cartons, More or Less, of Butter v. United States*, 165 F.2d 728, 731 (4th Cir. 1947); *United States v. Undetermined Quantities of Various Articles of Device Consisting in Whole or in Part of Proplast III or Proplast HA*, 800 F. Supp. 499, 502 (S.D. Tex. 1992).

opening an envelope, a California appellate court called the suit “an absurd waste of the resources of this court, the superior court, the public interest law firm handling the case and the citizens of California whose taxes fund our judicial system.”⁴² Another court summed up the position by describing a de minimis matter as one that the court should dismiss “in the interest of judicial economy.”⁴³

Some courts take a broad view of the costs of adjudication, suggesting that they include not just the costs directly incurred by the court, but also the opportunity cost posed by occupying a busy court’s time. As the Fifth Circuit noted in a suit over a small change in a student’s grade point average, “[e]ach litigant who improperly seeks federal judicial relief for a petty claim forces other litigants with more serious claims to await a day in court.”⁴⁴ This broad view of adjudication costs makes sense, as one of the primary purposes of de minimis is to help prevent delayed justice.⁴⁵

Despite the importance of the adjudication cost factor, it is insufficient to independently justify a de minimis ruling. If this were not true, de minimis could be used to dismiss almost any action. Rather, factor 2 (adjudication cost) is closely tied to factor 1 (the size of the harm in question). Only when the cost of adjudication outweighs the harm incurred may de minimis be justified. Put another way, it “is just not good common sense to encourage or allow further litigation at an expense in excess of the most that can be gained.”⁴⁶

3. *The Purpose of the Violated Legal Obligation*

A third factor commonly weighed by courts considering de minimis is whether its application would materially frustrate the purpose of the legal obligation in question. As noted by the Supreme Court in *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, “[w]hether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard.”⁴⁷ For

42. Harris v. Time, Inc., 191 Cal. App. 3d 449, 458 (Ct. App. 1987). It is worth noting that this case was a class action, a fact that further demonstrates the importance of adjudication costs as a de minimis factor, since presumably the court thought they outweighed the potential benefit to all of the members of the class.

43. City of Bozeman *ex rel* Dept. of Transp. of Mont. v. Vaniman, 898 P.2d 1208, 1211 (Mont. 1995).

44. Raymon v. Alvord Indep. Sch. Dist., 639 F.2d 257, 257 (5th Cir. 1981).

45. Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. PA. L. REV. 429, 429-30 (1926-27).

46. Veech & Moon, *supra* note 4, at 553.

47. 505 U.S. 214, 232 (1992).

example, in *Alcan Aluminum Corp. v. United States*,⁴⁸ the Federal Circuit used this rationale to reverse a U.S. Customs Service decision imposing an unfavorable import duty on an ingot shipped by the plaintiff from Canada. Noting that the purpose of the relevant statute was to prevent non-Canadian goods from being shipped to the US through Canada, the court held that application of the higher duty was improper where less than 1% of the content of the ingot originated outside Canada.⁴⁹

In conjunction with consideration of purpose, some courts consider the practical effects of failure to apply de minimis. Where strict application of the right or law in question would yield especially “stark”⁵⁰ results that do not seem justifiable given the trivial violation involved, a de minimis ruling is more likely. Here, too, *Alcan Aluminum* provides a good example. Rather than place a higher import duty on the 99% of ingot that qualified for a lower duty, the court noted that “[a]pplication of de minimis is particularly important in cases such as the one at hand, where stark, all-or-nothing operation of the statutory language would have results contrary to its underlying purposes.”⁵¹ Another example is *Fellows v. Martin*, a case in which a court refused to permit the forfeit of a 99-year lease and a \$9,900 deposit over failure to make a timely payment of \$25.01.⁵²

4. Effect on the Legal Rights of Third Parties

The fourth de minimis factor is generally used to justify denial of the defense. When adjudication of the relevant dispute would have a significant effect on the legal rights of third parties, courts may decide to adjudicate, even if the matter at hand, considered alone, would qualify for de minimis treatment. Courts use this rationale most often in cases debating the constitutionality of a law⁵³ or an important issue of statutory interpretation.⁵⁴ For example, one court refused the de minimis defense for a citi-

48. 165 F.3d 898 (Fed. Cir. 1999).

49. *Id.* at 903-04.

50. *William Wrigley, Jr.*, 505 U.S. at 231.

51. *Alcan Aluminum*, 165 F.3d at 903; see also *William Wrigley, Jr.*, 505 U.S. at 231; *Former Employees of Barry Callebaut v. Herman*, 177 F. Supp. 2d 1304, 1311-12 (Ct. Int'l Trade 2001).

52. 584 A.2d 458, 464 (Conn. 1991).

53. *Schwartz v. Essex County Bd. of Taxation*, 28 A.2d 482, 484 (N.J. 1942) (“An attack upon the constitutionality of a legislative act is never unimportant, and the standing of one otherwise qualified to question the legislation is not to be determined by the mere matter of dollars and cents involved.”).

54. *Ballin v. L.A. County Fair*, 43 Cal. App. 2d Supp. 884, 885-87 (App. Dep’t Super. Ct. 1941).

zen's lawsuit against an allegedly illegal tax, even though the tax's effect on the plaintiff would have been minimal.⁵⁵

A more obvious application of the same principle occurs in cases where the plaintiff represents the interests of third parties. For example, at least one court has refused to apply de minimis to a stockholder's derivative action on behalf of a corporation despite the fact that the shareholder instigating the suit owned only a few shares of stock.⁵⁶ Similarly, de minimis does not usually apply to class action lawsuits, even if the interest of the lead plaintiff alone is minimal.⁵⁷

5. Intent

Finally, in evaluating de minimis claims, the courts often consider the intent of the accused wrongdoer. Some courts state that intentionally wrongful conduct should not be condoned under any circumstances—that the morally culpable actor does not deserve de minimis. For example, the Seventh Circuit has stated that de minimis "is not intended for definite losses, however small, inflicted by definite wrongs."⁵⁸ In a somewhat more limited fashion, an early commentator asserted that de minimis "is inapplicable to the positive and wrongful invasion of another's property or person."⁵⁹

Notwithstanding this moralistic reasoning, courts often depart from the principle that an intentional wrongdoer cannot access the de minimis defense.⁶⁰ This makes sense: a trivial legal violation does not automatically become nontrivial if intentional. Nevertheless, courts do commonly consider the intent of the wrongdoer, not as an absolute bar to de minimis, but as one of one of several de minimis factors.⁶¹ The reason, however, may have more to do with utilitarian considerations than with moral culpability. Failure to hold people responsible for their intentional wrongs, no matter how minor, may lead to more such wrongs, and that the collective effect of these wrongs could be significant.⁶² The intent of the wrongdoer,

55. Jenney v. Assessors of Mattapoisett, 76 N.E.2d 126, 129 (Mass. 1947).

56. Smith v. Bradlee, 37 N.Y.S.2d 512, 519 (Sup. Ct. 1942).

57. Nemerofsky, *supra* note 7, at 333-34. *But see* Harris v. Time, Inc., 191 Cal. App. 3d 449, 458-60 (Ct. App. 1987).

58. Hessel v. O'Hearn, 977 F.2d 299, 304 (7th Cir. 1992).

59. McKean, *supra* note 45, at 430.

60. *See, e.g.*, State v. Smith, 480 A.2d 236, 237, 240-41 (N.J. Super. Ct. 1984) (dismissing a charge of shoplifting three pieces of bubblegum as de minimis).

61. *See* Veech & Moon, *supra* note 4, at 554-56.

62. Deterrence aside, it is also possible that society obtains greater utility from punishing one who intentionally does wrong than from punishing one who is negligent.

therefore, relates to de minimis primarily because application of the maxim may result in more legal violations, not because intentional legal violations are morally wrong.

C. A Theory of De Minimis

It may seem curious that de minimis exists at all, given that one might not expect trivial violations to reach courts in the first place. After all, the cost to the prospective prosecutor or plaintiff of litigating a trivial case will often overwhelm the potential benefits if the case is won.⁶³ There are several possible reasons such cases are still pursued. First and foremost, the party bringing the action may have a different conception of harm than does the state. For example, a lawsuit over a minor breach of contract may occur due to hurt feelings even if the amount in controversy is small.⁶⁴ Second, the costs incurred by the prospective plaintiff never equal the total costs of adjudication. A case that might be worth bringing from an individual perspective may not be worth bringing from a social perspective. Third, plaintiffs may act irrationally or may be uniformed. Regardless of the reason, de minimis's long legal history suggests that many trivial cases do reach the courts, and that courts need a way to deal with them. A cohesive theory of the application of de minimis will be helpful in this regard.

The analysis in Section II.B began to define the parameters of de minimis; however, it revealed little about when and why the maxim should apply. Put another way, the de minimis factors described in the last section are more descriptive than prescriptive. Unfortunately, the scholarship on de minimis leaves off at this unsatisfying point.⁶⁵ In some ways, this result is not surprising: extrapolating a cohesive theory from the many de minimis rationales and fact patterns seems a formidable task. Fortunately, there is another way to approach the problem. Rather than try to build a theory from the case law, this section builds a theoretical framework out of vari-

However, this retributive value is nearly impossible to calculate, and is unlikely to be significant with regard to trifling legal violations.

63. The discussion above focuses on cases in which a private party is bringing suit. The analysis is a bit different when the state is the prosecuting party. In theory, the state should undertake the same analysis as would a court applying de minimis, and thus not prosecute cases that would qualify for the defense. However, there are a number of reasons why this might not happen, including: (i) the fact that prosecutors do not pay litigation costs from their own pockets, (ii) a prosecutor's desire for a law-and-order reputation for use in a later election, and (iii) an honest difference of opinion concerning what qualifies as trifling.

64. As will be demonstrated below, this factor is likely to play an especially important role in copyright. *See infra* notes 189–191 and accompanying text.

65. *See supra* notes 17–19 and accompanying text.

ous descriptions of the purpose of de minimis. This framework is then compared with de minimis case law, and found to explain many of the justifications provided therein.

Courts and scholars have described the purpose of the de minimis defense in several different ways. The Seventh Circuit says it is intended “to place outside the scope of legal relief the sorts of intangible injuries . . . that must be accepted as the price of living in society,”⁶⁶ while another court emphasizes the interests of “judicial economy.”⁶⁷ Veech and Moon call the maxim “an interpretive tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure,”⁶⁸ while another early scholar suggests that without de minimis, the legal system “would be unnecessarily irksome and tedious, and beget a marked tendency to delay justice . . .”⁶⁹ While the language differs, each of these descriptions shares one fundamental insight: there are times when the social costs of applying black-letter law to a particular legal violation outweigh the benefits. De minimis provides a safety valve that permits courts to dismiss cases fitting this description.

Some may argue that courts should not be in the business of determining when laws should and should not be enforced. So long as a legislative pronouncement is clear—and constitutional—the job of the courts is to enforce the law, not decide whether to enforce it. Anything else, one might argue, invites judicial favoritism and inconsistency. However, given the long pedigree of de minimis,⁷⁰ and given the Supreme Court’s proclamation that it is to be read into all laws absent explicit instruction to the contrary,⁷¹ one can argue that lawmakers have implicitly agreed to courts’ de minimis activism, at least in cases where the law in question does not specifically address the issue. Further, the fact that there may be some drawbacks to judicial discretion does not mean it is never justified. It is clear that there are cases in which courts should exercise enforcement discretion, where the costs of adjudication clearly outweigh the benefits. It is not tenable to argue, for example, that it is in society’s best interest to adjudicate a dispute about trivial changes to a child’s grade-point average.⁷²

66. *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993).

67. *City of Bozeman ex rel Dept. of Transp. v. Vaniman*, 898 P.2d 1208, 1211 (Mont. 1995).

