

# COPYRIGHT'S PRIVATE ORDERING AND THE “NEXT GREAT COPYRIGHT ACT”

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## ABSTRACT

Private ordering plays a significant role in the application of intellectual property laws, especially in the context of copyright law. In this Article, I highlight some of the dominant modes of private ordering and consider what formal copyright law should do, if anything, to engage with private ordering in the copyright space. I conclude that there is not one single approach that copyright law should take with regard to private ordering, but instead several different approaches. In some instances, the best option is for the law to get out of the way and simply continue to provide room for various approaches to flourish. In other contexts, the copyright statute should actively support private ordering efforts that may be jeopardized by the current regime. Private ordering may also highlight areas where the law is in need of reform. This is perhaps most noticeable in the context of fair use which has led to the proliferation of much of the private ordering. The combination of the unpredictability and expense of fair use litigation combined with potentially high statutory damages has created a series of risk-averse litigation-avoidance practices and an underutilization of fair use. Legislation may be necessary to prevent a lock-in effect of some of these industry practices and norms. In particular, courts should be barred from using these customs to set the boundaries of fair use. Revisions to the Copyright Act could also address some of the uncertainty surrounding fair use and facilitate the use of works in instances that we would like to encourage. In recent years, copyright holders have used technology and contracts to greatly limit what users can do with copyrighted works and even with uncopyrightable elements of those works. Revisions to copyright law should engage with these private efforts and protect a significant fair use zone. Copyright's private ordering also reveals some areas of agreement which merit codification, such as faculty ownership of course materials and scholarship. Copyright law does not operate in a vacuum and any major revisions to copyright law must take into consideration the practices that have developed in its wake. As we look forward to a Copyright Act for the twenty-first century, Congress must not only consider ways to limit online piracy, but also how to protect the public's vital space to engage with, comment on, and rework copyrighted material in light of the myriad practices that have developed in the shadow of the 1976 Act.

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## I. INTRODUCTION

On March 4, 2013, the current Register of Copyrights, Maria Pallante, called for the “next great copyright act.”<sup>1</sup> Congress has followed her lead, calling for and conducting a number of hearings on what reforms might be appropriate for our now-aging Copyright Act.<sup>2</sup> This major review of copyright law must include consideration of private-sector activities in the copyright sphere. These privately generated rules have operated both to expand and to limit copyright in various ways without the opportunity for the public to debate or participate in these governing regimes.

The last major overhaul of U.S. copyright law culminated in the passage of the 1976 Copyright Act.<sup>3</sup> Since 1976, changing technology—particularly the digital revolution—has radically altered the copyright landscape.<sup>4</sup> A variety of piecemeal additions to the Act have tried to address some of these and other challenges for copyright law.<sup>5</sup> Unfortunately, these Band-Aids for outdated aspects of copyright law have made the law more byzantine, obsolete, and draconian,<sup>6</sup> without actually fixing many of the issues raised by the digital revolution. In part in reaction to these challenges for copyright

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1. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013); see also 159 CONG. REC. D253-01 (daily ed. Mar. 20, 2013) (Pallante’s speech before Congress).

2. See, e.g., *A Case Study in Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Prof. Pamela Samuelson), available at [http://judiciary.house.gov/\\_files/hearings/113th/05162013/Samuelson%20Testimony%20051613.pdf](http://judiciary.house.gov/_files/hearings/113th/05162013/Samuelson%20Testimony%20051613.pdf); *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014), available at <http://judiciary.house.gov/index.cfm/hearings?ID=8E18A9AA-1AA4-4D7C-8EBF-0284862EC44B>.

3. For an excellent discussion of the history of the passage of the 1976 Act, see Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

4. See DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 1 (2013) [hereinafter DEP’T OF COMMERCE] (“[A]rguably no prior technological change has impacted copyright with a magnitude comparable to the development of the Internet.”).

5. Some of these changes include the passage of the Digital Audio Home Recording Act of 1992 and the Digital Millennium Copyright Act in 1998.

6. See Jennifer E. Rothman, *E-Sports as a Prism for the Role of Evolving Technology in Intellectual Property*, 161 U. PA. L. REV. ONLINE 317, 318, 328–29 (2013) (discussing the challenges wrought by technology-specific legislation); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 551 (2007) (criticizing the law’s current length, complexity, and incomprehensibility); David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1237–39, 1307–44, 1374–78, 1381–83 (2004) (describing the many Congressional missteps in copyright law since the passage of the 1976 Act).

law, private ordering has proliferated in industries that frequently use or create copyrighted works. Such private ordering has included various forms of custom, such as industry practices, agreements, guidelines, and community norms, as well as contracts and technology that alter how copyrighted works can be used.<sup>7</sup> These efforts by private parties have sometimes worked in harmony with the public law, but at other times at cross-purposes with it. The public must be given the opportunity to weigh in on these private efforts as part of any study of today's copyright law and Congress must consider the role of private ordering. The Department of Commerce and the Copyright Office are increasingly acknowledging some aspects of private ordering in the copyright sphere.<sup>8</sup> Thus far, however, the government has not engaged in a robust analysis of the role of private ordering. Such an analysis is crucial in the upcoming process of revising our copyright laws. This Article provides an overview of the dominant modes of private ordering in the copyright context and makes some preliminary suggestions about possible statutory revisions that could both support the development of such private approaches and rein in some of their excesses.

Much of the private ordering has developed to address uncertainties or failings of the current law, while other aspects of such ordering have sought to provide alternatives for those who seek something different than what the basic defaults of copyright offer. There is therefore not one single approach that formal copyright law should take with regard to private ordering. In some instances, the best option is for the law to get out of the way and leave room for a variety of private approaches to flourish. This relatively hands-off approach has been the dominant mode of formal law to date and has allowed various communities to best tailor copyright law to their needs. In some contexts, however, formal law needs to engage more fully with private ordering. In some instances, the law needs to step in to prevent a lock-in effect of various problematic industry practices and norms that are altering the boundaries of copyright law without the appropriate public debate and

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7. The term "custom" has been used in the law to "mean many different things, from regularly occurring industry practices, to social norms, to ongoing practices that have existed from time immemorial." Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1900 n.1 (2007). Despite their differences, all customs share the common characteristic of being rules developed outside the legal system by communities or industries that have extra-judicial enforcement mechanisms. I have previously explored how custom affects the way copyrighted works are used as a de facto matter and also how custom influences courts' evaluations in individual copyright cases. *See id.* at 1909–46.

8. *See, e.g.*, Pallante, *supra* note 1, at 326 n.65 (pointing to industry agreements that facilitate the enforcement of copyright online); DEP'T OF COMMERCE, *supra* note 4, at 22–23 (noting the increasing use of fair use guidelines, but encouraging parties to work with a diverse set of participants to develop such guidelines).

legislative adoption. The Copyright Act also may need to actively support some private ordering that is jeopardized by the current regime.

Part II of the Article considers the risk-averse licensing practices that have dominated the creative industries and how revisions to copyright law could limit the negative impact of such customs and even counteract the pressures that feed this clearance culture. Part III evaluates the recent proliferation of guidelines and best-practices codes and statements intended to address the uncertain boundaries of fair use. Revisions to the Copyright Act should allow the continued development of such guidelines, but must also clearly indicate that these guidelines do not alter the boundaries of fair use.

Part IV considers the use of alternative regimes that are layered on top of the existing copyright structure. I focus here on the most prominent example of such an approach—Creative Commons—a nonprofit organization that provides standardized licensing contracts that alter the default restrictions of copyright. In this Part, I suggest ways that formal law can facilitate the use of such individualized approaches.

In Part V, I discuss the last major form of private ordering—the increasing use of contracts and technology by content providers to limit user rights far beyond what the law requires. Absent legislative intervention, these private efforts may make fair use largely irrelevant to most consumers. To counteract this effect, I recommend adding an express statutory provision requiring that contracts related to the use of copyrighted works and technology used for copyright enforcement must maintain a significant fair use zone.

Finally, in Part VI, I suggest some preliminary ideas for possible changes to the Copyright Act informed by copyright's private ordering. Some industry customs reveal areas of consensus that might merit greater stability through codification, such as faculty ownership of course materials and scholarship. Private ordering also highlights areas where the law generally needs revision. For example, much of the private ordering is driven by the unpredictability and expense of fair use litigation. A variety of reforms could provide greater support to those who wish to use others' copyrighted works without permission in contexts that we would like to facilitate.

## II. THE CLEARANCE CULTURE AND THE ROLE OF CUSTOMARY LICENSING PRACTICES

One dominant mode of private ordering in the copyright arena is the pervasive licensing of copyrighted works even when such licensing is unnecessary. In prior work, I have dubbed these practices of licensing or removing almost all copyrighted works from new works “litigation-avoidance

customs.”<sup>9</sup> These litigation-avoidance customs form a “clearance culture” in which the default approach is to clear everything without regard to whether the uses would have otherwise been lawful.<sup>10</sup>

These clearance practices are firmly entrenched in all media, including film, television, music, the fine arts, and publishing.<sup>11</sup> Many book publishers, movie and television studios, distributors, insurers, and other gatekeepers in various copyright fields err on the side of licensing all third-party content.<sup>12</sup> If licensing is not feasible, they often demand the removal of third-party material.<sup>13</sup> Many of the intended uses would likely be fair ones if litigated (to the extent one can accurately predict such things).<sup>14</sup> Nevertheless, legal counsel make reasonable calculations that in most instances it will be cheaper and easier to license works than to risk uncertain and expensive litigation. The current median cost of copyright litigation beyond the discovery stage ranges from \$300,000 to just under \$1.625 million (depending on the amount at risk).<sup>15</sup>

Not only does the cost of litigation itself often outweigh alternative arrangements between parties, but the consequences of losing in court are substantial. Even if no actual damages are caused by the use of a plaintiff’s work, statutory damages for copyright cases can be massive.<sup>16</sup> Additionally, attorney’s fees can be awarded to the prevailing party, so a loss can mean

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9. Rothman, *supra* note 7, at 1909–24, 1951–53. In other instances, licensing is driven by “relationship-preservation” because the parties have ongoing relationships with the owners of the relevant copyrighted works and do not wish to cause conflicts that will have future ill effects on business dealings. *Id.* at 1949, 1951–53 (drawing on the work of Lisa Bernstein in the context of contract law). I will focus here only on the prevalent litigation-avoidance customs, though relationship-preserving licensing undoubtedly adds to the overall clearance culture.