68. Veech & Moon, *supra* note 4, at 543-44.

69. McKean, *supra* note 45, at 429.

70. See *supra* notes 8-11 and accompanying text.

71. *Wis. Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

72. See *Raymon v. Alvord Indep. Sch. Dist.*, 639 F.2d 257, 258 (5th Cir. 1981).

Thus, the real question is not so much whether *de minimis* is justifiable, but when it is justified. Answering this question involves two levels of analysis. First, given the wide discretion courts have in deciding whether to apply *de minimis* to a particular set of facts, it makes sense to limit the *de minimis* defense to those cases in which the dangers of favoritism and inconsistency are lowest. The name of the maxim suggests the most effective way to minimize these risks. Since “*de minimis*” means “trifling,” the maxim should apply only to cases in which the violation in question is in fact trifling. By definition, a trifling violation is one in which the damage done, whether to the state or to a private individual, is insignificant. When a violation is trifling, it is clear that a court’s application of the maxim will produce no significant injustice, even in cases where such application is inconsistent with other decisions or the result of favoritism.

When deciding whether a harm is trifling, however, courts should consider only the harms that the rule in question is designed to prevent. Harms that are unrelated to the purpose of the rule, such as wounded pride, should not enter the analysis. These harms would not be compensable in any case, even if *de minimis* were not applied. Regardless of the level of harm perceived by the party bringing a legal action, society is prepared only to consider those harms addressed in its laws. *De minimis* analysis must recognize this fact.

Second, once it is clear that the relevant violation qualifies as trifling, courts need to decide whether to apply *de minimis*. The key question here should be whether the social costs of adjudication outweigh the social benefits. As the various formulations of *de minimis*’s purpose indicate, the maxim fundamentally concerns what is in society’s best interest. The fact that use of *de minimis* may not be in the interest of the party bringing the suit is not relevant at this stage of analysis; as noted above, so long as the relevant harm is trifling, the damage will not be great.

In the simplest cases, this cost/benefit question is often easy to answer: the marginal addition to court costs alone will often outweigh the direct benefit of fully adjudicating a trivial dispute. In many other cases, however, one must also consider indirect benefits of adjudication. Will failure to apply the law lead to more lawbreaking, and, if so, will the collective effect of this lawbreaking be more than trifling? Will adjudication of the merits resolve an important question of law, and thereby provide a significant external social benefit? These and similar questions demonstrate why a trifling harm alone is insufficient to justify application of *de minimis*. Given *de minimis*’ function—the dismissal of cases not worth adjudicat-

ing⁷³—it would make little sense to use the maxim in cases that are worth adjudicating from a societal standpoint, even if they cannot be justified by the size of the individual legal harm in question.

Admittedly, there is considerable subjectivity inherent in each of these two steps. The definition of “trifling” is open to debate,⁷⁴ though case law and common sense combine to set a high bar. Similarly, both defining and measuring social harms and benefits will often be a challenge. Nevertheless, as described above,⁷⁵ the potential benefits of a de minimis defense are significant, and the potential harms are mitigated by the requirement that the individual harm be trifling. Further, some of the uncertainty engendered by this subjectivity is defensible. Those who might intentionally violate a legal rule if they knew de minimis would apply are less likely to do so if unsure of its application.

To be sure, no court has explicitly adopted anything like the two-step test proposed above. As the previous section explored in detail, de minimis adjudication consists of a hodgepodge of differing rationales. Nevertheless, the proposed test does a good job of explaining the factors commonly considered by courts applying de minimis. Most obviously, factors one and two from section II.B—the size of the harm and the costs of adjudication—are central to the proposed test. Neither of the steps in the proposed test can be accomplished without knowing the size of the harm, and the costs of adjudication are a main determinant of the second step. Factor three—the purpose of the standard that has been violated—is important to ensure that courts are measuring the correct harm when considering whether the harm is trifling. Finally, factors four and five are relevant to the second part of the proposed test. An adjudication that directly affects the rights of third parties has clear social benefit apart from its effect on the plaintiff. Similarly, failure to adjudicate an intentional violation may make both the plaintiff and third parties more likely to break the law in the future—a significant external social cost.

Moreover, the proposed test does a fair job of explaining the results of most de minimis cases. There is some room for argument here: the subjectivity of the test makes the “correct” decision debatable in many cases, and some courts may well have gotten things wrong.⁷⁶ Nevertheless, there are

73. See *supra* notes 66-69 and accompanying text.

74. See generally Nemerofsky, *supra* note 7.

75. See *supra* note 72 and accompanying text.

76. In particular, those cases in which de minimis was found because the amount in controversy was small relative to the total amount at stake (rather than small in an absolute sense) may have been incorrectly decided. See *supra* notes 34-36 and accompanying

few cases in which a court's failure to consider one of the elements of the proposed test clearly led it to the wrong conclusion. Rather, courts instinctively consider only those elements of the test most relevant to the facts at hand.

III. DE MINIMIS IN COPYRIGHT: A POSITIVE ANALYSIS

In summarizing de minimis jurisprudence, Part II avoided mention of copyright cases. This omission is not due to a dearth of such cases. Rather, de minimis has taken a different path in copyright, one that does not fit the theory of the last section. Courts have applied the maxim in three separate ways in copyright cases, a multiplicity of functions first summarized in the landmark case of *Ringgold v. Black Entertainment Television, Inc.*⁷⁷ First, de minimis often comprises a part of substantial similarity analysis: if only a de minimis amount of a work is copied, there is no substantial similarity, and therefore no copyright infringement. Second, courts have sometimes combined de minimis with fair use analysis. Third, courts have applied de minimis, albeit rarely, in the manner described in Part II—an independent defense to infringements of little importance (“classic de minimis”).

This Part III describes each of these three de minimis uses in detail. It argues that in each of the first two uses—de minimis as a part of substantial similarity and as a part of fair use—courts have failed to adequately distinguish the way in which they use the maxim. In particular, it is often unclear whether the court uses the maxim colloquially, as an adjective that could just as easily be replaced with “trivial” or “minimal”; in a formal legal manner, privileging uses that otherwise would not be privileged; or in a third manner that combines elements of the first two. In contrast, the third use of de minimis—classic de minimis—is theoretically clear, but rarely used. Indeed, there is some question whether classic de minimis exists at all in copyright.

A. De Minimis in Substantial Similarity

The first common use of de minimis in copyright is as part of substantial similarity analysis. To see how this works, some background will be helpful. One of the prerequisites to a *prima facie* case of copyright infringement is a demonstration that the copyrighted work was copied.⁷⁸ However, not all copying is actionable; there must be substantial similarity

text. It is the absolute size of the harm, and how this compares to the costs of adjudication, that is the relevant calculus.

77. 126 F.3d 70, 74-75 (2d Cir. 1997).

78. *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946).

between the work of the plaintiff and that of the defendant.⁷⁹ Many courts⁸⁰ have distinguished two types of substantial similarity: comprehensive nonliteral similarity, in which the “fundamental essence or structure” is copied even if specific expression is not,⁸¹ and fragmented literal similarity, in which small bits of specific expression are copied but the overall structure is not.⁸² Courts often employ de minimis in instances of fragmented literal similarity, holding that substantial similarity is present only if the amount of literal expression copied is more than de minimis.⁸³ Put another way, de minimis, as used in these cases, is simply the opposite of substantial similarity: to say that a use is de minimis is to say that the allegedly infringing work is not substantially similar to the original.

One recent example of these principles in action is the Ninth Circuit case of *Newton v. Diamond*.⁸⁴ Diamond was the owner of a musical composition, three notes of which were sampled by the Beastie Boys. The court held that the copying of these three notes was de minimis, which meant that there was no substantial similarity and therefore no copyright infringement.⁸⁵ In keeping with standard substantial similarity analysis in cases of fragmented literal similarity, the court came to this decision by analyzing the importance of the sample to the plaintiff’s work, both quantitatively and qualitatively, with the ultimate aim of determining whether the average audience would recognize the appropriation.⁸⁶

A number of other courts have used de minimis in the same way. For example, the court in *Neal Publications v. F & W Publications, Inc.* found de minimis copying, and thus no substantial similarity, where the defendant copied a few words and phrases from the plaintiff’s human resources guide.⁸⁷ Comparable analyses led to different conclusions in *Epic Metals Corp. v. Condec, Inc.*, which held that copying two out of twelve photo-

79. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03[A] (2005).

80. *See, e.g.*, Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 239-42 (2d Cir. 1983); Werlin v. Reader’s Digest Ass’n, 528 F. Supp. 451, 462 (S.D.N.Y. 1981).

81. NIMMER, *supra* note 79, §13.03[A][1].

82. *Id.* §13.03[A][2].

83. *See, e.g.*, Warner Bros., 720 F.2d at 242 (“[De minimis] allow[s] the literal copying of a small and usually insignificant portion of the plaintiff’s work.”).

84. 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2905 (2005).

85. *Id. But see* Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 658 (6th Cir. 2004) (holding that there is no de minimis amount of copying of musical recordings).

86. *Newton*, 388 F.3d at 1195-96.

87. 307 F. Supp. 2d 928, 930-32 (N.D. Ohio 2004); *see also* Werlin v. Reader’s Digest Ass’n, 528 F. Supp. 451, 463-64 (S.D.N.Y. 1981) (finding that duplication of two sentences from plaintiff’s article is de minimis copying).

graphs from a brochure was not de minimis,⁸⁸ and *Compaq Computer Corp. v. Ergonome Inc.*, in which the court refused to grant summary judgment to the plaintiff because the trier of fact might have determined that copying a few phrases from a computer ergonomics handbook was de minimis.⁸⁹

This use of the maxim is problematic primarily because it employs an ambiguous concept of de minimis. In each of the cases described above, the court acts as if de minimis can privilege an activity that would otherwise not be permitted. A closer analysis, however, suggests that use of the term de minimis probably had little effect on the results. It has always been true that some small amount of fragmented literal similarity is insufficient to constitute substantial similarity, regardless of whether that small amount is called de minimis.⁹⁰ Indeed, the term “substantial similarity” clearly suggests that some amount of copying will not qualify. Accordingly, despite the courts’ implicit suggestions to the contrary, they seem to use de minimis in its colloquial sense in these cases, without formal legal effect.

There is another set of cases, however, in which use of de minimis has incorporated the notion of observability into substantial similarity determinations. To fully understand these cases, a bit of background is helpful. One of the touchstones of substantial similarity analysis is its focus on the amount of the plaintiff’s work taken, not on the prominence of the copied expression in the defendant’s work.⁹¹ For example, the *Newton v. Diamond* court found no substantial similarity because the three copied notes constituted a small portion of the plaintiff’s work, even though the copied notes were prominent in the defendant’s work.⁹² This makes theoretical sense, as the fundamental question one asks in substantial similarity analy-

88. 867 F. Supp. 1009, 1013 (M.D. Fla. 1994).

89. 137 F. Supp. 2d 768, 778-80 (S.D. Tex. 2001).

90. See, e.g., *Caddy-Imler Creations, Inc. v. Caddy*, 299 F.2d 79, 81-82 (9th Cir. 1962) (“[T]wo precisely similar sentences out of many hundreds, is not, in our view, an extensive reproduction of the exact terminology. . . . Nor can we term or classify such sentences so reproduced as important and vital part(s) of the two compositions”) (quotation marks omitted); *W. Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909) (“In addition to copying, it must be shown that this has been done to an unfair extent.”); NIMMER, *supra* note 79, §13.03 (“It is clear that slight or trivial similarities are not substantial and are therefore noninfringing.”).

91. See, e.g., *Newton*, 388 F.3d at 1195; NIMMER, *supra* note 79, §13.03[A][2] (“The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work – not whether such material constitutes a substantial portion of defendant’s work.”).

92. *Newton*, 388 F.3d at 1195-96.

sis is whether there is copying, not whether use of the copied work is sufficiently damaging. As the *Newton* court noted, a “rule that measured the significance of the copied segment in the defendant’s work would allow an unscrupulous defendant to copy large or qualitatively significant portions of another’s work and escape liability by burying them beneath non-infringing material in the defendant’s own work . . .”⁹³

A recent set of cases, beginning with *Ringgold*, appears to have moved away from this rule, at least in the context of visual works. The plaintiff in *Ringgold* filed suit because her artwork was visible in the background of several scenes in the defendant’s television program.⁹⁴ It was clear that the entire work was copied, which would normally be sufficient for a finding of substantial similarity. However, the *Ringgold* court held that “[i]n cases involving visual works, like the pending one, the quantitative component of substantial similarity also concerns the observability of the copied work – the length of time the copied work is observable in the allegedly infringing work and such factors as focus, lighting, camera angles, and prominence.”⁹⁵

Thus, in *Ringgold*, use of de minimis altered substantial similarity analysis by calling for consideration of the use of the copied work, not just the amount copied.⁹⁶ This practice was a clear break from the past. A district court in the same circuit had come to the opposite conclusion in nearly identical circumstances the year before the *Ringgold* decision.⁹⁷

The *Ringgold* court went on to decide that the defendant’s use of the plaintiff’s work was not de minimis,⁹⁸ but other cases using the *Ringgold* test have come to the opposite conclusion. In *Sandoval v. New Line Cinema Corp.*, for example, the Second Circuit found that the plaintiff’s photographs, which appeared in the background of the film *Seven*, were sufficiently inconspicuous for de minimis to apply.⁹⁹ Similarly, the Sixth Cir-

93. *Id.* at 1195.

94. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

95. *Id.* at 75.

96. It may be argued that the change the *Ringgold* court made to substantial similarity was independent of its use of de minimis. However, the fact that de minimis analysis traditionally focuses on the harm done, and that this is exactly the effect that *Ringgold* holding had on substantial similarity analysis, suggests that the change wrought in that case was influenced by de minimis.

97. *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62, 65 (S.D.N.Y. 1996) (holding, in the substantial similarity context, that whether “an infringement is de minimis is determined by the amount taken without authorization from the infringed work, and not by the characteristics of the infringing work”).

98. *Ringgold*, 126 F.3d at 76-77.

99. 147 F.3d 215, 218 (2d Cir. 1998).

cuit in *Gordon v. Nextel Communications* determined that the defendant's use of the plaintiff's dental illustration in its infomercial was sufficiently fleeting and out of focus to qualify for de minimis treatment.¹⁰⁰ In both of these cases the court made its de minimis determination, and therefore its substantial similarity determination, almost entirely on the basis of the observability of the plaintiff's work in the defendant's work rather than on the amount of the defendant's work that was taken.

To some degree, and in some circumstances, it may make sense to consider the observability of the plaintiff's work in the defendant's work. If the plaintiff's work is so blurry or obscured that it is unrecognizable, one might argue that the defendant has not "copied" the plaintiff's work at all. However, factors such as the length of time that the defendant's work displays the plaintiff's work, or the relative size of the plaintiff's work when displayed, are an awkward fit for substantial similarity analysis. These considerations are relevant mainly to the question of how much harm the copying does, not whether copying has occurred at all.

Accordingly, unlike the cases discussed at the beginning of this section, in the *Ringgold* line of cases de minimis appears to have independent legal effect. It introduces a new element to substantial similarity: the traditional de minimis focus on the amount of harm done. Without this new element there is substantial similarity when an entire work is copied. With it, substantial similarity merges with classic de minimis.

In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit recently evinced yet another view: neither de minimis nor substantial similarity is relevant to some types of infringement analyses.¹⁰¹ In *Bridgeport*, the defendant copied two seconds of the plaintiff's sound recording for a rap song.¹⁰² The district court, using an analysis similar to that in the first set of cases above,¹⁰³ determined that the use was de minimis, and, therefore, that there was no substantial similarity and no infringement. The Sixth Circuit reversed, ruling that neither de minimis nor substantial similarity has any place in the analysis of infringement of a sound recording. The court justified this curious result in several ways, including reference to the statutory language,¹⁰⁴ the need for a bright-line rule,¹⁰⁵ the fact that the defendant would be unjustly enriched if it did not pay,¹⁰⁶ and the exis-

100. 345 F.3d 922, 924-25 (6th Cir. 2003).

101. 401 F.3d 647, 658 (6th Cir. 2004).

102. *Id.* at 653.

103. See *supra* notes 84-89 and accompanying text.

104. *Bridgeport Music*, 401 F.3d at 658.

105. *Id.*

106. *Id.*

tence of a market for sample licenses.¹⁰⁷ The court reiterated these conclusions in a rehearing of the case.¹⁰⁸

The *Bridgeport* decision represents a landmark change: the court eliminated substantial similarity, a longstanding staple of infringement analysis,¹⁰⁹ from the requirements for infringement of a sound recording. Further, most of the justifications used by the court could apply to other types of copyrighted works.¹¹⁰ While the court took pains to note that its analysis applied only to sound recordings,¹¹¹ its logic largely belies this claim. A full exploration of the wisdom of eliminating the substantial similarity requirement is beyond the scope of this Article, but others have expressed alarm at this change, and it is not clear how likely it is to spread outside of the Sixth Circuit.¹¹²

The *Bridgeport* court's views on de minimis are less clear. Obviously, elimination of substantial similarity also means elimination of de minimis as a part of substantial similarity analysis. Yet the court felt it necessary to specifically negate the possibility of either "de minimis or substantial similarity analysis."¹¹³ Why? It is difficult to know for certain, but the reason may stem from confusion regarding what role de minimis plays with respect to substantial similarity analysis. Is it a separate defense, a colloquial expression, or some amalgam of the two? The court does not address this issue.

In sum, the principal feature of de minimis in substantial similarity analysis is a lack of theoretical clarity. In some cases it acts as a helpful way of expressing substantial similarity decisions without having any actual effect on those decisions. In other cases de minimis acts more like an independent defense, with legal effect separate from the factors generally

107. *Id.* at 660-61.

108. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801-04 (6th Cir. 2004).

109. See NIMMER, *supra* note 79, §13.03[A] ("[S]ubstantial similarity between the plaintiff's and defendant's works is an essential element of actionable copying.").

110. It may be argued that one of the justifications—the relevant statutory language—is different for sound recordings. While it is true that 17 U.S.C. § 114 (the clause the court relied upon) applies only to sound recordings, 17 U.S.C. § 106, which applies to all copyrighted works, is equally unambiguous. See 17 U.S.C. §§ 106, 114 (2000). Further, as noted above in *supra* note 17 and accompanying text, the Supreme Court has specifically held that de minimis should be read into all statutes absent contrary indication. It takes real creativity to argue that there is contrary indication in § 114 but not in § 106.

111. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 655 (6th Cir. 2004).

112. See, e.g., *Recent Cases-Copyright Law-Sound Recording Act, Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright*, 118 HARV. L. REV. 1355 (2005).

113. *Bridgeport Music*, 401 F.3d at 658.

considered in substantial similarity. Still another view holds that de minimis has no place in analysis of substantial similarity. The end result of this confusion is uncertainty in both the substantial similarity and the de minimis doctrines.

B. De Minimis As an Element of Fair Use

The second use of de minimis in copyright is as part of fair use analysis. Fair use is one of the most common, and one of the most controversial, defenses to copyright infringement. It is designed to privilege uses of copyrighted materials that further the purpose of copyright—the promotion of creativity.¹¹⁴ Thus, for example, fair use privileges the use of copyrighted works for criticism,¹¹⁵ scholarship,¹¹⁶ and parody¹¹⁷ because strict enforcement of copyright in these cases would inhibit creativity more than promote it. It is not always easy to know what should qualify for fair use, however. The relevant statute lists four factors for consideration in fair use decisions,¹¹⁸ but how a court should analyze and balance those factors is unclear.¹¹⁹ Further, courts are expressly permitted to consider any other factors deemed relevant.¹²⁰

A number of courts have used de minimis in conjunction with fair use,¹²¹ often (though not always) as part of analysis of the fourth fair use factor—the effect of the use on the market for, or value of, the original

114. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). It should be noted that there remains some theoretical disagreement about whether this should be the only goal of fair use. See *infra* notes 239-242 and accompanying text.

115. 17 U.S.C. § 106.

116. *Id.*

117. See generally *Campbell*, 510 U.S. at 569 (describing the application of the fair use factors to privilege parodic use of copyrighted material).

118. These factors are:

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

17 U.S.C. § 107 (2000).

119. For a more complete discussion of this point, see *infra* notes 210-212 and accompanying text.

120. *Id.*; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

121. For purposes of clarity, please note that the cases described in this Section III.B explicitly incorporate de minimis in their fair use analyses. These cases should be distinguished from those in which fair use is used to privilege a trivial copyright violation without any mention of de minimis. The latter cases are discussed *infra* Section IV.C.

work.¹²² Unfortunately, there is considerable confusion regarding exactly what role the maxim should play. Indeed, this confusion is quite similar to that described above (in substantial similarity): some courts have used de minimis in fair use solely as a descriptive term, other courts suggest the maxim may have independent legal effect, and a third view holds that courts should not consider de minimis in fair use analysis.

The use of de minimis in fair use was thrust into the spotlight in the Supreme Court's opinion in *Sony Corp. of America v. Universal City Studios, Inc.* (hereinafter "Betamax").¹²³ One of the major issues considered in that case was whether VCR "time shifting," or recording a television program to watch later, was fair use.¹²⁴ In its consideration of the fourth fair use factor, the majority approvingly quoted a scholar describing "the partial marriage between the doctrine of fair use and the legal maxim *de minimis non curat lex*" in cases where little harm has been done to the copyright owner by use of his work.¹²⁵ Yet neither the majority opinion nor the source it quotes clearly denotes the role that de minimis should play in these decisions. Both texts could be read to suggest that de minimis can act as an independent defense to the infringement in question, or alternatively that de minimis merely plays an unspecified role within fair use analysis.

Cases since *Betamax* have done little to resolve this ambiguity. One recent example is a 1994 case from the Southern District of New York, *Amsinck v. Columbia Pictures Indus.*¹²⁶ The defendants in *Amsinck* produced a film in which the plaintiff's artwork was visible in the background of several scenes for a total of one minute and thirty-six seconds. Although the court ruled that no actionable copying had occurred,¹²⁷ it further noted that even if the plaintiff were able to make a case of *prima facie* copyright infringement the defendant's use would be a privileged fair use.¹²⁸ In its consideration of the fourth fair use factor, the court stated that "[i]n situations where the copyright owner suffers no demonstrable harm from the use of the work, fair use overlaps with the legal doctrine of de

122. 17 U.S.C. § 107.

123. 464 U.S. 417 (1984).

124. *Id.* at 447-56.

125. *Id.* at 451 n.34 (quoting Alan Latman, FAIR USE OF COPYRIGHTED WORKS (1958), reprinted in SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86th Cong., COPYRIGHT LAW REVISION 30 (1960) (included as Study No. 14)).

126. 862 F. Supp. 1044 (S.D.N.Y. 1994).

127. *Id.* at 1047-48.

128. *Id.* at 1050.

minimis, requiring a finding of no liability for infringement.”¹²⁹ Taken alone, this quote seems to indicate that de minimis may function as an independent basis for privileging the use. But the court did not act this way in practice: de minimis functioned merely as one of several factors considered in the court’s discussion of fair use,¹³⁰ and it is not clear how much of an effect it had on the final determination.

Other cases seem to lean in different directions regarding the role of de minimis, reflecting the confusion in this area. At one end of the spectrum stands an unpublished Sixth Circuit decision, *Mihalek v. Michigan*, in which the court considered whether making and retaining two photocopies of the plaintiff’s advertising plan was a copyright violation.¹³¹ Quoting *Betamax*, the court ruled that the activity in question could qualify as either fair use or as de minimis.¹³² Notably, the court’s discussion of de minimis was not limited to its consideration of one of the fair use factors.¹³³ Accordingly, *Mihalek* provides support for the proposition that de minimis retains independent legal authority, even when considered in conjunction with fair use.

A different approach was taken by a District Court in California in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, a case that concerned the defendant’s distribution of the plaintiff’s ad parody for fundraising purposes.¹³⁴ As in the cases above, the court referred in its analysis to the *Betamax* language describing a “partial marriage” between de minimis and fair use.¹³⁵ Unlike *Mihalek*, the *Hustler* court used de minimis only in its colloquial sense, as a way of describing the effect of the use in question on the market for the original.¹³⁶ The Ninth Circuit later upheld the court’s decision, including its use of de minimis.¹³⁷

129. *Id.* at 1049.