10. Rothman, *supra* note 7, at 1911–16; PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 22 (2004), available at [http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES\\_Report.pdf](http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf) (defining the “clearance culture” as “the shared set of expectations that all rights must always be cleared”). Others have also used this term. *See, e.g.*, MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 5 (2005), available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>; *cf.* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY *passim* (2004) (comparing the current lock-down culture with his ideal “free culture”).

11. *See* Rothman, *supra* note 7, at 1911–16.

12. *Id.*

13. *Id.*

14. *Id.*

15. AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF THE ECONOMIC SURVEY 2013, at 36 (2013).

16. *See* 17 U.S.C. § 504(c) (2012).

paying legal fees that significantly exceed damages, statutory or otherwise.<sup>17</sup> The threat of injunctive relief also looms large because if granted, such relief can destroy the chance of recovering the initial investment in a project. This risk is particularly great in the motion picture industry because the upfront investment costs are substantial. Criminal liability also encourages parties to err on the side of licensing, especially given that a breach of the dominant licensing practices may expose a party to being found a willful infringer subject to penalties that include prison time and additional fines.<sup>18</sup>

#### A. FEAR OF GAMBLING ON FAIR USE

Much of the pressure to adopt these clearance practices derives from uncertainty as to the boundaries of copyright's fair use defense. The fair use defense permits uses of another's copyrighted work without permission or payment in some circumstances. The fairness of a particular use is primarily determined by considering four factors set forth in § 107 of the Copyright Act.<sup>19</sup> Section 107 provides that:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>20</sup>

The fair use doctrine can be difficult to apply in the real world. Average citizens have trouble evaluating what uses they can make of others' works and even experienced copyright attorneys note the unpredictability of fair use

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17. *See* 17 U.S.C. § 505 (2012).

18. *See* 17 U.S.C. § 506 (2012) (exposing those who willfully infringe copyrights for commercial advantage to up to ten years in prison and additional financial penalties); Richard Feiner & Co. v. Passport Int'l Prods., No. 97-Civ-9144(RO), 1998 WL 437157, at \*1 (S.D.N.Y. July 31, 1998) (finding that copyright infringement was willful because the use of unlicensed film clips contravened industry clearance practices); *see also* 18 U.S.C. § 2319 (2014) (setting forth additional criminal penalties for violation of 17 U.S.C. § 506).

19. *See* 17 U.S.C. § 107 (2012); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (setting forth the common law fair use doctrine).

20. 17 U.S.C. § 107 (2012).

determinations. Scholars and courts have long described the fair use doctrine as “murky,” “unpredictable” and “ad hoc.”<sup>21</sup>

Several recent works have challenged these dire assessments of fair use.<sup>22</sup> Michael Madison, for example, has noted numerous “patterns” or categories of preferred uses—ones more likely to be found fair.<sup>23</sup> These categories include journalism, parody, and criticism.<sup>24</sup> According to Professor Madison, if a user conforms to the practices of a particular pattern of use, the use is likely to be found fair.<sup>25</sup> Pamela Samuelson has similarly claimed that “copyright fair use caselaw is more coherent and more predictable than many commentators seem to believe.”<sup>26</sup> Like Madison, Professor Samuelson describes “clusters” of uses that are more likely to be held fair.<sup>27</sup> Her categories include expressive uses, such as transformative or productive ones (e.g., parodies or critical commentaries), authorship-promoting uses, uses that promote learning, and foreseeable uses (e.g., personal uses and uses in litigation).<sup>28</sup> Matthew Sag’s recent empirical analysis of fair use cases supports Madison’s and Samuelson’s contention that fair use is more predictable than is often claimed.<sup>29</sup> Professor Sag points to the strong likelihood of succeeding on a fair use defense when a use is transformative and copies only part of the underlying work.<sup>30</sup>

Although I agree that there are broad categories and patterns of uses more likely (or even likely) to be found fair, these broad assessments do not provide sufficient security for users in individual cases. There is a big difference between knowing that given categories of uses tend to be favored for fair use—e.g., uses in news or education—and knowing how a particular case will turn out. Moreover, in the gray areas (and even outside them) the case law is littered with overturned assessments of fair use and cases that

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21. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); WILLIAM F. PATRY, PATRY ON FAIR USE §§ 3:89, 9:33 (2d ed. 1995); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–06 (1990); Lloyd Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137–38 (1990).

22. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

23. See generally Madison, *supra* note 22.

24. *Id.* at 1645–64.

25. *Id.* at 1622–64.

26. Samuelson, *supra* note 22, at 2537.

27. *Id.* at 2541 & *passim*.

28. *Id.* at 2546–2614.

29. Sag, *supra* note 22, at 79–81.

30. *Id.*

point in different directions.<sup>31</sup> Major content-industry players therefore unsurprisingly often prefer to license, given the risks associated with asserting a fair use claim, even when they know the use at issue falls into one of the preferred categories.

The *Campbell v. Acuff-Rose Music, Inc.* case is emblematic of why litigating fair use is not a preferred business model in the content industries.<sup>32</sup> *Campbell* is most often cited for its shift in focus in fair use determinations to the question of transformativeness. This approach, which has been universally adopted, adds a consideration to the first fair use factor that evaluates the purpose and character of a defendant's use. Courts now consider whether the use changes or alters the original work to such an extent that the work is "transformed."<sup>33</sup>

Despite this dominant narrative of *Campbell*, the case is also an object lesson on why parties prefer to license even if they think they could eventually prevail on a fair use determination in the courts. *Campbell* involved the claim that the song, *Pretty Woman*, by the rap group 2 Live Crew infringed *Oh, Pretty Woman*, a song recorded and written by Roy Orbison. A district court in Tennessee held 2 Live Crew's use of Orbison's song fair.<sup>34</sup> The Sixth Circuit, however, reversed, concluding that the use was not fair primarily because it was commercial, took the heart of the underlying work, and likely damaged the market for derivatives of the song.<sup>35</sup> The Supreme Court

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31. See, e.g., *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), *rev'g* 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (holding that many of the artist's uses of defendant's photographs were fair); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), *rev'g* 136 F. Supp. 2d 1357 (N.D. Ga. 2001) (holding that the novel *The Wind Done Gone* could be a fair use of Margaret Mitchell's *Gone With the Wind*); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *rev'g* 650 F. Supp. 413 (S.D.N.Y. 1986) (holding that uses of excerpts and paraphrases of J.D. Salinger's letters in a biography about the famous author were not fair use). Compare, e.g., *Ringgold v. Black Entm't Television*, 126 F.3d 70, 80–81 (2d Cir. 1997) (reversing the district court and rejecting a fair use defense when a poster appeared for less than thirty seconds in the background of a scene in a television sitcom), with, e.g., *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044 (S.D.N.Y. 1994) (holding that the use of a copyrighted mobile in a film was fair even though it was sometimes shown in close-up and appeared on screen for over one and a half minutes), and *Gottlieb Dev. L.L.C. v. Paramount Pics. Corp.*, 590 F. Supp. 2d 625 (S.D.N.Y. 2008) (holding that the use of a copyrighted pinball machine in the background of a film was not infringing).

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

33. There is a consensus that after *Campbell*, fair use defenses became easier to win, at least if one could show that the underlying work was sufficiently "transformed." See Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL'Y REV. 119, 149 (2012).

34. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153–58 (M.D. Tenn. 1991) (finding fair use primarily on the basis that it was a parody that would not directly injure the market for the original and that would have been unlikely to receive a license).

35. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1434–39 (6th Cir. 1992).

granted certiorari on the fair use question and reversed the Sixth Circuit. The Court held that the commerciality of the use was not dispositive and that the lower courts should consider the transformativeness of the use in addition to the song's commercial status when evaluating the first fair use factor—the purpose and character of the use.<sup>36</sup>

Although the use in *Campbell* is often referred to as a fair one and the case as a “win” for the defendant, this is not true. The Supreme Court did not end the fair use litigation with its decision, but instead remanded for further fact finding on the market harm factor.<sup>37</sup> The song had generated significant revenue for Acuff-Rose (the holder of Orbison's copyright) not only from the initial recording, but also from the licensing of covers and other derivative works. The district court was instructed to consider whether the use by 2 Live Crew would harm these markets and then to weigh that harm with the other fair use factors.

Two years after the Supreme Court decision the case settled *without a final determination of fair use*. As part of the agreement, 2 Live Crew paid a licensing fee to Acuff-Rose.<sup>38</sup> Although the amount of the license is not public, there is no question that it would have been cheaper to just pay a licensing fee at the outset before the massive attorneys' fees accrued.<sup>39</sup> 2 Live Crew's victory was a Pyrrhic one. Thus, rather than solidify future assertions of fair use, *Campbell* reinforces the preference to license or remove material whenever possible. Even if one had predicted, reasonably, at the outset that the use was fair, the cost of litigating the case to the Supreme Court likely far exceeded the cost of the license—if obtainable—and perhaps even the value to the defendant of doing the parody in the first place. If the attorneys had known the path *Campbell* would take, they might have suggested that the record label not release the song.<sup>40</sup>

The path of *Campbell* is hardly an isolated instance of courts going back and forth on fair use determinations. The case law is littered with such examples. I will highlight two recent examples. In *Cariou v. Prince*, the Second Circuit recently reversed (in part) the district court's determination that the uses of the plaintiff's photographs in artworks by appropriation art

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36. *Campbell*, 510 U.S. at 578–79.

37. *Id.* at 593–94.

38. *Acuff-Rose Settles Suit with Rap Group*, MEMPHIS COMMERCIAL APPEAL, June 5, 1996, at A14.

39. *Cf.* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005) (noting that it is “cheaper to license than to litigate” fair use).

40. This possible trajectory was not entirely lost on the record label, which had initially sought a license for the Orbison song, but was denied one by Acuff-Rose. *Campbell*, 510 U.S. at 572–73.

phenomenon Richard Prince were infringing. The Second Circuit held most of the uses fair because they were transformative.<sup>41</sup> Notably, the court agreed with the district court with regard to at least five of the photographs, concluding that these were not sufficiently transformative to hold the uses fair as a matter of law.<sup>42</sup> The court remanded the case back to the district court for an evaluation of fair use on these allegedly infringing artworks.<sup>43</sup> Like *Campbell*, the case then settled.<sup>44</sup> Each party paid their own (likely substantial) attorneys' fees.<sup>45</sup> It is not clear whether Prince paid a licensing fee, because the terms of the agreement to settle have not been disclosed.<sup>46</sup>

A similar litigation history can be seen in the Margaret Mitchell estate's efforts to stop Alice Randall's unauthorized alternative version of *Gone with the Wind*, told from the slaves' point of view. Randall's *The Wind Done Gone* was held infringing by a district court. The Eleventh Circuit then reversed and held that the use's transformiveness weighed in favor of fair use.<sup>47</sup> As in *Campbell* and *Cariou*, the appeal did not end the fair use litigation; instead, the case was remanded for further fact-finding.<sup>48</sup> Randall's publisher, Houghton Mifflin, then settled the case and agreed to pay a licensing fee to the Mitchell estate for the use—with the caveat that the fee would go to Morehouse College rather than directly to the Mitchell estate. The publisher also agreed to clearly label Randall's book as an “unauthorized parody.”<sup>49</sup>

Given these commonplace reversals, conflicting decisions on similar uses, and the reality that many of these so-called victories for fair use were in fact resolved by paying licensing fees and substantial attorneys' fees, it remains a smart business decision to license whenever possible. Even though fair use may be more predictable (and generous) than some have feared, it still does not provide sufficient reliability, predictability, or efficiency to incentivize assertions of fair use. The dominant clearance culture therefore largely remains in place.<sup>50</sup>

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41. *Cariou v. Prince*, 714 F.3d 694, 705–12 (2d Cir. 2013).

42. *Id.* at 710–11.

43. *Id.* at 712.

44. Stipulation of Voluntary Dismissal, *Cariou v. Prince*, No. 08-CIV.11327, at \*1 (filed on March 19, 2014).

45. *Id.*

46. Jan Wolfe, *Cariou, Viacom Copyright Suits Settlements*, 30 ENT. LAW & FIN. NEWSLETTER (ALM Media Props., New York, N.Y.), Apr. 1, 2014, at 5.

47. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

48. *Id.* at 1275–77.

49. David Mehegan, *Settlement Lets 'Gone With the Wind' Parody Live On*, BOSTON GLOBE, May 10, 2002, at C4.

50. Rothman, *supra* note 7, at 1911–16; Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y 371,

## B. JUDICIAL RELIANCE ON LITIGATION-AVOIDANCE CUSTOMS

These individual risk-averse decisions to license or remove material negatively affect what sorts of creative works get made and their content. In the context of potential revisions to copyright law, the bigger concern is not the societal losses caused by these individual creative alterations, but instead courts' willingness to consider such practices as evidence of what sorts of uses are fair. In numerous instances, courts have looked at clearance-culture licensing practices as evidence that a particular use is unfair because it contravenes the industry custom to license those types of uses.

Courts consider both actual and potential licensing markets when evaluating two of the fair use factors. The first fair use factor considers the "purpose and character of the use."<sup>51</sup> As part of this inquiry, courts determine whether a use is commercial in nature. The failure to license a work when it is customary to do so has been viewed as evidence that a use is commercial in nature—a determination that weighs against fair use.

The consideration of licensing practices to determine if a use is commercial stems in large part from the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*<sup>52</sup> In *Harper & Row*, the Court explained that: "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."<sup>53</sup> The customary price is determined by what others are paying to use a work. The tendency to license works to avoid litigation costs and the unpredictability of fair use establishes a "customary price." When a defendant is found to have not paid this "customary price," the defendant's use is often held unfair.<sup>54</sup>

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375 (2010). In Section III.B, I discuss some successes in pushing back against these practices.

51. 17 U.S.C. § 107 (2012).

52. *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539 (1985).

53. *Id.* at 562 (citing *Roy Export Co. Establishment v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1] (1984)) (emphasis added).

54. *See, e.g.*, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02, 804 n.19 (6th Cir. 2005) (questioning the availability of a fair use defense for the unlicensed sampling of another's song in an industry where most companies and artists "sought licenses as a matter of course"); *Davis v. Gap, Inc.*, 246 F.3d 152, 166–68, 176 (2d Cir. 2001) (rejecting the fair use defense for incidental display of sunglasses in advertisement when the defendant failed to pay the customary price for use of a copyrighted design); *Ringgold v. Black Entm't Television*, 126 F.3d 70, 80–81 (2d Cir. 1997) (rejecting the fair use defense when the defendant did not follow industry custom of clearing background scenery used in a television show); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1385–88 (6th Cir.

Courts also consider licensing practices when analyzing the fourth fair use factor. This factor evaluates the effect of the use on the market for the work or the work's underlying value.<sup>55</sup> When there is a general industry practice to license copyrighted works in a particular context and a defendant fails to do so, courts point to the existence of an overall licensing market as evidence that a defendant's failure to license causes or will cause market harm.<sup>56</sup> Taken together, these litigation-avoidance customs, driven by reasonable business calculations, have a multiplier effect that makes it difficult to successfully assert a fair use defense when risk-averse licensing is common.

One of the clearest examples of courts' reliance on customary licensing practices is the Second Circuit's decision in *Ringgold v. Black Entertainment Television*.<sup>57</sup> In *Ringgold*, Black Entertainment Television ("BET") used a poster of the plaintiff's artwork in the background set-dressing of its television sitcom, *ROC*. BET was assumed to have lawfully purchased the poster after deciding that it would be an appropriate piece of art for the scene.<sup>58</sup> The poster was visible for less than thirty seconds, was never the focal point of

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1996) (rejecting the fair use defense when the defendant did not follow the industry custom of licensing coursepack materials); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926–27, 930–31 (2d Cir. 1994) (rejecting the fair use defense when a private corporation did not follow the industry practice of licensing); *Twentieth Century Fox Film Corp. v. Marvel Enters.*, 155 F. Supp. 2d 1, 47–48 (S.D.N.Y. 2001) (rejecting the fair use defense when the defendants failed to license footage used in a promotional clip in contravention of the industry practice to license such clips); *Richard Feiner & Co., Inc. v. Passport Int'l Prods., Inc.*, No. 97 Civ. 9144(RO), 1998 WL 437157, at \*1 (S.D.N.Y. July 31, 1998) (finding defendants' failure to license film trailers reckless because "defendants are not amateurs in video production" and it was film "industry practice to license trailers for exhibition"); *cf. Triangle Publ'ns v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1176 (5th Cir. 1980) (holding that the use of plaintiff's copyrighted magazine cover was fair use, in part because the advertising industry routinely follows a practice of using copyrighted works in comparative ads); *Frank Schaffer Publ'ns v. The Lyons P'ship, L.P.*, 10 Ent. L. Rep. 9, 13 (C.D. Cal. 1993) (holding that use was fair where no license was sought, in part because the "customary price for the inclusion of [the plaintiff's posters in the defendant's show's set] is gratis").

55. 17 U.S.C. § 107 (2012).

56. *See, e.g., Bouchat v. Baltimore Ravens, Ltd.*, 619 F.3d 301, 308–13 (4th Cir. 2010); *Davis*, 246 F.3d at 166–68, 176; *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994–95 (9th Cir. 1998); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122–23 (9th Cir. 1997); *Ringgold*, 126 F.3d at 80–81; *Princeton Univ. Press*, 99 F.3d at 1385–86; *Am. Geophysical Union*, 60 F.3d at 926–27; *Rogers v. Koons*, 960 F.2d 301, 311–12 (2d Cir. 1992); *Amsinck v. Columbia Pictures Indus., Inc.* 862 F. Supp. 1044, 1048–49 (S.D.N.Y. 1994); *Frank Schaffer Publ'ns v. The Lyons P'ship, L.P.*, 15 Ent. L. Rep. 9 (C.D. Cal. 1993); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1532 (S.D.N.Y. 1991).

57. *Ringgold v. Black Entm't Television*, 126 F.3d 70 (2d Cir. 1997) (reversing a district court decision that the use was fair).

58. *Id.* at 71–72. The network itself likely did not concern itself with the poster, but the production designer or set dresser likely chose it on behalf of the production.

any shot, and was not referred to in the dialogue.<sup>59</sup> Nevertheless, the court rejected a fair use defense in large part because of the failure to conform with the industry practice of licensing copyrighted works used as set-dressing.<sup>60</sup> The court concluded that BET failed to pay the “customary price” for using Ringgold’s work because it did not license her artwork.<sup>61</sup> In so holding, the Second Circuit reversed the district court’s finding of fair use.

Not only do such fair use decisions problematically reject the defense in instances in which it should be found, but they also further skew licensing practices and exacerbate the under-assertion of fair use. When courts consider licensing evidence, parties are more likely to license, which makes courts more likely to once again rely on licensing evidence.<sup>62</sup> The end result is doctrinal feedback which exacerbates the incorporation of these risk-averse, but customary practices.<sup>63</sup> Small acts of litigation-avoidance can lead to a cascade of risk-averse practices that ultimately set the fair use standard without courts ever engaging in an independent fair use analysis.

A prime example of this is the licensing practices that developed in response to the settlement of a complaint filed against New York University (“NYU”) involving the copying of works for educational uses. The lawsuit by publishers against the university alleged that the copying of works for use in classroom materials infringed various copyrights. Rather than litigate the

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59. *Id.* at 72–74.

60. *Id.* at 79–80. The court cited an amicus brief filed by the Artists Rights Society and the Picasso estate that listed numerous examples of other shows and films that licensed artwork in similar circumstances. *See id.*; *see also* Brief for Artists Rights Society as Amici Curiae, *Ringgold v. Black Entm’t Television*, 126 F.3d 70 (2d Cir. 1997) (No. 96-9329).