130. *Id.* at 1048-50.

131. No. 92-1641, 1993 WL 460787 (6th Cir. Nov. 9, 1993) (unpublished table decision).

132. *Id.* at **3.

133. Indeed, the court specifically, and without qualification, states that the activity in question would “fall under the maxim *de minimis non curat lex*.” *Id.*

134. 606 F. Supp. 1526, 1530 (C.D. Cal. 1985), *affirmed* by 796 F.2d 1148 (9th Cir. 1986); *see also* L.A. Times v. Free Republic, 54 U.S.P.Q. 2d 1453, 1469-70 (C.D. Cal. 2000) (using de minimis colloquially as part of analysis of the fourth fair use factor).

135. *Hustler Magazine*, 606 F. Supp. at 1539.

136. *Id.* (“[A]ny effect [the use] might have on the marketability of back issues would be *de minimis* . . .”).

137. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986). For the court’s brief discussion of de minimis, see *id.* at 1156 (“We agree with the district court that the effect on the marketability of back issues of the entire magazine is *de minimis* . . .”).

A third view, best articulated by the Second Circuit in *Ringgold*, holds that de minimis should not play any role in fair use analysis. Taking its cue from the District Court decision, the *Ringgold* court noted that de minimis might inform the third fair use factor: the amount and substantiality of the portion of the copyrighted work that the defendant used.¹³⁸ “A defendant might contend, as the District Court concluded in this case, that the portion used was minimal and the use was so brief and indistinct as to tip the third fair use factor decisively against the plaintiff.”¹³⁹ Having described this approach, the court rejected it:

[T]he concept of *de minimis* . . . is an inappropriate one to be enlisted in fair use analysis. The third fair use factor concerns a quantitative continuum. Like all the fair use factors, it has no precise threshold below which the factor is accorded decisive significance.¹⁴⁰

Although limited to the third fair use factor, the *Ringgold* court’s criticism applies equally well to the use of de minimis in analysis of any other factor. Thus, the logic of the opinion suggests that de minimis should not apply at all in fair use.¹⁴¹

In sum, there are at least three theories of the role de minimis should play in fair use analysis. First, some courts appear to believe the maxim can be used as an alternative to fair use in cases where the damage done is trifling. Second, many courts use de minimis colloquially, as a way to help describe the court’s conclusion with respect to one of the fair use factors. Third, some believe that de minimis and fair use should not be mixed at all. As in substantial similarity, the net result of this inconsistency is confusion.

138. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). For those keeping score, the cases described so far have used de minimis in the third and fourth factors—one wonders why the first and second factors have been left out. While not necessarily an issue if the maxim is being used in its colloquial sense, this seems problematic for proponents of the idea that the doctrine should affect analysis of the factor in question.

139. *Id.*

140. *Id.* at 75-76.

141. It is worth noting that court seemed unsure of the role the maxim might play. The quotation above indicates that the court worried about de minimis affecting fair use analysis, which would not be a problem if the term were merely used colloquially. Thus the court assumes, and then criticizes, a use of de minimis somewhere between a colloquial use and an independent defense.

C. Classic De Minimis

One of the lessons of the previous two sections is that a number of courts have applied classic de minimis (de minimis as an independent defense) in fact if not always in name. The *Ringgold*, *Sandoval*, and *Gordon* decisions all used analyses closer to classic de minimis analysis than to traditional substantial similarity analysis.¹⁴² Similarly, the *Mihalek* and *Amsinck* decisions suggested that de minimis is available as an alternative to fair use in cases where the copyright holder suffers little harm.¹⁴³ None of these courts, however, clearly and forthrightly relied upon classic de minimis in its decision. So the question remains as to whether there a de minimis defense to copyright infringement.

At least one appeals court thinks the answer is yes. The Second Circuit describes classic de minimis in copyright as a doctrine that privileges *prima facie* copyright violations that are “so trivial that the law will not impose legal consequences.”¹⁴⁴ A more detailed description of the need for, and role of, classic de minimis in copyright was provided by the court in *On Davis v. Gap, Inc.*:

Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of law. We do not hesitate to make a photocopy of a letter from a friend to show another friend, or of a favorite cartoon to post on the refrigerator. Parents in Central Park photograph their children perched on Jose de Creeft's Alice in Wonderland sculpture. We record television programs aired while we are out, so as to watch them at a more convenient hour. Waiters at a restaurant sing “Happy Birthday” at a patron's table. When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law.¹⁴⁵

Despite its eloquent description of the role of classic de minimis, the *Davis* holding did not rely upon it. Rather, after considering the defense, the court ruled that use by a clothing store of copyrighted eyeglasses in an advertisement did not qualify.¹⁴⁶ The *Ringgold* court reached the same

142. See *supra* notes 95-100 and accompanying text.

143. See *supra* notes 126-133 and accompanying text.

144. *Ringgold*, 126 F.3d at 74.

145. 246 F.3d 152, 173 (2d Cir. 2001).

146. *Id.* This decision was based on a combination of factors including the fact that the eyeglasses were a “highly noticeable” part of the advertisement, and the viewer's

conclusion with respect to its facts.¹⁴⁷ Indeed, despite the apparent utility of classic de minimis, there is only one prominent case that has clearly relied upon the maxim to dismiss a copyright infringement suit. It is another Second Circuit case, *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*¹⁴⁸ The defendant in *Knickerbocker* used an illustration of the plaintiff's copyrighted product on some blister card packaging. The use was extremely limited, however: the blister card was only used inside the defendant's company, and the defendant claimed that it would have changed the illustration had the packaging ever been used publicly. The court ruled that "the copyright claim with respect to the blister card falls squarely within the principle of de minimis non curat lex,"¹⁴⁹ and affirmed dismissal of the claim on this basis.

Outside the holding itself, the *Knickerbocker* court gave little indication of its view of the limits of classic de minimis in copyright, and courts since *Knickerbocker* have "uniformly rejected the argument that [the *Knickerbocker* holding] can be expanded to apply to broader contexts."¹⁵⁰ This is not entirely surprising, as there is a limit to what can be considered trifling, and many defendants have made such arguments in the context of uses much more significant than that in *Knickerbocker*.¹⁵¹ It is strange, however, that no courts have followed the *Knickerbocker* holding under any circumstances. Neither have courts in other circuits adopted the Second Circuit's view of classic de minimis in copyright.

Thus, direct evidence for the viability of classic de minimis as a copyright defense consists of one Second Circuit holding, dicta in several other cases decided by the same court,¹⁵² and somewhat ambiguous dicta in a few cases applying fair use.¹⁵³ This must be weighed against evidence suggesting the contrary. While no court has explicitly rejected the ex-

likely impression that "the models posing in the ad have been outfitted from top to bottom, including eyewear, with Gap merchandise." *Id.*

147. *Ringgold*, 126 F.3d at 76-77.

148. 668 F.2d 699 (2d Cir. 1982).

149. *Id.* at 703.

150. Deborah F. Buckman, *Application of "De Minimis Non Curat Lex" to Copyright Infringement Claims*, 150 A.L.R. 661, §2(b) (1998-2004).

151. See, e.g., *Repp v. Webber*, 914 F. Supp. 80, 83-84 (S.D.N.Y. 1996) (finding no de minimis where the gross receipts for the sale of products including the plaintiff's work totaled \$75.87); *Nat'l Enquirer, Inc. v. News Group News, Ltd.*, 670 F. Supp. 962, 970 (S.D. Fla. 1987) (holding that eighty-five publicly-distributed copies of an infringing work was not comparable to the insignificant infringement in *Knickerbocker*).

152. See also *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 916 (2d Cir. 1994) (suggesting that de minimis might apply to the copying of scholarly articles by an individual for personal research).

153. See *supra* notes 123-133 and accompanying text.

tence of classic de minimis in copyright,¹⁵⁴ numerous courts have failed to apply it to trivial copyright infringements. As one scholar puts it, “the overwhelming thrust of authority upholds liability even under circumstances in which the use of the copyrighted work is of minimal consequence.”¹⁵⁵ Examples include a case in which the Second Circuit refused to find de minimis with respect to the sale of twelve infringing plastic dolls,¹⁵⁶ another in which the court deemed \$75.87 in gross receipts from sales of infringing products actionable,¹⁵⁷ and a third in which the court failed to label the creation of an infringing production model of a crop sprayer de minimis even though the model was never sold.¹⁵⁸

These cases suffice to convince Professor Nimmer that, despite the *Knickerbocker* holding, classic de minimis is not a viable copyright defense.¹⁵⁹ This conclusion, however, is an overstatement; it is more accurate to say that the status of classic de minimis in copyright is unclear than to say the defense is invalid. After all, in all areas of law application of the maxim is left to the court’s discretion. Thus the fact that courts fail to use de minimis in some cases where it might apply cannot be taken as conclusive proof that the maxim could not be used. Further, the fact that other doctrinal methods, particularly fair use, are often used to privilege activity that might otherwise qualify for de minimis treatment may explain the dearth of de minimis cases.

Moreover, there is nothing specific to copyright that would make classic de minimis inapplicable. There is no black-letter rule or explicit “contrary indication”¹⁶⁰ to exempt copyright from the general statutory applicability of de minimis. While it may be argued that the existence of statutory damages in copyright¹⁶¹ amounts to an implicit Congressional contrary indication, many legal violations have minimum legal ramifications,

154. As described above, the *Bridgeport* decision comes closest. However, it seems likely that the court intended merely to forestall consideration of de minimis as applied in substantial similarity, and only with respect to sound recordings. *See infra* notes 101–113 and accompanying text.

155. NIMMER, *supra* note 79, § 8.01[G].

156. Warner Bros. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1126 (2d Cir. 1989).

157. Repp v. Webber, 914 F. Supp. 80, 83-84 (S.D.N.Y. 1996).

158. Walker Mfg., Inc. v. Hoffmann, Inc., 261 F. Supp. 2d 1054, 1065-68 (N.D. Iowa 2003).

159. NIMMER, *supra* note 79, § 8.01[G].

160. *See, e.g.*, Wis. Dept. of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (“[De minimis] is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.”).

161. 17 U.S.C. § 504(c). The minimum generally awardable is \$750, an amount that would likely be considered more than trifling in most circumstances.

a fact not generally viewed as a reason not to apply de minimis.¹⁶² Indeed, courts ruling in other areas are more likely, not less, to apply de minimis to a trivial violation when the ramifications of failure to do so are stark.¹⁶³ Further, as described below,¹⁶⁴ statutory damages have not stopped courts from privileging trivial copyright infringements using other doctrinal tools.

More broadly, there is nothing particular about intellectual property law that refutes de minimis. In trademark law the maxim has been used extensively in cases where evidence of consumer confusion is minimal.¹⁶⁵ Additionally, if somewhat more controversially, several courts have used de minimis to privilege minor patent infringements.¹⁶⁶ Finally, at least one court has suggested that de minimis could apply to right of publicity claims.¹⁶⁷ Further, it is worth noting that trivial violations are less likely in each of these areas than in copyright.¹⁶⁸

Theory aside, it is clear that the dearth of de minimis cases in copyright is, in large part, a self-perpetuating phenomenon. Given the judicial importance of precedent, courts considering trivial copyright violations are understandably reluctant to privilege such violations using a doctrine that other courts have not already used in similar circumstances.¹⁶⁹ The fact

162. For example, many criminal statutes have minimum punishments, but de minimis has been used to throw out trivial cases. *See, e.g.*, State v. Smith, 480 A.2d 236, 240 (N.J. Super. Ct. 1984) (holding that theft of three pieces of bubble gum was de minimis).

163. *See supra* notes 50-52 and accompanying text.

164. *See infra* notes 183-186 and accompanying text.

165. *See, e.g.*, Savin Corp. v. Savin Group, 391 F.3d 439, 459 (2d Cir. 2004) (finding that a single anecdote of consumer confusion is de minimis); Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 902 (9th Cir. 2002).