61. *Ringgold*, 126 F.3d at 81 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

62. *See* *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1397 (6th Cir. 1996) (Merritt, J., dissenting); *id.* at 1400–04, 1407–10 (Ryan, J., dissenting); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 n.17, 931 (2d Cir. 1994); *id.* at 936–39 (Jacobs, J., dissenting); *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 448–49 (S.D.N.Y. 2001); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001); Rothman, *supra* note 7, at 1933–34; James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 885–906 (2007); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 38–47 (1997); Matthew Africa, Comment, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1145–64 (2000).

63. Gibson, *supra* note 62, at 884–86 & *passim*; cf. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1717–18 (1996); Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 994 (1992); Abhiji V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797, 798 (1992).

case, NYU settled.<sup>64</sup> This settlement led many other universities and copy stores to license material used in course readers and handouts, even though there was no governing case law on these uses.<sup>65</sup> When the less risk-averse entities then claimed the uses were fair, courts cited the licensing that followed the NYU settlement as a basis for denying fair use defenses in similar contexts. In the first court decision to litigate the fair use question, *Basic Books v. Kinko's*, a court held that it was not a fair use to copy articles and other materials for the classroom in part because of the customary practice of licensing such uses.<sup>66</sup> After this single court decision on the issue, most holdouts started licensing materials.<sup>67</sup> When subsequent challenges were made to the fair use evaluation in *Basic Books*, courts pointed again to the now-even-more-prevalent licensing practices as a basis for rejecting a fair use defense in the context of course packets.<sup>68</sup> It may be appropriate to license articles and other materials routinely used in an educational context,<sup>69</sup> particularly if the educational market is the primary market for the underlying work, but the fact that such licensing is customary should have little relevance for determining fair use. I will discuss the appropriate role for evidence of licensing in the next section.

### C. DISRUPTING THE CLEARANCE CULTURE

Any revision to the Copyright Act must address the courts' reliance on litigation-avoidance licensing customs. Even though not all courts have gone down this problematic path, enough have that this line of cases must be overruled by statute. The Copyright Act should clarify that such industry

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64. Addison-Wesley Publ'g Co. v. N.Y. Univ., No. 82 Civ. 8333, 1983 WL 1134, at \*1 (S.D.N.Y. May 31, 1983).

65. See Steven J. Melamut, *Pursuing Fair Use, Law Libraries and Electronic Reserves*, 92 LAW LIBR. J. 157, 182 (2000); Bernard Zidar, *Fair Use and the Code of the Schoobyard: Can Copyshops Compile Coursepacks Consistent with Copyright?*, 46 EMORY L.J. 1363, 1377 (1997) (citing KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES 45 (1993)).

66. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

67. See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1384 (6th Cir. 1996); Rothman, *supra* note 7, at 1920–21, 1954–55.

68. See, e.g., *Princeton Univ. Press*, 99 F.3d at 1384–88 (pointing to dominant licensing practices in fair use analysis to find commercial purpose and likely market harm); *cf.* *Addison-Wesley Publ'g Co. v. N.Y. Univ.*, No. 82 Civ. 8333, 1983 WL 1134 (S.D.N.Y. May 31, 1983) (Order and Final Judgment) (providing the terms of the NYU settlement).

69. *Cf.* *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (holding some educational uses not fair because of available licensing), *rev'd on other grounds*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014). After the substantive editing of this Article was complete, the Eleventh Circuit issued its opinion in *Patton*. The appellate decision agreed with the relevance of available licensing markets in the educational context. See *id.* at 1275–81.

clearance practices should be discounted. Given the strong impetus to remove uncleared works or license works regardless of the likely viability or appropriateness of a fair use defense, the mere existence of such practices provides limited information about the fairness of the particular use. The fact that licensing markets exist should not weigh against fair use simply because licensing is common practice.

Some scholars do not share my concerns about using customary licensing as a proxy for fair use. In particular, Richard Epstein, while acknowledging many areas of agreement with my analysis, suggests that common licensing practices may be indicative of appropriate fair use boundaries.<sup>70</sup> Although he thinks bullying by copyright holders and the ensuing litigation avoidance by “frightened” users should not be considered in fair use analysis, he contends that most other clearance-culture practices are more deserving of deference.<sup>71</sup> In the context of *Ringgold*, for example, he thinks that the customary licensing may reflect the appropriateness of licensing background artwork.<sup>72</sup> For him, the workability of such a licensing regime suggests that the markets may be working well in this regard because these practices may allow parties to access works for use in scenes (at reasonable rates), while at the same time facilitating payments to creators for uses of their works.<sup>73</sup>

This apparent win-win, however, frames fair use primarily through a market failure lens.<sup>74</sup> Some have suggested that if licensing is possible, all works should be licensed.<sup>75</sup> However, fair use has never been, and should never be, “fared use.”<sup>76</sup> Courts do not require a defendant to demonstrate that a plaintiff would not have been willing to license at a reasonable fee before finding a fair use. Nor should a custom of not licensing such works definitively establish the contrary—that such uses are fair. Fair use means

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70. Richard A. Epstein, *Some Reflection on Custom in the IP Universe*, 93 VA. L. REV. BRIEF 223 (2008) (responding to my work).

71. *Id.* at 224–25.

72. *Id.* at 225–27.

73. *Id.*

74. For a fuller response to Richard Epstein, see Jennifer E. Rothman, *Why Custom Cannot Save Copyright's Fair Use Defense*, 93 VA. L. REV. BRIEF 243 (2008).

75. See, e.g., PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 188–216 (2003); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614 & *passim* (1982) (advocating a test for fair use that requires a demonstration of “market failure”). I note that Professor Gordon in other work has suggested that copyright should be limited either in scope or by the First Amendment in ways that exceed this market failure analysis. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

76. Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 569 (2010).

more than simple market failure.<sup>77</sup> Regardless of whether reasonable licensing rates are available, not all uses of another's copyrighted works should be by permission or payment only. If in every instance where a license could be purchased, but is not, a court concludes that the "customary price" is not paid, and rejects a fair use, fair use will be dramatically narrowed.

Consider the fact that individual songs can now be purchased on iTunes and other services for ninety-nine cents. If this fee is considered the customary price, because people customarily pay the ninety-nine cents, then are all uses of songs without paying this fee unfair? Under the customary-price language, yes—even if a song is exchanged among close friends or family, used as background music for a classroom project, or displayed in slides by a copyright professor making a point. Even if there were a mechanism for easily paying for a license for such uses at reasonable rates, it is not appropriate to require payment in each of these instances. Consider a use in a slightly different context. Suppose that a documentary filmmaker wishes to include (without blurring the image or text) a poster of the hit boy band One Direction that one of his subjects has up on her bedroom wall. Why should One Direction or the holder of the copyright in the image receive any compensation for the appearance of posters that were lawfully purchased and actually hung in the documentary subject's room? Even if the filmmaker could obtain a reasonably priced license to display the poster in her movie, he should not have to ask anyone's permission or pay any fee to document his subject's reality. There are many instances in which the freedom of expression and association, and the rights of privacy and liberty demand that uses be permissible regardless of the functioning of licensing markets.<sup>78</sup>

The foregoing analysis does not mean that evidence about licensing is wholly irrelevant. The availability and ease of licensing is a relevant and useful inquiry in fair use. Evidence of frequent licensing can demonstrate the feasibility of licensing in a particular context and weigh against a finding of fair use. The key question, however, should be whether there is a reasonable and appropriate mechanism for obtaining the copyrighted work at a reasonable price in the required form, not the frequency (or infrequency) of licensing.

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77. *See id.* at 528–29, 532–33.

78. For a more in-depth discussion of some of these uses, see generally Rothman, *supra* note 76, in which I describe uses that should be protected under a liberty-based analysis.

This distinction is highlighted in the recent *Cambridge Press v. Becker* district-court decision.<sup>79</sup> In *Becker*, the court evaluated a fair use defense by Georgia State University for electronically copying and distributing works (or parts of those works) for use in online reserves accessible to students.<sup>80</sup> The court held that the fair use determination depended in large part on whether there was an easy way of getting an electronic copy of the required article or book chapter at a reasonable fee.<sup>81</sup> When digital formats were available at reasonable prices, the court concluded that the uses were less likely to be fair. In contrast, when no electronic copies were available or were offered only at unreasonable fees, a finding of fair use was much more likely.<sup>82</sup> Although I do not think the availability (or lack thereof) of such licensing should be dispositive of fair use, it certainly is relevant. Market failure can be an appropriate basis on which to find fair use (or perhaps craft a reasonable, compulsory licensing fee),<sup>83</sup> but the absence of market failure should not bar a fair use defense.

My focus here, however, is not on when licensing markets *should* be considered, but when they *should not* be considered in fair use analysis. The clearance culture described above and courts' reliance on such licensing practices have contracted the scope of fair use in concerning ways. One possible way to address this overreliance on risk-averse licensing practices is to codify an explicit rejection of cases like *Ringgold*. The fair use provision could explicitly state that the commonness of licensing should not determine commerciality or likely market harm. For example: "Evidence of whether licensing is customary in a particular context should not be considered." Given the discussion of other aspects of private ordering in this article, it might be useful to have a broader provision that would list a series of disfavored considerations in the fair use context.<sup>84</sup> Additional language could

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79. *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd on other grounds*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014). After the substantive editing of this Article was complete, the Eleventh Circuit issued its opinion in *Patton*. The appellate decision largely agreed with the market failure analysis of the district court. *See id.* at 1275–81.

80. *Id.* at 1201.

81. *Id.* at *passim*.

82. *Id.*

83. I am open to Jane Ginsburg's thoughtful idea to shift, in some limited instances, some fair use from an on/off switch to a "permitted, but paid" regime. *See* Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383 (2014). However, I am not convinced that only "new works" should benefit from "(free) fair use," nor that all "new works" should escape payment. Also, the boundaries of what constitutes a new work may be challenging to delineate.

84. *See* discussion *infra* Section VI.A.

clarify that the existence of a feasible and reasonably priced licensing market may nevertheless be considered as one among several considerations.