166. *See, e.g.*, Ling-Temo-Vought v. Kollsman Instrument Corp., 372 F.2d 263, 269-70 (2d Cir. 1967); Medtronic Vascular v. Boston Scientific, 348 F. Supp. 2d 316, 322 (D. Del. 2004). *But see* Embrex, Inc. v. Service Eng'g Corp., 216 F.3d 1343, 1352-53 (Fed. Cir. 2000) (Rader, J., concurring); Smithkline Beecham Corp. v. Apotex Corp., 247 F. Supp. 1011, 1051 (N.D. Ill. 2003) ("[W]hether there is a *de minimis* defense in patent law is an unsettled question.").

167. Prima v. Darden Rests., Inc., 78 F. Supp. 2d 337, 350-51 (D.N.J. 2000).

168. There are a number of reasons for this, but perhaps the most important is that copyright, by its nature, is regularly violated in trivial ways by the average citizen engaging in everyday life, a point described in detail in Section IV.B. This is not true of patent, trademark, right of publicity, or perhaps any other type of law.

169. This judicial conservatism, when combined with the great need to privilege trivial violations of copyright (a topic addressed at length in Section IV.B), makes clear why so many courts find it necessary to fit de facto classic de minimis cases within the confines of fair use or substantial similarity. It is both easier and safer to justify these decisions under the cover of doctrines commonly used to privilege other uses of copyrighted works.

that the best way to know what qualifies as de minimis is to look at other cases exacerbates the reluctance of courts to privilege uses as de minimis.¹⁷⁰ Part IV argues that this cycle needs to be broken, and provides guidelines for how to do so.

IV. DE MINIMIS IN COPYRIGHT: A NORMATIVE ANALYSIS

Part II formulated a theory of the role that de minimis plays in most areas of the law, and Part III explained how this role has become confused in copyright. Part IV attempts to resolve this confusion by defining the proper use of de minimis in copyright. It begins, in Section IV.A, with a call for clarity, arguing that courts can resolve many of the problems described in the last Part simply by being precise about the way in which they use de minimis in each case. This discussion precedes a two-part argument for expanded use of classic de minimis. Section IV.B shows why a defense for trivial infringements is essential in copyright, and Section IV.C argues that classic de minimis is often better-suited to play this role than is fair use. Finally, Section IV.D provides some practical and theoretical guidelines for these changes.

A. The Need for Clarity

The most important lesson of Part III is that use of de minimis in copyright is considerably confused. As noted therein, the confusion begins with the fact that courts have used de minimis at three different stages of analysis: in determining substantial similarity, as part of the fair use defense, and as a separate defense.¹⁷¹ It continues once the stage of analysis is chosen. In both substantial similarity and fair use, de minimis has appeared both colloquially and with independent legal effect, though how much effect is often unclear. The confusion may be even worse with respect to classic de minimis, with courts and commentators in disagreement about whether the defense exists at all.

There are many costs to this confusion, but three stand out. First, as described in Part II, de minimis serves an important purpose in the law, a purpose that cannot be effectively achieved in copyright so long as the aims and mechanisms of the maxim are unclear. Using other doctrines to privilege trivial copyright violations is likely to lead to problems of over- and under-inclusiveness, both because a lack of theoretical clarity makes it

170. *See supra* note 21.

171. Presumably, use of de minimis in one of these three analytical stages would not preclude use in either of the other two, raising the unfortunate prospect of an opinion that includes three separate uses of de minimis.

more difficult to discern when a violation should be privileged, and because it may be difficult to justify privileging some trivial violations under the precepts of another doctrine. Second, incorporation of de minimis into fair use and substantial similarity analyses adds uncertainty to those doctrines. The aims of de minimis are not identical to the aims of either fair use or substantial similarity, and under the current legal regime it is not clear what courts should do when these aims conflict. Finally, and more generally, lack of legal clarity makes it difficult for those subject to the law to conduct themselves so as to maximize their well-being, and may even contribute to a deterioration in political discourse.¹⁷² While uncertainty in legal rules may at times be justified by a countervailing benefit,¹⁷³ the current level of uncertainty in de minimis is clearly counterproductive.

Accordingly, one key to improving the function of de minimis in copyright is clarification. As in other areas of the law, de minimis can serve two functions: as a colloquial expression and as a separate defense. However, courts must be clear regarding which use they are making, and careful not to confuse the two. There is no room for “halfway de minimis,” something more than a colloquial expression but less than an independent defense. As the discussion of Part III showed, any such use yields confusion both in de minimis and in the doctrine with which it is applied. Further, there is no clear benefit to halfway de minimis, no use that it is both desirable to privilege and that could not otherwise be privileged either by the traditional precepts of the doctrine in question or by classic de minimis, properly construed.

In practice, then, courts should use the term de minimis in substantial similarity and fair use analyses only colloquially. As such, it should not materially affect the results of those analyses. It would be better still, though not absolutely necessary, if courts avoided use of the term de minimis altogether in these cases, as the potential for confusion is significant. By definition, other terms (such as “trivial” or “trifling”) could perform the same colloquial function.

172. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1692-95 (1988).

173. Some of the uncertainty associated with the application of classic de minimis may be justified by the fact that it dissuades strategic actors from breaking legal rules exactly to the point they know will qualify for the defense. This justification does not apply to use of de minimis in fair use and substantial similarity analysis, however. For a more general review of the costs and benefits of uncertainty in legal rules, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

Regardless, analyses in cases like *Ringgold* and its progeny (in which de minimis changed substantial similarity analysis), and in cases like *Mihalek* and *Amsinck* (in which de minimis seemed to be an alternative to fair use analysis), need to be clarified. If courts desire to privilege a use based upon the triviality of the harm done, they should do so separately, using classic de minimis. If, on the other hand, classic de minimis cannot justify the use in question, it should not be privileged on the basis of its triviality. In either case, a better understanding of the proper role of classic de minimis in copyright is necessary. The remainder of this Article is devoted to addressing this issue.

B. The Need to Privilege Trivial Copyright Violations

Implementation of the clarifications suggested in the last section will require reinvigoration of classic de minimis. Courts will need a doctrinal tool to continue privileging some of the trivial uses permitted under the current legal regime (using de minimis as part of fair use or substantial similarity analysis). This need, however, is just the tip of the iceberg. This Section argues that copyright, more than perhaps any other area of the law, needs a clear legal method of privileging trivial violations, and that recent technological and legal developments are increasing this need.

Trivial *prima facie* violations of copyright are commonplace. This is, in large part, due to three particulars of copyright law. First, almost any type of work that is fixed in tangible form and that contains even a modicum of creativity is copyrightable.¹⁷⁴ Second, copyright attaches to such works automatically, without any need for registration or other formalities.¹⁷⁵ Third, the statutory rights of copyright owners are broad: any unauthorized duplication, display, or dissemination of a creative work is a *prima facie* copyright violation, as is the creation of a derivative work based on a copyrighted work.¹⁷⁶ Thus every photograph taken by a tourist that includes an advertisement, artwork, or newspaper is a *prima facie* copyright violation, as are most uses of that photograph.¹⁷⁷ Every teenager who makes a mix music tape for a friend, and every worker who photocopies an interesting article or cartoon is technically violating copyright. Even singing “Happy Birthday” at a restaurant is a *prima facie* copyright

174. 17 U.S.C. § 102(a).

175. See generally 17 U.S.C. § 408.

176. 17 U.S.C. § 106.

177. See generally Andrew Inesi, *Images of Public Places: Extending the Copyright Exemption for Pictorial Representations of Architectural Works to Other Copyrighted Works*, 13 J. INTELL. PROP. L. 61 (2005).

violation.¹⁷⁸ Indeed, absent fair use (which the next section discusses in detail), most people would violate copyright law in minor ways on a regular basis.¹⁷⁹

Clearly, it would not be in society's best interests to adjudicate all of these potential copyright disputes.¹⁸⁰ Fortunately, a number of factors have combined to prevent courts from being overrun with copyright litigation. First, and most obviously, trivial disputes do not usually make it to court. Litigation is expensive, and most copyright owners are unwilling to undertake this expense if the use in question has done them little harm.¹⁸¹ However, one should not exaggerate the importance of this factor. If it held true in all cases, there would be little need for classic de minimis in any area of the law.¹⁸² In addition, many common copyright violations, such as tourist snapshots, are private enough that copyright holders generally do not find out about them. Finally, there is always the possibility (though rarely the certainty) that fair use will apply to a trivial use, fear of which undoubtedly discourages many potential lawsuits.

Nevertheless, disputes over arguably trivial copyright violations have reached courts with increasing frequency. As detailed both above and below, courts have responded in at least five different ways: using de minimis in fair use analysis,¹⁸³ de minimis in substantial similarity analysis,¹⁸⁴ fair use alone,¹⁸⁵ de minimis alone,¹⁸⁶ or refusing dismissal on the theory

178. See Leval, *supra* note 3, at 1457-58.

179. See *On Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001) ("Trivial copying is a significant part of modern life.").

180. A more formal model for when it might and might not be in society's best interest to adjudicate a seemingly trivial copyright dispute is provided *infra* Section II.C.

181. Judge Leval is a proponent of this explanation, calling disputes that would qualify for classic de minimis "[q]uestions that never need to be answered." Leval, *supra* note 3, at 1457; see also *On Davis*, 246 F.3d at 173 ("The *de minimis* doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying."); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (calling the fact that classic de minimis is seldom applied in copyright cases understandable).

182. Indeed, as described in Part II, the fact that legal action is sometimes taken to stop seemingly trivial legal violations is not necessarily a sign of irrationality. Rather, it may spring from different conceptions of harm. For example, the copyright owner may feel that his dignity or artistic integrity has been harmed by the violation, harms that a court should not (and generally cannot accurately) take into account. Further, a copyright owner might rationally file suit in hopes of incentivizing others not to make use of his work (even if such uses are legally permissible). See *supra* notes 64 and 77 and accompanying text.

183. See *infra* Section III.B.

184. See *infra* Section III.A.

185. See *infra* notes 203-209 and accompanying text.

that copyright law mandates liability for even the most trivial violation.¹⁸⁷ The fact that so many courts are searching for a way to privilege trivial uses provides compelling evidence of the need to do so. Clearly, however, this multiplicity of approaches is problematic; a more comprehensive approach would provide greater clarity and consistency.

Now would be a good time to find this clarity, as the problems posed by minor copyright infringements are likely to get worse. Intellectual property owners increasingly seem to view their copyrights as they would physical property—an asset that no third party has any right to use.¹⁸⁸ Jessica Litman has argued that a fundamentally new conception of copyright is arising, one that permits copyright owners to “extract all the potential commercial value from works of authorship.”¹⁸⁹ This new attitude suggests a disconnect between the harm copyright owners perceive when their works are infringed and the actual incentive harm that society is willing to recognize. As noted above,¹⁹⁰ differing conceptions of harm are especially likely to lead to legal action over violations that, from the societal perspective, are trivial. This is exactly what is happening, as a number of copyright holders are now taking aggressive action to stop even the most innocuous uses of their copyrighted material.¹⁹¹

Further, there are several reasons to believe that technological change will make a clear defense for trivial copyright infringements even more valuable. First, and most obviously, new technologies are likely to increase the number of copyright infringements. Digital cameras, scanners, the digitization of content, and the internet make it easy and nearly costless to copy, distribute, and display copyrighted materials. As a result, more people are more easily able to violate copyright in more ways. Of course, one cannot classify all copyright infringements using new technologies as trivial. Mass-scale copying of copyrighted works certainly does not qualify. However, many of the infringements made possible by new technologies will fit at least some people’s notions of trivial. Exam-

186. See *supra* notes 146-149 and accompanying text.

187. See *supra* notes 155-158 and accompanying text.

188. This is a questionable assertion even with respect to physical property. For example, in the context of real property there are a number of limitations on the owner’s right to prevent others from using his property, including necessity, easements, and government regulations.

189. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 237, 345 (2002); see also LAWRENCE LESSIG, THE FUTURE OF IDEAS, 180-87 (2001); JESSICA LITMAN, DIGITAL COPYRIGHT 79-81 (2000) (describing changing conceptions of copyright).