Changing the effect of customary licensing practices on fair use evaluations will provide an important and positive pushback against the dominant clearance culture. Parties will not have to license just because everyone else is doing it. Instead, they will only need to license when they otherwise think the use is not fair. The uncertainty of fair use may still drive some risk-averse licensing, but the feedback loop created by such licensing will be disrupted. Making fair use more predictable, adding safe harbors, and limiting the scope of statutory damages, as I discuss in Part VI, will also encourage assertions of fair use and more frequent and positive engagement with copyrighted works.

### III. THE PROLIFERATION OF USE GUIDELINES

In response to some of the uncertain areas of fair use and the clearance culture that has followed, a variety of private agreements and guidelines have been developed to set forth either safe zones of uses or parameters for compliance with fair use in particular arenas. There is a wide range of such “agreements,” “guidelines,” “statements,” and “codes.”<sup>85</sup> In some instances, companies set forth their own internal guidelines to facilitate corporate compliance with copyright law.<sup>86</sup> Industries and trade groups have also sought to insulate themselves from liability by agreeing in a more formal manner to a set of standard copying practices.<sup>87</sup> Sometimes these guidelines or agreements have developed with a broad base of parties, but more frequently only a few parties (often with common views) agree on what they think are appropriate uses of others’ copyrighted works. Unsurprisingly, owner-dominated groups have largely set forth restrictive guidelines and user-dominated groups mostly more permissive ones.

I will focus on two primary examples of such guidelines. The first is the Classroom Guidelines that were explicitly commissioned by Congress to provide guidance in the educational context. Members of Congress could not agree on statutory language to address the use of copyrighted works in the

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85. See Rothman, *supra* note 7, at 1916–24.

86. *Id.* at 1922.

87. See, e.g., Robert S. Bray, *Photocopying and Copyright: A Progress Report*, 48 SPECIAL LIBRARIES 100, 101–03 (1957) (Chairman of Photographic Reproduction Committee urging adoption of policy regarding library photocopying to avoid an “unfavorable incident” in which publishers sue); Excerpts of Record at 696–97, Roy Export Co. Establishment of Vaduz v. Columbia Broad. Sys., Inc., 672 F.2d 1095 (2d Cir. 1981) (Nos. 81-7027, 7109) (Testimony of Eaton); Heins & Beckles, *supra* note 10, at 20–21; Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973).

classroom, so they punted the issue to private parties to resolve. The second example is a series of best practices “statements” and “codes” put out by American University’s Center for Social Media. These statements claim to set forth guidelines (and a preferred approach) for evaluating fair use in different contexts in communities that frequently rely on the use of others’ copyrighted works. I will discuss each of these guidelines in turn.

#### A. THE CLASSROOM GUIDELINES

The most influential of the non-statutory copyright guidelines is the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions,” commonly referred to as the “Classroom Guidelines.” While drafting the fair use section of the 1976 Copyright Act, Congress recruited industry representatives, in particular publishers, to develop their own guidelines for what constituted fair use of writings and music in educational settings.<sup>88</sup> The chairman and other members of the subcommittee working on the copyright revision “urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material.”<sup>89</sup> Congress contended that “workable voluntary arrangements” were the preferable solution to questions regarding the scope of fair use, at least in the context of educational uses.<sup>90</sup> Unfortunately, the Classroom Guidelines were developed and negotiated primarily by large publishers and a few author organizations; educators, universities, and scholars were only minimally represented and students were entirely voiceless in the process.<sup>91</sup> No educator or university organization was a signatory to the Guidelines.<sup>92</sup> The American Association of University Professors and the American Association of Law Schools actively opposed the guidelines.<sup>93</sup>

In light of this history, these guidelines unsurprisingly take a narrow view of what sort of uses of copyrighted works are permissible in the educational

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88. The Author-Publisher Group, Author’s League, Association of American Publishers, Inc., and the Chairman of the Copyright Committee signed the resulting agreement on Classroom Guidelines. AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS, H.R. REP. NO. 94-1476, at 68–70 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681–83.

89. H.R. REP. NO. 94-1476, at 67, *reprinted in* 1976 U.S.C.C.A.N. 5680.

90. H.R. REP. NO. 90-83, at 33, 36 (1967); H.R. REP. NO. 94-1476, at 67–68, *reprinted in* 1976 U.S.C.C.A.N. 5680–82.

91. *See* Rothman, *supra* note 7, at 1918–19.

92. H.R. REP. NO. 94-1476, at 72, *reprinted in* 1976 U.S.C.C.A.N. 5685. *See also* Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522, 1535 n.10 (describing Peter Jaszi’s testimony that the guidelines were forced on educators).

93. H.R. REP. NO. 94-1476, at 72, *reprinted in* 1976 U.S.C.C.A.N. 5685.

context. The Guidelines provide that *single* copies of the following items may be made for or by teachers for use in teaching or research: “a chapter from a book, an article from a periodical or newspaper, a short story, short essay or short poem and a chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.”<sup>94</sup> Multiple copies, not exceeding one copy per enrolled student, are permitted under more limited circumstances where such uses are deemed to meet tests for brevity, spontaneity, and cumulative effect.<sup>95</sup> Brevity is defined as less than 250 words of a poem and a range of 500–2500 words of a prose work depending on its nature.<sup>96</sup> The copies must also include a notice of copyright.<sup>97</sup>

Although the Guidelines purport to set forth the minimum allowable uses, many universities, other educational institutions, and libraries have followed them as if they represent the maximum allowable uses.<sup>98</sup> Many universities have handed out the Guidelines to their professors and mandated conformity with them.<sup>99</sup> The Berkman Center for Internet & Society has estimated that 80% of American universities comply with the Guidelines.<sup>100</sup> Some universities will only defend professors against copyright infringement actions if they conform to the Guidelines, or if they act with the express

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94. H.R. Rep. No. 94-1476, at 68, *reprinted in* 1976 U.S.C.C.A.N. 5682.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 52 (1979) (treating Guidelines as if they provided binding rules for educational uses and suggesting without support that educators participated in development of guidelines).

99. *See, e.g.*, ACADEMIC PLANNING PROGRAMS AND COORDINATION, UNIV. OF CAL. OFFICE OF THE PRESIDENT, UNIV. OF CAL. POLICY: REPRODUCTION OF COPYRIGHTED MATERIALS FOR TEACHING AND RESEARCH (1986), *available at* <http://policy.ucop.edu/doc/2100007/ReproCopyrightMaterial> [hereinafter *U.C. Policy*]; ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 259 n.73 (1991) (describing Stanford University practice in the 1980s).

100. William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, BERKMAN CTR. FOR INTERNET & SOC'Y 57 (Aug. 10, 2006), *available at* <http://cyber.law.harvard.edu/home/2006-09>. The Classroom Guidelines are not the only copyright guidelines routinely followed. Similar Music Guidelines were developed to govern the use of musical works in classrooms. Many libraries also conform to the guidelines issued by CONTU (Commission on New Technological Uses of Copyrighted Works) governing Photocopying Under Interlibrary Loan Arrangements. CONTU Guidelines, *supra* note 98 (limiting photocopies to 5 articles per periodical title per year).

approval of university counsel.<sup>101</sup> Some universities go even further than the Guidelines and require that all material circulated in the classroom be accompanied by release forms or be purchased.<sup>102</sup> More recently, a few universities have bucked this trend. The University of Minnesota has chosen to defend professors if they reasonably believe fair use applies even if the use exceeds the Classroom Guidelines.<sup>103</sup> At the beginning of 2014, NYU withdrew its requirement that faculty comply with the Classroom Guidelines and the school now allows its faculty to conduct a fair use analysis in conjunction with the library staff and legal counsel.<sup>104</sup>

Courts have often (though not universally) viewed copying exceeding the Guidelines as unfair even though the Guidelines are not legally binding.<sup>105</sup> In *Basic Books, Inc. v. Kinko's Graphics Corp.*,<sup>106</sup> for example, Kinko's infringement was viewed as bad faith in part because Kinko's in-house handbook noted that its copying practices exceeded the standards of the Classroom

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101. See, e.g., *U.C. Policy*, *supra* note 99; FIN. AND ADMIN. POLICIES & PROCEDURES, UNIV. OF VA., COPYING OF COPYRIGHTED MATERIAL (1987), available at <http://www.virginia.edu/polproc/pol/xvf1.html> [hereinafter *Virginia Policy*].

102. See, e.g., *Virginia Policy*, *supra* note 101.

103. See UNIV. OF MINN. PAGE FOR INSTRUCTORS, <https://www.lib.umn.edu/copyright/university-minnesota-instructors/> (last visited June 9, 2014).

104. Compare N.Y. UNIV., OFFICE OF THE PROVOST, STATEMENT OF POLICY AND GUIDELINES ON EDUCATIONAL AND RESEARCH USES OF COPYRIGHTED MATERIALS (2014), available at <http://www.nyu.edu/content/dam/nyu/compliance/documents/CopyrightedMaterials.1.6.14.pdf> [hereinafter *2014 NYU Policy*] with N.Y. UNIV., UNIVERSITY POLICY ON PHOTOCOPYING COPYRIGHTED MATERIALS (1983), available at <http://www.nyu.edu/content/dam/nyu/compliance/documents/photocopying.pdf> [hereinafter *1983 NYU Policy*] (requiring compliance with Classroom Guidelines and withdrawing the university's indemnification for failure to comply without express approval of counsel).

105. H.R. REP. NO. 94-1476, at 68, 70–71 (1976), reprinted in 1976 U.S.C.C.A.N. 5682–85 (noting that the Classroom Guidelines are not legally binding and are “not intended to limit the types of copying permitted under the standards of fair use under judicial decision”). Examples of courts that have relied on the Classroom Guidelines in fair use determinations include: *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996) (rejecting fair use defense in part because preparation of course packets exceeded Guidelines); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 919, 919 n.5 (2d Cir. 1994) (rejecting fair use defense when private-sector copying exceeded Guidelines); *Marcus v. Rowley*, 695 F.2d 1171, 1178–79 (9th Cir. 1983) (rejecting fair use defense because copying for class materials exceeded Guidelines); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530, 1535–37 (S.D.N.Y. 1991) (holding preparation of course packets not a fair use because violated Guideline's prohibition on anthologies). *But see* Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190, 1227–29 (N.D. Ga. 2012) (rejecting argument that the uses of copyrighted works were not fair because they exceeded the Guidelines), *rev'd on other grounds*, Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1283 (11th Cir. 2014) (agreeing with district court's rejection of the Guidelines).

106. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

Guidelines.<sup>107</sup> Thus, these guidelines that were intended to state a minimum floor of allowable uses have frequently set the ceiling on educational uses.

#### B. BEST-PRACTICES STATEMENTS AND CODES OF FAIR USE

Various use communities, in an effort to encourage and support greater assertion of fair use rights to counteract the dominant clearance culture, have recently begun to develop their own informal guidelines for fair use. In contrast to the Classroom Guidelines, these guidelines seek to encourage, rather than to limit, the use of copyrighted works. The most prominent example of such an approach is the Best Practices Statements and Codes produced by American University's Center for Social Media. These statements have been helpful in a number of ways, providing guidance to those who are lost in the fair use thicket (particularly documentary filmmakers) and ideally helping to insulate them against findings of willful infringement.<sup>108</sup> Many of these statements and codes were preceded by reports that usefully documented the fair use needs of particular communities.<sup>109</sup>

The *Documentary Filmmakers' Statement of Best Practices* (hereinafter "*Filmmakers' Statement*") is the oldest and most well known of these statements. It sets forth four categories of uses of others' copyrighted works that are likely fair in the context of documentary films. The privileged categories are critique or commentary, illustrative quoting, incidental uses (i.e., captured during the filming process), and uses in historical sequences.<sup>110</sup> Each of these categories contains a number of "limitations." Such limitations include, for example, in the context of the category approving the use of "copyrighted works of popular culture to illustrate an argument or point," a suggestion that documentarians should "assure that the material is properly attributed . . . [; that] quotations are drawn from a range of different sources[; that] each quotation . . . is no longer than is necessary to achieve the intended

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107. *Id.* at 1535–37, 1544–45 (holding that there was a willful infringement in the context of a violation of the classroom guidelines).

108. See Rothman, *supra* note 50, *passim* (providing a detailed discussion of the value and pitfalls of these statements).

109. See, e.g., Patricia Aufderheide & Peter Jaszi, THE GOOD, THE BAD, AND THE CONFUSING: USER-GENERATED VIDEO CREATORS ON COPYRIGHT (2007), available at [http://www.cmsimpact.org/sites/default/files/good\\_bad\\_confusing.pdf](http://www.cmsimpact.org/sites/default/files/good_bad_confusing.pdf); Patricia Aufderheide & Peter Jaszi, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 22 (2004), available at [http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES\\_Report.pdf](http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf).

110. CENTER FOR SOCIAL MEDIA, AMERICAN UNIVERSITY, DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 4–5 (2005), available at <http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use> [hereinafter *Filmmakers' Statement*].

effect; [and that] the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.”<sup>111</sup>

Another example of such guidelines is the *Code of Best Practices in Fair Use for OpenCourseWare* (hereinafter “*OpenCourseWare Code*”). The *OpenCourseWare Code* provides five categories of uses favored for fair use. Three of the five categories overlap with those set forth in the *Filmmakers’ Statement*: incidental uses, uses for critique and analysis, and illustrative uses. Two additional categories are then added that favor demonstrative or explanatory uses, and “assigned and supplementary materials.”<sup>112</sup> Once again each category contains a number of significant limitations. The category of uses of copyrighted works for demonstrative or explanatory uses, for example, is limited to circumstances when the use is not “cumulative,” there is “[n]o ready substitute [available] (including one that the instructor himself or herself could create with reasonable effort),” the extent of the use is appropriate, and attribution is provided where “reasonably possible.”<sup>113</sup>

The *Filmmakers’ Statement*, which was published in 2005, has had a positive effect in combating the clearance culture described in Part II.<sup>114</sup> After its adoption, various film industry gatekeepers, such as Errors & Omissions (“E & O”) insurers and production companies, reconsidered their policies and became more willing to insure, produce, and distribute documentary films that had not licensed all copyrighted material included within the films.<sup>115</sup> If a filmmaker claimed that the uses were fair and that he

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111. *Id.*

112. CENTER FOR SOCIAL MEDIA, AMERICAN UNIVERSITY, CODE OF BEST PRACTICES IN FAIR USE FOR OPENCOURSEWARE 10–14 (2009), available at <http://www.cmsimpact.org/ocw/> [hereinafter *OpenCourseWare Code*].

113. *Id.* at 13–14.

114. The *Filmmakers’ Statement* has not been as successful with bigger players in the industry or in the movie industry outside of documentary filmmaking. Many distributors still demand clearance, and the overall film and television communities remain very much at the heart of the clearance culture. Nor has compliance with the best practices statements stopped copyright holders from suing if they do not think a use is fair. *See, e.g.*, *Aguiar v. Webb*, No. 1:07CV1167371-2 (D. Mass.). In *Aguiar*, the plaintiff filed and pursued a copyright infringement suit despite the claim by the defendant that he had complied with the *Filmmakers’ Statement*. *See* Amended Complaint, *Aguiar v. Webb*, No. 1:07CV1167371-2 (D. Mass.) (filed on March 24, 2008); Answer to Restatement of Counterclaim, *Aguiar v. Webb*, No. 1:07CV1167371-2 (D. Mass.) (filed May 23, 2008). The case was eventually settled. Joint Stipulation of Dismissal with Prejudice, *Aguiar v. Webb*, No. 1:07CV1167371-2 (D. Mass.) (May 3, 2010).

115. Patricia Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY, Oct. 2007, at a. A number of other factors also likely contributed to a move away from the clearance culture, at least in the context of documentary films. In part, the public relations drive surrounding the *Filmmakers’ Statement’s* release may have been more effective than the statement itself. The development of legal clinics to support filmmakers if

or she had complied with the terms of the *Filmmakers' Statement*, then E & O insurers became willing to issue insurance.<sup>116</sup> Distributors and producers also became more willing to rely on fair use rather than to require by rote that all uses be licensed ones.<sup>117</sup> Shortly after the release of the *Filmmakers' Statement*, a number of filmmakers were able to release films at the Sundance Film Festival that had been threatened with removal from the program because of clearance problems.<sup>118</sup> Notably, Kirby Dick's film, *THIS FILM IS NOT YET RATED*, which used more than one hundred unlicensed movie clips, was screened and subsequently distributed theatrically and on home video.<sup>119</sup> PBS and the Independent Film Channel have relied on the *Filmmakers' Statement* to develop their own internal standards and practices.<sup>120</sup>

In addition to the successful push to increase assertions of fair use, there are many other potential benefits of these statements. The broad categories of uses (such as illustrative, incidental, historical, and critical), as well as some of the limitations (e.g., not using more than is necessary to make the relevant point) track current fair use law, are normatively appropriate, and provide clear guidance to non-lawyers.

Nevertheless, there are reasons to discourage the wholesale codification of these statements and codes, as well as their treatment by courts as setting the standard for fair use in a particular arena. First, like the Classroom Guidelines, the drafters of the best practices statements have thus far not included a particularly representative group of parties whose interests are affected by the particular uses. None of the best practices statements that I have reviewed has included representation of content providers whose work is most likely to be used. The *Filmmakers' Statement*, for example, did not bring into the process the parties whose works were most likely to be included in the documentaries. For example, no major movie studios or record companies were approached or included.<sup>121</sup> Although I agree with the

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they are sued has also been crucial, as has Stanford University's offer to insure any documentary filmmaker who could not obtain insurance but who had viable fair use claims. See Colette Voge, *Insurance Resource for Documentary Filmmakers*, STANFORD UNIV. CTR. FOR INTERNET AND SOCIETY BLOG (Feb. 27, 2007, 5:55 AM), <http://cyberlaw.stanford.edu/node/5209/>. Cf. Aufderheide & Jaszi, *supra*, at b (discussing Stanford University's Fair Use Project and its commitment to defend filmmakers who comply with the *Filmmakers' Statement*)

116. Aufderheide & Jaszi, *supra* note 115, at a, b.

117. *Id.*

118. *Id.*

119. *Id.*; Patricia Aufderheide, *How Documentary Filmmakers Overcame their Fear of Quoting and Learned to Employ Fair Use: A Tale of Scholarship in Action*, INT'L J. COMM. 26, 33–34 (2007).

120. Aufderheide, *supra* note 119, at 34; Aufderheide & Jaszi, *supra* note 115, at a.

121. See, e.g., *Filmmakers' Statement*, *supra* note 111, at 2; see also *OpenCourseWare Code*, *supra* note 113.

drafters that consensus would likely not have been reached had these big content providers been included, the failure to even try to include them in the discussion highlights the one-sidedness of the statements. Moreover, the fact that it is unlikely that the two (or, more accurately, many) different sides could agree on any common principles should raise serious flags about relying on these statements as expressions of the appropriate boundaries of fair use.

Even within the relevant use community there have been complaints that only a limited number of parties were brought to the table during the development of the statements. Both documentary filmmakers and librarians have raised concerns to me because their expressed views were not adequately reflected in the final statements or codes. Members of the Association of College & Research Libraries (“ACRL”) have expressed concerns that the *Code of Best Practices in Fair Use for Academic and Research Libraries*, developed by American University and the Association of Research Libraries, is not reflective of their needs or preferences, nor of the comments some of them had shared with the drafters of the Code.<sup>122</sup> I point this out not to address the substantive merits of the specific areas of disagreement between these groups of expert and equally well-intentioned librarians, but instead to highlight some of the concerns of adopting any of these statements as expressions of the scope of fair use in a particular context.

A second major concern with the statements is that in their drafters’ efforts to provide greater clarity to users, the specific guidelines sometimes exceed or narrow the boundaries of fair use beyond what is appropriate.<sup>123</sup>

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122. These opinions were conveyed to me at the 2012 annual meeting of the American Library Association, at which I spoke to members of the Copyright Discussion Group of the ACRL.