190. See *supra* notes 63-64 and accompanying text.

191. See Chilling Effects, <http://www.chillingeffects.org> (last visited March 21, 2006) (providing numerous examples).

ples include posting vacation images that include copyrighted works to a personal website, e-mailing a digitized copy of a cartoon to a sibling, and perhaps even trading one or two copyrighted files with a friend over a P2P network.

Second, the nature of many of these technologies makes it easier for copyright owners to discover minor infringements. Infringing amateur content that would previously have been accessible only to the family and friends of the infringer is now often placed on the internet, where it can be located by the copyright owner. Further, new digital resource management technologies may soon make it possible for copyright holders to track all uses of their works.¹⁹² Clearly, copyright holders who know about infringements are more likely to take legal action to stop them than are those that do not.

Third, by lowering costs and increasing creative options, new technologies are increasing the importance of both amateur creative production and mix-and-match creativity.¹⁹³ Amateurs are now capable of producing creative works of professional quality,¹⁹⁴ and artists are increasingly incorporating third-party copyrighted works in their own works, from music sampling to appropriation art.¹⁹⁵ Each of these groups could benefit from a clear rule permitting trivial copyright infringements, because each is likely to value the additional creative possibilities such a rule would permit over the incremental incentive provided by protection from trivial infringements. (Indeed, amateurs have no need at all for the creative incentives provided by copyright.) Accordingly, privileging trivial copy-

192. See Pamela Samuelson, *DRM {And/Or/Vs.} the Law*, 46 COMMS. OF THE ACM 4, 42 (2003) (describing the power DRM can give copyright owners).

193. See LAWRENCE LESSIG, FREE CULTURE 100-107 (2004) ("We live in a 'cut and paste' culture enabled by technology."); Yochai Benkler, *Freedom in the Commons: Toward a Political Economy of Information*, 52 DUKE L.J. 1245, 1246-47 (2003) (noting that decentralized, non-market production can now play a much more important role in the economy); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1019 (2004) ("[W]e are certain that decentralized amateur-to-amateur information practices are ascendant and will continue to grow in importance.").

194. For example, *Tarnation*, an amateur film made for less than \$1,000, recently won a host of critic's awards. See Charlotte Higgins, *\$200 Family Film is Festival Hit*, GUARDIAN (LONDON), May 18, 2004, at 6, available at http://www.guardian.co.uk/uk_news/story/0,3604,1219070,00.html; Internet Movie Database, <http://www.imdb.com/title/tt0390538/awards> (last visited Apr. 11, 2006).

195. Examples run the gamut from the small-scale sampling at issue in *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004), cert. denied, 125 S. Ct. 2905 (2005), to whole-scale artistic appropriation, such as that at issue in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

right infringements has the potential to significantly augment creativity and therefore effectuate the underlying purpose of copyright law.

In response to the above, some may argue that new technologies make a defense for minor infringements less necessary, not more. This argument stems from market failure theory, which was first described in the copyright context by Wendy Gordon.¹⁹⁶ Gordon argued that fair use is justified when market imperfections, such as high transaction costs or externalities, prevent efficient uses of copyrighted works.¹⁹⁷ The Second Circuit expanded this argument to rule that fair use is not justified when transaction costs fall far enough, even if the use in question would previously have qualified.¹⁹⁸ One might extend the argument still further to suggest that new technologies, which often lower transaction costs, should make a defense for trivial infringements, whether fair use or de minimis, less necessary.

However, there are several reasons to reject this argument. First, the direct benefit to the infringer of a trivial infringement will often be quite small. Thus, in order to outweigh the transaction costs, the costs would need to drop to nearly zero—an unlikely event. Second, Gordon and others have emphasized the fact that transaction costs are not the only type of market failure.¹⁹⁹ Externalities can also lead to market failure and thus justify the employment of a copyright infringement defense. There is reason to believe that many trivial infringements, which are especially likely to be committed by amateurs, will have external cultural benefits.²⁰⁰ Finally, copyright's version of market failure theory assumes copyright as its base, and then asks when it is efficient to diverge from the copyright model. Another approach would be to assume no copyright as the base, and then ask when protection is efficient. Viewed this way, one would be hard pressed to argue that protection from trivial uses of copyrighted works provides any significant economic benefits.²⁰¹

196. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

197. *Id.* at 1614-16.

198. Am. Geophysical Union v. Texaco, 60 F.3d 913, 930-31 (2d Cir. 1994).

199. Gordon, *supra* note 196, at 1630-35; see also Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 48-53 (1997) (discussing the inability to internalize diffuse external benefits as a type of market failure).

200. See, e.g., Benkler, *supra* note 193, at 1272-73 (discussing the positive effects of nonproprietary production on democracy, autonomy, and justice).

201. External effects of enforcement could change this calculus, as noted *supra* notes 53-62 and accompanying text and *infra* notes 263-264 and accompanying text.

C. De Minimis versus Fair Use

Even if one accepts the argument that copyright desperately needs a method of privileging trivial violations, disagreement may continue regarding which method is the right one. Although Part III demonstrated that combining de minimis with either fair use or substantial similarity does not solve the problem, there is another, more important alternative to classic de minimis. As demonstrated below, fair use alone (i.e., without any mention of de minimis)²⁰² can be, and has been, frequently used to privilege trivial copyright violations. This raises the question of whether de minimis is necessary when fair use can solve the problems of the last Section. This Section is devoted to providing an answer.

1. Theoretical Advantages of De Minimis

Copyright case law is rife with examples of fair use being used to privilege arguably trifling copyright infringements. The Supreme Court in *Betamax* ruled that time shifting—recording a television program for later viewing—was privileged fair use.²⁰³ The Ninth Circuit in *Sega v. Accolade* found that making temporary copies of computer programs was fair use if necessary to create an interoperable program,²⁰⁴ and in *Kelly v. Arriba Soft Corp.* held that fair use applies to the use of thumbnail images on the internet.²⁰⁵ Several courts have used fair use to privilege minor uses of copyrighted materials in the background of audiovisual works.²⁰⁶ Others have found fair use in the making of temporary photocopies of a book for research purposes,²⁰⁷ the use of a copyrighted photograph in a murder defense trial,²⁰⁸ and the copying of a political mailing list.²⁰⁹

One of the major reasons that courts can, and have, used fair use as a proxy for de minimis is its malleability. Scholars and courts have long opined about the inconsistency and uncertainty of fair use, which has been

202. This qualifier is intended to distinguish pure fair use cases from those that mix fair use and de minimis. The latter set of cases is discussed at length *supra* in Section III.B.

203. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420-21 (1984).

204. 977 F.2d 1510, 1521-27 (9th Cir. 1992).

205. 280 F.3d 934, 943-44 (9th Cir. 2002).

206. See, e.g., *Jackson v. Warner Bros.*, 993 F. Supp. 585 (E.D. Mich. 1997); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997).

207. *Duffy v. Penguin Books USA*, 4 F. Supp. 2d 268, 274-75 (S.D.N.Y. 1998).

208. *Kulik Photography v. Cochran*, 975 F. Supp. 812, 814 (E.D. Va. 1997).

209. *Nat'l Rifle Assn. v. Handgun Control Fed'n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994).

called “the most troublesome” doctrine in copyright.²¹⁰ Courts have interpreted each of the four statutory fair use factors in strikingly different ways, and there is no clear guidance regarding how to balance the four factors against one another. Further, the fair use statute explicitly permits consideration of factors other than the four statutory factors,²¹¹ but provides little guidance regarding what those other factors should be or how important they are. Therefore, courts are able to use fair use as a way to justify almost any refusal to apply copyright. Indeed, empirical evidence suggests that courts’ fair use analyses are driven by their ultimate fair use holdings, not vice-versa.²¹²

However, the fact that the fair use test is sufficiently malleable to cover cases that might otherwise qualify for classic *de minimis* does not mean that it should be used to do so. To understand why, some background is helpful. Copyright law is usually justified by the need to give authors adequate incentives to create copyrightable works.²¹³ This justification derives from the U.S. Constitution, which authorizes the creation of intellectual property rights to “promote the Progress of Science and useful Arts.”²¹⁴ Without copyright, the theory goes, creative works suffer from the possibility of being copied and sold by third parties at marginal cost. This practice could prevent creators from recouping their up-front creative costs, and it could dissuade them from creating more works. Ultimately,

210. *Dollar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); *see also* *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1991) (calling fair use “so flexible as virtually to defy definition”); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 132 (4th ed. 2004) (noting that a “vague line, frequently litigated, divides fair and unfair unauthorized copying”); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 16-17 (2002) (describing fair use as “routinely refer[red] to as ‘resistant to generalization,’ ‘unpredictable,’ and ‘subjective’”) (citations omitted).

211. 17 U.S.C. § 107.

212. *See generally* David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263 (2003).

213. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“The purpose of copyright is to create incentives for creative effort.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

214. U.S. CONST. art. I, § 8, cl. 8.

the public could lose the benefits of new works.²¹⁵ Copyright solves this problem by granting creators temporary monopoly rights that allow them to recover their fixed creative costs, thus assuring a continued supply of new creative works. Put another way, copyright achieves its constitutional purpose by increasing artists' incentives to create.²¹⁶

Fair use is a safety valve intended to permit courts "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."²¹⁷ In other words, fair use is intended to further copyright's goal by permitting uses of copyrighted works that are likely to lead to a net increase in creativity.²¹⁸ Many of the prototypical examples of fair use, such as copying for purposes of criticism, news reporting, and scholarship,²¹⁹ provide evidence of this intent. In each case the use in question advances copyright's goal because the copied work is used to create a new work, whether a book review, a news report about an art show, or a scholarly study of a contemporary poet's works. A ruling of fair use in these circumstances is, in effect, a determination that the creative value of these new works outweighs any loss in creative incentives resulting from failure to enforce the copyright in the original work. The four fair use factors, and any other relevant consideration of fair use analysis, are (or should be) merely an analytical means to achieve this end.

The devil, though, is in the details. Even those who agree with the utilitarian calculus sketched out above (which, as detailed below, is not

215. See COOTER & ULEN, *supra* note 210, at 120-21; William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON LAW REV. 1, 5 (2000).

216. Nevertheless, it should be noted that Congress is given great deference by the courts regarding how best to achieve copyright's constitutional purpose. In one relatively recent case the Supreme Court found that Congress could rationally determine that factors other than creative incentives—such as adhesion to an international copyright treaty—may promote the useful arts and sciences regardless of their effects on creative incentives. *Eldred v. Ashcroft*, 537 U.S. 186, 205-06 (2003).

217. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

218. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and the useful Arts.'") (citation omitted); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992) ("The 'fair use' exception applies where the Copyright Act's goal of encouraging creative and original work would be better served by allowing the use than by preventing it.").

219. These examples are prototypical because they are specifically listed in the statutory fair use section. 17 U.S.C. § 107.

everyone)²²⁰ disagree about its boundaries, and in particular about what should constitute promotion of creativity. Judge Leval takes perhaps the strictest view, suggesting that fair use should be limited to uses he calls “transformative,” which are uses that “must be productive and must use the quoted material in a different manner or for a different purpose from the original.”²²¹ Others take a broader view, both regarding what should be considered transformative (also sometimes called “productive”) and regarding the question of whether a work must be transformative to qualify for fair use.²²² For example, commentators have pointed out that teaching and research, which are listed in the preamble to the fair use statute as prototypical examples of fair use, are not transformative in the sense that they do not directly yield new works.²²³ Nevertheless, by strongly supporting access to creativity and the diffusion of knowledge, these uses could qualify as transformative or productive in a broader sense. The last time the Supreme Court addressed the issue, it adopted a toned-down version of Judge Leval’s proposal, noting that “[a]lthough such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”²²⁴

Fortunately, for current purposes it is not necessary to resolve the debate over what should qualify as transformative. Most scholars and courts can agree, at least, on the general rule that fair use is more appropriate when the use in question is transformative, however that term is defined. Therefore, while courts may disagree on whether a new work must be created for fair use to apply, all would agree that it should be more difficult

220. See *infra* notes 239-242 and accompanying text. The utilitarian version of copyright’s goal is, however, the dominant theory. See Lloyd Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1150 (1990) (“There is broad agreement that a determination of fair use should depend largely, if not exclusively, on answers to two questions . . . which are drawn from utilitarian assumptions about the copyright scheme generally.”).

221. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990) (“If a quotation of copyrighted material reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors.”).

222. See, e.g., Fisher, *supra* note 172, at 1743 (suggesting that whether a use is productive should be one of several factors courts consider in fair use determinations); Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579 (suggesting a functional use test in place of the current transformative use test); Loren, *supra* note 199, at 30-32.

223. Loren, *supra* note 199, at 30-31.

224. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

for a non-transformative work to qualify,²²⁵ because few non-transformative uses clearly advance the purpose of fair use.²²⁶

Some courts, determined to privilege trivial copyright violations, seem to have lost sight of this purpose. *Betamax* is the most prominent example of this trend. The relevant portion of the holding in that case—that time shifting is not a violation of copyright—does nothing to advance even the broadest definition of copyright’s purpose. The act of time shifting neither creates a new work nor, in most cases, increases creative incentives in any significant way. Indeed, except in rare circumstances (such as educational programming), there are no traditionally-favored social benefits to time shifting.²²⁷ Furthermore, the negative incentive effects of the holding may have been more significant than the court allowed.²²⁸ In sum, the net effect of the time-shifting portion of the *Betamax* holding, if any, was to decrease total creativity, an effect diametrically opposed to the purpose of fair use.²²⁹

Another fair use decision that seems inconsistent with fair use’s purpose is *National Rifle Ass’n of America v. Handgun Control Federation of Ohio*, a Sixth Circuit case.²³⁰ The plaintiff in that case created a list of state representatives for a mailing to its members, which the defendant copied for its own political mailing. A copyright action ensued, and the court ruled the defendant’s actions to be fair use.²³¹ Like *Betamax*, this holding does not appear to promote the purpose of copyright in any sig-

225. *Id.*; see also Leval, *supra* note 221, at 1111 (“I believe the answer to the question of justification [for fair use] turns primarily on whether, and to what extent, the challenged use is *transformative*.”).

226. Leval, *supra* note 221, at 1116.

227. The pleasure VCR owners gain from watching entertainment at their leisure cannot count, or all copying could be argued to further copyright’s purpose by increasing the utility of the copier.

228. The court concludes that time shifting does little harm to copyright holders. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984). But even a little harm is unjustifiable without a countervailing benefit. Further, there are reasons to doubt the court’s conception of harm. As noted by the dissent, some consumers were building libraries of recorded works, a practice that could have a detrimental effect on sales of those products. *Id.* at 458-59. Further, the ability of time-shifting consumers to skip advertisements could have a detrimental effect on sales of those advertisements. *Id.*

229. It should also be noted that, in retrospect, the net effect of the *Betamax* decision as a whole may have increased creative incentives, largely because the market for sales and rentals of creative works on tape (and later DVD) turned out to be quite large. This was not clear at the time of the *Betamax* decision, however. More importantly, the fact that video tape players increase creative incentives does not mean that time shifting does.

230. 15 F.3d 559 (6th Cir. 1994).

231. *Id.*

nificant way. Arguing that the defendant's mailing as a whole was a transformative use would be a stretch; the defendant's version of the list was a photocopy of the plaintiff's, even if it was sent in an envelope together with material drafted by the defendant. A fairer interpretation would hold the list alone to be the relevant unit of creativity. Thus, creativity was not promoted by the defendant's actions, nor was there any traditionally-favored educational benefit.

Despite the fact that the uses in *Betamax* and *National Rifle* did not further the purpose of fair use, each court found that all of the fair use factors justified its ruling.²³² However, an even-handed reading of the facts shows that their conclusions with respect to the first three factors are highly questionable.²³³ Perhaps sensing this, each court emphasized the fourth factor: the effect of the use on the market for, or value of, the copied work. The *Betamax* court analyzed this factor far more extensively than any other, concluding that fair use was proper because time shifting "has no demonstrable effect upon the market for, or the value of, the copyrighted work."²³⁴ The court in *National Rifle* was even clearer about its reliance on factor four, calling it the most important of the fair use factors.²³⁵

This emphasis on the size of the harm done to the plaintiff should sound familiar—it is the central focus of classic de minimis analysis. Indeed, not only could both the *Betamax* and *National Rifle* courts have achieved the same results using classic de minimis rather than fair use, but there is reason to believe de minimis would have been a much better choice.²³⁶ As the foregoing analysis suggests, de minimis is a closer theoretical fit for the issues presented in the two cases. It is specifically designed to privilege legal violations that do little or no harm, and the size of the harm was the primary reason given by both courts for their holdings. Fair use, on the other hand, is primarily intended to promote creativity, an aim neither *Betamax* nor *National Rifle* appears to further.

To generalize the point, de minimis is often a better theoretical fit than fair use for privileging trivial, non-transformative infringements because non-transformative uses generally do not promote the underlying purpose of fair use. Several factors may strengthen this conclusion, including the

232. *Id.*; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448-55 (1984).

233. See *infra* notes 255-256 and accompanying text.

234. *Betamax*, 464 U.S. at 450.

235. *Nat'l Rifle Assn.*, 15 F.3d at 561.

236. Judge Leval agrees that de minimis would have been a better doctrinal hook for the holding in *Betamax*. See Leval, *supra* note 3, at 1457 (1997).

copying of the entire original work, the commercial use of the allegedly infringing product, and a high level of creativity in the original work, as each of these factors militates against a fair use holding. In contrast, none of these factors has an important effect on de minimis analysis; so long as the use in question is trivial, the maxim can apply.

One could criticize this model in two significant ways. First, it may be argued that *any* limitation on copyright promotes creativity, and therefore the purpose of fair use, by increasing access to creative works. Access can promote creativity by providing aspiring creators with both the inspiration and the materials for future creative endeavors. Therefore, one might view fair use as warranted whenever the marginal creative value of access outweighs the marginal creative value of the increased incentives protection would provide. Since the marginal incentive value of preventing a trivial use will generally be close to zero, fair use will almost always be warranted.²³⁷ The *Betamax* court intimated just such an argument in its fair use analysis, noting that a technical infringement that does little harm “merely inhibit[s] access to ideas without a countervailing benefit.”²³⁸

This argument is powerful but flawed. First, it is exceedingly difficult to measure the creative value of access in a particular case. As noted above, courts and commentators have traditionally considered whether a new work is transformative (or productive) as a proxy for the creative value of a new work. One possible reason is that fair use analysis would become even more unwieldy if the generic notion of access were added to the mix. Further, the question of incentives versus access is the fundamental question addressed by Congress in its copyright legislation. Despite the open-endedness of fair use analysis, courts should be chary of reopening that question to an excessive degree absent Congressional invitation. Unlike most of the other factors considered by courts in fair use, there is no direct indication that Congress intended for the perceived value of access to play a prominent role in fair use analysis. Finally, and most importantly, a focus on the creative value of a trivial use misses the point. Both the creative value of the use and the value of prohibiting the use will be vanishingly small in most cases. It makes sense to privilege trivial uses

237. Viewed another way, this mode of analysis diminishes the importance of the transformative nature (or lack thereof) of the infringing work. Transformative works are considered a better fit for fair use specifically because it is assumed that transformative works are those most likely to promote creativity. If all infringing works promote creativity, the difference between transformative and non-transformative uses becomes one of degree, not kind.

238. *Betamax*, 464 U.S. at 450-51.

because they are not worth considering, not because a complex test suggests that they may provide a trivial benefit to aggregate creativity.

The second challenge to the model presented above is more fundamental, and was best described by Professor Lloyd Weinreb.²³⁹ While it is clear that one purpose of copyright (and therefore fair use) is promotion of creativity, Weinreb argues that this need not be the only goal.²⁴⁰ He believes it is proper for a court to consider custom and community notions of fairness in fair use decisions, regardless of the effect of these considerations on total creativity.²⁴¹ Applying this notion to trivial infringements, Weinreb might argue that both custom and fairness favor fair use. Accordingly, fair use is a good theoretical fit for privileging trivial infringements, and the advantages of de minimis recede.

There are at least two reasons to reject this approach, however. First, it seems to be a recipe for uncertainty. Fair use is already ambiguous enough without giving courts carte blanche to decide what fits their conceptions of fairness. Weinreb, anticipating this complaint, suggests that community standards of fairness may be better defined than some of the elements currently considered in fair use.²⁴² Yet even if this debatable assertion is true, the response should be an attempt to fix the current test with the current goals, not abandonment of those goals (and, arguably, any meaningful limits on courts' fair use discretion). Second, abstract notions of fairness do not necessarily cut in favor of privileging trivial infringements. Many would consider it unfair to take another's intellectual property, especially for a non-transformative use, without permission or payment. Yet, as argued in Section IV.B, it may nevertheless make sense to privilege some such uses. De minimis is the best way to do that.

2. *Practical Advantages of De Minimis*

Whether or not there are theoretical problems with applying fair use to a given trivial infringement, there remain practical reasons to favor classic de minimis. Foremost among these is ease of analysis. As described at length in the next section, de minimis analysis in the copyright context will usually boil down to a simple question about the size of the harm: if trifling, de minimis can apply. Compare this to fair use, with its four non-

239. See Weinreb, *supra* note 220; see also Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (arguing that fair use decisions are based on case law patterns).

240. Weinreb, *supra* note 220, at 1141.

241. *Id.* at 1150-52.

242. *Id.* at 1153.

exclusive factors and the numerous interpretations thereof. All else equal, a simple analysis is preferable to a complex one for two reasons.

First, the simplicity of de minimis would enable courts to spend less time and money adjudicating the case, an advantage that is especially welcome in the trivial cases to which de minimis applies. Several case examples will help to illuminate the point. In *Italian Book Corp. v. American Broadcasting Cos.*, a music publisher sued a television broadcaster for copyright infringement.²⁴³ The suit was based on the airing of a news segment about a local parade at which the plaintiff's song played in the background. The court ruled that fair use applied, but its analysis was cursory. Rather than balancing the fair use factors, or focusing on the fact that the segment was news (a traditionally-favored fair use category), the court emphasized the minimal effect of the use on the value of the plaintiff's work.²⁴⁴ The court largely ignored other possible lines of analysis, including the first three fair use factors. A similar analysis yielded fair use in *Fleming v. Miles*, in which a graphic artist was sued for including in her portfolio a copy of artwork that included elements created by a third party.²⁴⁵ The court in *Kulik Photography v. Cochran* evinced an even greater disregard for the four factors, summarily concluding that use of a copyrighted photograph in a televised trial was fair use.²⁴⁶

In a sense, these cases were correctly decided. The uses in question, unlike those in *Betamax* and *National Rifle*, seem close to those for which fair use was originally intended. Yet none of the three courts was willing to engage in a full fair use analysis to support its holding. Given the limitations on courts' time and resources, there are strong practical reasons to favor this simplified approach. Supreme Court precedent, however, does not permit fair use shortcuts: the deciding court must consider and balance all of the fair use factors before it makes a decision.²⁴⁷ Indeed, at least one plaintiff has used a court's failure to fully consider all of the fair use factors as the basis for an appeal.²⁴⁸

Classic de minimis avoids this problem by permitting courts to dispense with the complexity of fair use analysis when copyright violations

243. 458 F. Supp. 65 (S.D.N.Y. 1978).

244. *Id.* at 70.

245. 181 F. Supp. 1143, 1152-53 (D. Or. 2001).

246. 975 F. Supp. 812, 814 (E.D. Va. 1997) (suggesting disregard for four factors in dictum).

247. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) ("All [of the fair use factors] are to be explored, and the results weighed together, in light of the purposes of copyright.").

248. See *Bond v. Blum*, 317 F.3d 385, 392 (4th Cir. 2003).

are trivial. Further, the fact that courts in cases like *Fleming* and *Italian Book* rely so heavily upon the fourth fair use factor strongly suggests that one can classify the uses at issue in those cases as trivial. Indeed, the analyses in those cases are already closer to de minimis analysis than to traditional fair use analysis. Accordingly, courts applying de minimis to cases like these would not necessarily have to change their legal reasoning. They would just have to stop calling that reasoning fair use.