123. See Rothman, *supra* note 50, at 376–78 (discussing questionable interpretation of fair use). For purposes of this Article, I will not focus on this aspect of the best practices statements, though the lack of consideration of market harm in the fair use analysis is another basis not to adopt the statements as complete expressions of the boundaries of fair use. See *id.*; see also *Filmmakers’ Statement*, *supra* note 111, at 2; *OpenCourseWare Code*, *supra* note 113 (although noting that injury to copyright holders’ earnings has some relevance, listing only “transformativeness” and “amount used” as “core” considerations in determining fair use). Even though it is true that transformativeness has become increasingly important in recent years in fair use assessments, it has not completely replaced market harm as a consideration. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584–86, 616–17 (2008) (determining that 83.8% of the time the evaluation of market harm correlates with the outcome of dispositive opinions). The statements also sometimes ignore caselaw that is not favorable to the communities or uses addressed by the statements. For example, the *OpenCourseWare Code* does not address the course packet cases in which courts have held that the copying of assigned materials for course packets is not fair use. For a discussion of the course packet cases, see Rothman, *supra* note 7, at 1935, 1940, 1953–54.

Some of the statements limit uses beyond the requirements of copyright law and in ways that would be detrimental to various creative and educational communities if enforced. As mentioned, each of the statements contains express “limitations” on categories of uses that would otherwise be fair. Some of these limitations are overly restrictive.

One telling example limits incidental uses in circumstances that should be uncontroversially fair. The *Filmmakers’ Statement* limits incidental uses of music captured on film so that an editor and director cannot cut or edit a scene or sequence to the beat of the captured music or allow the music to spillover to another scene.<sup>124</sup> Cutting to the rhythm of the music is an integral part of the craft of filmmaking and allowing music from one scene to spill over during a scene transition is an important technique. If the music is captured incidentally, rather than purposefully, it should not matter how the filmmaker constructs the scene in post-production as long as the incidentally captured material is not substantially divorced from the situation in which it was first recorded. Cutting to the beat of the music or smoothing out a scene transition does not unmoor the incidentally copyrighted works from the setting in which the music was first captured.

Another example from the *Filmmakers’ Statement* is a principle that limits the ability to make documentary films that revolve around copyrighted works. The Statement requires that “[t]o support a claim that a use [of copyrighted works in a historical sequence] is fair, the documentarian should be able to show that . . . the film project was not specifically designed around the material in question.”<sup>125</sup> This suggestion is out of sync with the demands of filmmakers and even with the broad permitted categories of illustrative and historical sequences. Documentary projects should continue to be able to be designed around copyrighted works. For example, documentaries about 1950s television sitcoms, the Beach Boys, or the portrayal of gay characters in film and television are legitimate projects, even though each project would by necessity focus on copyrighted works. To throw all such films into a disfavored category is especially concerning when so much of our culture—that a filmmaker might want to comment on—is composed of copyrighted works. Based on conversations with several attorneys at legal clinics that frequently consider the best-practices statements, I suspect that the drafters of the best-practices statements would agree with my assessment that these uses should be fair and might even claim that such uses would fit within the protected zones of the Statement. Nevertheless, this confusion about how to interpret the Statement demonstrates the challenge of overlaying an

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124. *Filmmakers’ Statement*, *supra* note 111, at 5.

125. *Id.* at 5–6.

additional text, with its own share of ambiguities and missteps, on an already complicated fair use structure.

The Statements and Codes also impose additional burdens on users that are not required by copyright law and that have not been established as indicative of fair use. The *OpenCourseWare Code*, for example, places significant burdens on educators. Even though incidental uses of copyrighted works in open courseware are viewed as a category favoring fair use, educators must first try to remove copyrighted works from their materials before being able to claim fair use.<sup>126</sup> There is no explanation for why educators should have to make such an effort. If the use is fair, it should not be solely because the material was inseparable. The Code also limits illustrative and explanatory uses to one example or illustration per point.<sup>127</sup> As any experienced teacher knows, students learn through repetition—so why can't examples be cumulative? The Code also states that educators should not use copyrighted works if the educator could create other material independently or substitute non-copyrighted works. These limitations concede far too much ground to copyright holders and are not required by current fair use law.

The drafters of the best-practices statements also make a number of concerning statements about fair use that run throughout all of the statements and codes. Many of the statements suggest a preference for licensing when material is easily available at reasonable rates.<sup>128</sup> The *Filmmakers' Statement* requires all copyrighted works used in historical sequences to be licensed if licenses can be obtained at reasonable rates. This preference for licensing continues to make non-licensed uses suspect, the very opposite of what that the best practices statements were trying to achieve. By doing so, the best practices statements ironically further endorse a concept of fair use limited to situations involving market failure (in which licensing is not possible or the offered rates are unreasonable).<sup>129</sup>

My concern is not only with the ways the statements restrict fair uses, but also with instances in which the statements permit uses that either are not fair or at least are controversial and unsettled areas of fair use analysis. For example, the *Code of Best Practices in Fair Use for Online Video* deems virtually all uses fair because the commentary and critique category is read very

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126. *OpenCourseWare Code*, *supra* note 113, at 10–11.

127. *Id.* at 12–13.

128. *See, e.g., id.* at 13–14 (suggesting that if there is an available licensing regime educators should license demonstrative and explanatory uses, as well as supplementary and assigned readings).

129. I have previously critiqued this model of fair use. *See* Rothman, *supra* note 76, at 528–29, 532–33.

broadly.<sup>130</sup> In the report supporting this code, the drafters suggest that a mashup titled Clint Eastwood's "The Office," which mixed together clips from the television series *The Office* with the movie *Evan Almighty*, would be a fair use.<sup>131</sup> This conclusion was based on an assessment that such a use would fit within the favored category of commentary or critique.<sup>132</sup> Although it may not be immediately apparent how this mashup is a commentary, the contention is that this user-generated content shows what it would be like if Clint Eastwood directed an episode of *The Office* and therefore provides a cultural commentary on the two films and Eastwood as well.<sup>133</sup> This analysis opens the door so wide that there can be no market for licensing material for such mashups. I do not think fair use demands such a broad reading. There is at least a colorable argument that such mashups would cause significant market harm and interfere with new business models for content creators. Not all mashups are infringing, but neither are they all fair.<sup>134</sup> This is still a developing area and one private group with its own particular interests should not determine the scope of fair use in this context for everyone.

Thus far, courts have not given credence to (or rejected) these best practices statements and codes. Parties nevertheless are beginning to cite them more frequently in their briefs as a basis for asserting fair use.<sup>135</sup>

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130. CTR. FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (2008), available at [http://www.cmsimpact.org/sites/default/files/online\\_best\\_practices\\_in\\_fair\\_use.pdf](http://www.cmsimpact.org/sites/default/files/online_best_practices_in_fair_use.pdf).

131. CTR FOR SOCIAL MEDIA, RECUT, REFRAME, RECYCLE: QUOTING COPYRIGHTED MATERIAL IN USER-GENERATED VIDEO 7–9 (2008), available at [http://www.cmsimpact.org/sites/default/files/CSM\\_Recut\\_Reframe\\_Recycle\\_report.pdf](http://www.cmsimpact.org/sites/default/files/CSM_Recut_Reframe_Recycle_report.pdf).

132. *Id.* at 8 (classifying this mashup as a "meta-commentary" that fits within the preferred category of "negative or crucial commentary").

133. *Id.*

134. The Department of Commerce's Internet Task Force has remained neutral on the issue and has called for further discussion and roundtables on the issue. DEP'T OF COMMERCE, *supra* note 4, at 3, 28–29, 101.

135. *See, e.g.*, Brief of Appellees at 15–16, 54, *Cambridge Univ. Press v. Albert*, Nos. 12-14676-FF, 12-15147-FF (11th Cir. argued Nov. 19, 2013) (citing the Copyright Clearance Center's ("CCC") fair use checklist and citing the CCC's "White Paper" dated March 2011 titled "Using Electronic Reserves: Guidelines and Best Practices for Copyright Compliance," arguing the district court correctly applied fair use because the electronic use of one book chapter is a "best practice"); Reply Brief of Appellants, *Cambridge Univ. Press*, at 25 n.6 (citing to the CCC's White Paper, arguing that the district court erroneously applied fair use because the CCC "advises the opposite of what the district court did"); Brief for American Library Association et al. as Amici Curiae Supporting Affirmance, *Cambridge Univ. Press*, at 4, 6–10, 13–14, 18, (citing and quoting the Code of Best Practices in Fair Use for Academic and Research Libraries, asserting fair use on the basis that the university's electronic reserves policy "[e]mbodies [w]idespread and [w]ell-[e]stablished [b]est [p]ractices in [f]air [u]se"); Brief for Org. for Transformative Works et al. as Amici Curiae Supporting Appellee and Cross-Appellant Stephanie Lenz, *Lenz v. Universal Music Corp.*, Nos. 13-16106, 13-16107,

Although the drafters of the statements point out that they do not intend the statements to set forth the full scope of fair use, courts may view uses that exceed the limits of these statements as suspect. This is exactly what we have seen happen elsewhere—as with courts’ treatment of violations of the Classroom Guidelines and dominant industry licensing practices. The possibility that the best-practices statements will set the ceiling rather than the floor of fair use is particularly concerning given some of the problematic limits set forth within the codes and statements.

### C. LIMITING THE ROLE OF PRIVATE FAIR USE GUIDELINES

Despite my concerns about the best-practices statements and the problematic history of the Classroom Guidelines, both of these types of guidelines are useful. They are informative and highlight potential areas of fair use needs in given communities. Any reforms to the Copyright Act should continue to allow room for the development of such statements. The law, however, should clarify that courts should not be bound by these guidelines when deciding fair use. Neither compliance nor noncompliance with the statements and other private fair use guidelines should provide a basis to find or reject fair use. As with the risk-averse clearance-culture practices, the law should not lock in these aspects of private ordering.