A second, related, practical advantage of de minimis over fair use is the relative ease with which a de minimis decision can be justified (assuming de minimis is accepted as a viable defense). Given the ambiguity of fair use, and the number of factors involved, it is easy to make reasonable arguments on both sides in all but the most obvious cases. De minimis, on the other hand, should be less controversial in most cases; the main question is what qualifies as trivial. While there certainly will be some disagreement over that question, one would be hard-pressed to find any incentive harm at all for many types of copyright violations.²⁴⁹

An example of the difficulty courts sometimes have justifying fair use holdings may be found in *Belmore v. City Pages, Inc.*²⁵⁰ City Pages was a local newspaper that reprinted an allegedly racist story that had originally appeared in a police publication; the author of the story sued City Pages for copyright infringement.²⁵¹ In its fair use analysis, the court concluded that two of the four fair use factors militated against fair use, since the story was copied in its entirety and was clearly creative.²⁵² Further, the court's conclusion that the first factor favored fair use was arguable: it concluded that the transformative nature of the use outweighed its commerciality.²⁵³ Thus the court forced itself to rely heavily on the fourth factor, the harm done, to justify its fair use holding. Put another way, the court found fair use even though only one of four factors clearly pointed in that direction.²⁵⁴

Betamax and *National Rifle*, each described in detail above, provide similar examples. Even if one takes the position that there is no theoretical problem with application of fair use in those cases, the courts' four-factor analyses were questionable. In *Betamax*, a less creative analysis of the fac-

249. See *infra* Section IV.B.

250. 880 F. Supp. 673 (D. Minn. 1995).

251. *Id.* at 675.

252. *Id.* at 677-80.

253. *Id.* at 677-78.

254. *Id.* It is also worth noting that Professor Nimmer, in his brief analysis of the case, suggested that each of the first three fair use factors inclined against fair use. Nimmer, *supra* note 212, at 269.

tors suggests that two clearly militate against fair use, and that the other two are ambiguous.²⁵⁵ A neutral analysis of the *National Rifle* opinion comes to a similar conclusion.²⁵⁶ More broadly, Professor Nimmer recently showed five cases between 1995 and 2001 in which courts ruled a use fair despite the fact that the first three factors, under a neutral analysis, inclined against fair use.²⁵⁷

Clearly, these results are difficult to justify. What is the purpose of the fair use factors if not to help drive the holding? A court's opinion, and the legal analysis therein, should clarify the reasoning behind a holding, ideally convincing the neutral observer of the correctness of the holding. Many of these opinions do the opposite: they either bend the fair use factors to suit the court's ultimate conclusion,²⁵⁸ or ignore the factors that do not support that conclusion. Courts should not have to play this game to justify conclusions that are, for the most part, eminently reasonable. Rather, they should use classic de minimis to reach those same conclusions.

3. Summary

Classic de minimis holds three significant advantages over fair use. First, fair use is a bad theoretical fit for some trivial violations. Second, de minimis analysis is much easier than fair use analysis, a significant advantage when dealing with matters of trivial importance. Third, a de minimis determination will often be more easily defended than a fair use determination. This is not to say that de minimis is a better fit than fair use for all trivial copyright violations.²⁵⁹ Rather, de minimis and fair use are separate tools with separate goals. While there is considerable overlap between the two, fair use should not do all the work. Courts should be able to avail themselves of either fair use or de minimis, as circumstances dictate. This approach will ensure that courts can privilege those uses that should be

255. Although most time shifting is noncommercial, it is also non-transformative, suggesting that factor one could go either way. Television programs are highly creative works of a type generally given deference under factor two. That the entire work is usually taken suggests that factor three militates against fair use. Factor four, which the court said favored fair use, is arguable, as discussed *supra* note 228.

256. The main difference in analysis between *Betamax* and *National Rifle* is probably factor two—the nature of the copyrighted work. Compare *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496 (1984) with *Nat'l Rifle Assn. of Am. v. Handgun Control Fed'n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994). The works at issue in *Betamax* were highly creative, while that in *National Rifle* was less so.

257. Nimmer, *supra* note 212, at 269-277.

258. *Id.* at 281.

259. In particular, fair use may be the better route for privileging uses that are both transformative and of questionable triviality.

privileged, while simultaneously saving judicial resources and preventing fair use from drifting too far from its theoretical moorings.

D. Mechanics of Application

Upon combination of the past few sections, it becomes apparent that the use of de minimis in copyright should be fundamentally reconsidered. Two steps should be taken to maximize the maxim's utility and minimize confusion. First, as described in Section IV.A, courts must be clear about the way in which they use the maxim. Second, courts should reinvigorate classic de minimis. As in other areas of the law, classic de minimis can play an important role in copyright, permitting courts to throw out claims not worth adjudicating. Further, it is better designed for this purpose than are the doctrinal alternatives, most notably fair use.

With the need for, and role of, classic de minimis established, it is time to turn to the mechanics of its application. Particularly, it is time to define in more detail how and when classic de minimis should apply in copyright. Fortunately, there is a model for the way things should be done: the use of de minimis in other areas of the law. The following paragraphs apply the de minimis framework described in Section II.C to the copyright context. In addition to providing a roadmap for the application of classic de minimis, the discussion demonstrates that there are no theoretical roadblocks to such application. Indeed, classic de minimis is well-designed to address some of the excesses of copyright.

Section II.C argued that application of classic de minimis should comprise a two-step process. First, the court must determine that the harm in question, considered alone, is trifling. While this determination is inherently subjective, there is one important control: the harm should be measured solely by reference to the purpose of the rule in question. In copyright this means the relevant harm is the decrease in creative incentives wrought by the infringement in question.²⁶⁰ Other harms—such as a copyright owner's anger at a loss of control over the work—are generally irrelevant.²⁶¹ Clearly, numerous copyright violations will fit this triviality crite-

260. Moreover, there are at least two reasons to believe that copyright's purpose militates in favor of de minimis, at least in some cases. First, copyright is limited in time and scope in part because there is value in wide access to creative works. De minimis would increase this access. Second, and relatedly, in some cases failure to enforce copyright could increase the number of creative works by providing other creators with more raw materials for their creativity.

261. For an explanation of why this is so, see *supra* text between notes 72-73. If and to the extent that a court reasonably believes that copyright law is intended to address other harms (as where statutory "moral rights" are implicated), these harms can and should be taken into account by the model presented above.

rion. As discussed above, most copyright infringements have no effect whatsoever on creative incentives.²⁶²

In cases where the court deems the individual harm to be trivial, the analysis can move to the next step. Step 2 is a balancing test that compares the social costs and benefits of using de minimis. One must consider each side of this equation broadly in an attempt to determine whether external considerations counsel against application of the maxim, even if the individual harm is trivial. The maxim should apply only where benefits exceed costs. While courts could, in theory, consider a number of factors in this balance, Section II.B lists some of the most important: the size of the direct harm done by the infringement, the direct costs of adjudication, the intent of the statute in question, the effect of adjudication on third parties, and intent of the accused infringer.

The first three factors are more easily analyzed than the last two. Pursuant to step 1, the size of the harm will always be trifling. The direct costs of adjudication, on the other hand, will always be significant in the copyright context—copyright lawsuits, like most lawsuits, are not cheap. Finally, the purpose of the statute is useful primarily to ensure that the correct harm is being measured, and thus is more relevant to step 1 than to step 2. Accordingly, cases in which only these factors are relevant will always qualify for de minimis: infringement costs deemed trivial in step 1 will be outweighed by adjudication costs in step 2.

Things become more interesting in cases where the indirect benefits of adjudication are relevant. In particular, if adjudication on the merits would have an important effect on third parties, de minimis may not be justified. However, there are several reasons to believe that this is unlikely in copyright. First, while there may be social value in consistent enforcement of certain fundamental rights, copyright clearly does not belong in the same category as, for example, the rights of free speech and due process. Indeed, enforcement of copyright is already limited in numerous ways.²⁶³ Second, important questions of statutory interpretation will seldom arise in the de minimis context (and if they do the court can always decline to apply de minimis). Third, unlike a stockholder derivative action or a class action lawsuit, plaintiffs in copyright suits rarely represent interests other than their own.

The final factor, intent of the accused infringer, is more difficult to analyze. One may argue that the act of enforcement has the important ex-

262. See *infra* Section IV.B.

263. Examples include fair use, the limited length of the copyright term, and the first sale doctrine.

ternal effect of convincing other potential infringers to abide by the law, and that the collective damage done by infringements resulting from failure to enforce copyright would be more than trivial. This is a specialized version of an issue often considered in conjunction with the fourth fair use factor: whether the harm in question would be significant if widespread.²⁶⁴

While intent could play a role in some de minimis decisions, this issue is unlikely to play a significant role in most cases for several reasons. The uncertainty of the maxim—de minimis determinations are left to the judge's discretion and it is unclear what level of infringing activity will qualify—makes it unpredictable to potential infringers.²⁶⁵ Further, given the fact that other doctrines (particularly fair use) are currently stretched to privilege many of the uses that would otherwise qualify for de minimis, any effect on other potential infringers is doubtful. Finally, many trivial uses would remain trivial even if widespread, as a number of courts analyzing the fourth fair use factor have concluded.

Accordingly, more often than not, copyright de minimis decisions boil down to a question of whether the size of the infringement harm is small enough to qualify as trifling. If so, the use is de minimis, since adjudication costs will outweigh any benefit deriving from adjudication. If not, the use is not de minimis.

Admittedly, determination of what qualifies as trifling is subjective. However, one might argue that copyright violations can be split into two categories: those that almost certainly have no effect on creative incentives (as noted above, most infringements probably fit this description), and those that affect creative incentives. The best way to reduce subjectivity is to use de minimis only for infringements in the former category. While this practice will not completely eliminate subjectivity, it is better than the alternative. De minimis is significantly less subjective and confusing than the mix of rationales currently used to privilege some trivial copyright violations.

One final note seems appropriate. At first blush, the suggestions made in this Article may seem to require radical change. In fact, courts could implement them fairly easily. Current case law is not so much wrong as it is confusing. The suggestions made herein would not change many holdings, only the reasoning used to achieve those holdings. Thus it would not be necessary to overrule many decisions. In addition, reinvigoration of classic de minimis would not require creating a new doctrine, either judi-

264. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

265. Of course this would hold true in all contexts where de minimis might apply, not just in copyright.

cially or statutorily. Classic de minimis has been around for hundreds of years, the Supreme Court has specifically noted that it applies to statutory law, and no legal authority has expressly denied its applicability to copyright. Courts simply need to start using it.

V. CONCLUSION

The legal maxim of *de minimis non curat lex* has been both misused and underused in copyright. Courts misuse it by confusing the colloquial use of the term (as a synonym for “trifling”) with the formal legal use of the term (as a defense to infringement). This confusion has been most prominent in substantial similarity analysis, and it also occurs in fair use. De minimis is underused in that courts have avoided using it in its classic form, as an independent defense to copyright infringement. Instead, courts have relied upon several different methods to privilege minor infringements, most prominently fair use. However, none of these methods is an ideal vehicle for this purpose, and their numerosity leads to confusion.

Failure to use de minimis effectively in copyright is problematic for a number of reasons. First, some courts may feel compelled to adjudicate disputes even when it is clear that such adjudication is not in society’s best interests. Second, use of substantial similarity and fair use to privilege trivial infringements has distorted those doctrines. Third, these problems are likely to get worse as new technologies and attitudes increase the likelihood of legal disputes over trivial infringements.

Fortunately, there is a simple solution to these problems. Courts should take care to use the term “de minimis” clearly, either as a colloquial expression or as a formal defense, but never as something between the two. This distinction means the term should only be used colloquially in substantial similarity and fair use analyses, or, even better, not at all. Additionally, courts should reinvigorate the use of classic de minimis in copyright. Only classic de minimis will permit courts to address the legal challenges posed by trivial copyright violations without distorting other areas of copyright.