Government agencies involved in copyright laws and policies have increasingly referred to these private fair use guidelines, but have not fully engaged with either their benefits or pitfalls.<sup>136</sup> The Department of Commerce recently stated that it “supports private efforts to explore the parameters of fair use, and notes that best practices produced with input from both user groups and right holders can offer the greatest certainty.”<sup>137</sup> Even though the Department of Commerce has stated its support of such guidelines in theory, it appropriately noted that the guidelines would be only minimally useful in creating safe spaces for “fair” uses unless a variety of

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at \*28 (9th Cir. appeal docketed May 31, 2013) (arguing that Universal Music can make fair use assessments before issuing takedown notices by relying on American University’s Best Practices Statements); Brief for American Library Association et al. as Amici Curiae Supporting Appellees and Affirmance at 5–6, 17–19, *Authors Guild, Inc. v. HathiTrust*, No. 12-4547, 2014 WL 2576342 (2d Cir. 2014) (arguing that HathiTrust Digital Library’s uses were fair because they were consistent with the Code of Best Practices in Fair Use for Academic and Research Libraries). *But see* Mot. to Dismiss Second Amend. Compl., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), at 5 (arguing against using Electronic Frontier Foundation’s “Fair Use Principles for User Generated Video Content,” because the principles are not found in the Copyright Act).

136. DEP’T OF COMMERCE, *supra* note 4, at 22–23, 29, 65 (pointing to American University’s fair use guidelines and the fair use checklist created at Columbia).

137. *Id.* at 23.

parties on different sides of the issues were represented in the guidelines' development.<sup>138</sup>

#### IV. ALTERNATIVE OVERLAYS TO COPYRIGHT: THE CREATIVE COMMONS APPROACH

The difficulty of determining the limits and exceptions to copyright law, which has driven both the clearance culture and the various private guidelines discussed in Parts II and III, has encouraged several other efforts to provide a greater ability to use copyrighted works. Instead of focusing on the users, some efforts have focused on creators who would prefer a copyright law that is more permissive and that makes it easier for third-parties to use and share works. One of the most successful of these efforts is Creative Commons. Creative Commons is a nonprofit organization that was formed in 2001 with the idea of layering an alternative, formalized licensing regime on top of existing copyright law.<sup>139</sup> Creative Commons's mission is to provide greater freedom to use works than the defaults of copyright law. The project has been tremendously successful. Hundreds of millions of works have been licensed using Creative Commons licenses.<sup>140</sup> Major bands and recording artists, such as Nine Inch Nails and David Byrne, have used these licenses, as have Al Jazeera, Google, the California Digital Open Source Library, and even the White House.<sup>141</sup> The most common Creative Commons licenses require attribution but permit noncommercial derivative works or adaptations if the new work is distributed in a share-alike manner—i.e., under the same Creative Commons licensing regime under which it is licensed.<sup>142</sup>

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138. *See id.*; *see also* Rothman, *supra* note 7, at 1972–73.

139. *See* CREATIVE COMMONS, <http://creativecommons.org/> (last visited June 9, 2014).

140. Brief for Creative Commons Corporation et al. as Amici Curiae Supporting Plaintiff-Appellant at 1–2, *Jacobson v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008).

141. *Id.* at \*1; *Who Uses CC?*, CREATIVE COMMONS, <http://creativecommons.org/who-uses-cc/> (last visited June 16, 2014); *S.B. 1053 Creates the California Open Source Digital Library*, CREATIVE COMMONS, [http://wiki.creativecommons.org/S.B.\\_1053\\_Creates\\_the\\_California\\_Open\\_Source\\_Digital\\_Library/](http://wiki.creativecommons.org/S.B._1053_Creates_the_California_Open_Source_Digital_Library/) (last visited July 23, 2014).

142. *License Statistics*, CREATIVE COMMONS, [http://wiki.creativecommons.org/Metrics/License\\_statistics/](http://wiki.creativecommons.org/Metrics/License_statistics/) (last modified Mar. 2, 2014, 3:46 PM). Attribution is now a requirement of all Creative Commons licenses, but it started out as an option that licensors could choose. Creative Commons defines a derivative work as a “work based upon the Work or upon the Work and other pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be recast, transformed, or adapted . . . .” *License*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-nd/3.0/us/legalcode/> (last visited June 29, 2014).

Creative Commons is not intended to replace copyright law, but instead provides an easy way to tailor the scope of copyright for particular creators who only want to exercise some, rather than all of the exclusive rights that copyright provides.<sup>143</sup> The Creative Commons motto is “some rights reserved,” as opposed to copyright law’s traditional “all rights reserved.”<sup>144</sup> Creative Commons is an important intervention in the one-size-fits-all approach to copyright and one that does not need codification. It both facilitates the enactment of particular authors’ preferences and the communication of those preferences to potential users.

Copyright law should support alternative regimes like Creative Commons. This can largely be done by staying clear of the fray. Nevertheless, there are some ways that future copyright revisions could support (or at least not discourage) the adoption of Creative Commons and other alternative licenses. In particular, it would be helpful to clarify that a violation of a Creative Commons license or other private overlay does not put a user in a worse position than if she had used a copyrighted work that was not put out under such a license. Although the legal code to the Creative Commons licenses expressly states this, it is not clear that courts or litigants will so interpret the effect of these licenses.

Under the current regime, users might avoid Creative Commons–licensed works, particularly if they know they cannot comply with the terms of the licenses.<sup>145</sup> Many users cannot comply with the share-alike provision, particularly when it limits uses to those that are noncommercial.<sup>146</sup>

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143. See CREATIVE COMMONS, <http://creativecommons.org/> (last visited June 9, 2014). There have been a number of smaller scale efforts to provide alternative visions of copyright law. The American Library Association as early as the 1970s started distributing journals with notices that the journals could “be photocopied for the noncommercial purpose of scientific or educational advancement” without permission. See NAT’L COMM’N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 51 (1979).

144. Creative Commons licenses also allow for the dedication of works to the public domain. In these instances, rather than “some rights [being] reserved,” “no rights [are] reserved.” See CREATIVE COMMONS, <http://creativecommons.org/> (last visited June 9, 2014).

145. I have had several conversations with documentary filmmakers who have been reluctant to use works licensed under Creative Commons licenses once they realize that they cannot conform to the offered license, even if they have a strong fair use defense.

146. The term noncommercial is not defined, but has often been interpreted as uses that are for an economic profit. Creative Commons has determined that most Internet users consider something commercial when users earn money for the use (whether via online advertising or otherwise). See CREATIVE COMMONS, DEFINING “NONCOMMERCIAL”: A STUDY OF HOW THE ONLINE POPULATION UNDERSTANDS “NONCOMMERCIAL USE” 11–12 (2009). This interpretation of “noncommercial” means that documentary films distributed for any payment would be considered commercial.

Filmmakers, for example, even documentary filmmakers, usually seek some sort of commercial distribution for their projects. When deciding whether to rely on fair use of a Creative Commons work or fair use of a traditionally distributed one, users may avoid Creative Commons works. This is true for a variety of reasons.

First, as a practical matter, is a person who licenses under a Creative Commons rubric more or less likely to sue for a violation of that license? Those who use Creative Commons licenses may well wish to sue for copyright infringement if others use the works without following the licensing restrictions. Copyright holders who requested that the underlying works not be altered or distributed commercially may be particularly likely to sue parties who do so in contravention of expressed preferences.<sup>147</sup> On the other hand, creators who actively seek out the more permissive Creative Commons license for their work may be more sympathetic to users and less likely to sue for infringement.

Second, users may worry that a violation of the license will weigh against a finding of fair use. As discussed, this is a legitimate fear. When defendants exceed their own in-house guidelines or the Classroom Guidelines or fail to conform with industry licensing practices, courts are much more likely to reject a fair use defense.<sup>148</sup> A court may similarly disfavor uses that exceed the expressed preference of the creator/owner as set forth in the violated Creative Commons license. To the extent that fair use is sometimes thought of as an equitable doctrine that considers what is fair in a normative sense, courts and juries may be less inclined toward users who knowingly violate the express wishes of the copyright holder.<sup>149</sup> Even though the all-rights-reserved default of copyright law might also limit the intended use, a court might look more favorably on such a use because there was no express preference that was communicated and then violated.

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147. *See, e.g.*, Complaint at 3–9, *Gatehouse Media v. That's Great News, L.L.C.*, No. 10CV50165, 2010 WL 2960003 (N.D. Ill. June 30, 2010) (publisher of local newspapers disseminated electronically under a Creative Commons license sues for copyright infringement when a for-profit business uses reprints of articles and/or plaques with articles); Complaint at 3–4, *Foster v. Virgin Enters. Ltd.*, No. 2:14cv04113 (C.D. Cal. May 29, 2014) (suing for copyright infringement of photograph which had been offered under a noncommercial Creative Commons license when it was used by a commercial airline on its website without attribution, permission or payment); *Cards Against Humanity, L.L.C. v. Loftek Technological Co., L.L.C.*, No. C13-0727, 2013 WL 693441, at \*7 (N.D. Cal. February 19, 2013) (suing for copyright infringement, inter alia, for sale of knock-off card game when plaintiff's game had been issued under a Creative Commons license).

148. *See* discussion *supra* at Sections II.B & III.B.

149. *See* Rothman, *supra* note 7, at 1937–41, 1979–80.

To the extent that a fair use defense is rejected, the violation of the Creative Commons license could also serve as evidence of bad faith or willfulness which will throw the defendant into the higher statutory-damages range and open the defendant up to criminal liability. Few courts have considered the effect of Creative Commons licenses, though parties have filed an increasing number of complaints involving alleged violations of such licenses or seeking declaration of noninfringement on the basis of reliance on those licenses.<sup>150</sup> Notably, some have claimed that at least one entity is using Creative Commons licenses to lure users and then, when they take the bait, threatening to sue for copyright infringement.<sup>151</sup>

A final concern for potential users of works licensed under Creative Commons licenses is uncertainty over whether a breach-of-contract claim could exist for the violation of the license. The licenses suggest that only copyright claims remain if the license terminates,<sup>152</sup> but litigants have claimed that a breach of the license's provisions gives rise not only to a claim for copyright infringement, but also to a breach-of-contract claim.<sup>153</sup> Such a contract claim could potentially survive a finding that a use is fair.

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150. *See, e.g.*, *Promedical Inc. v. 3 Lions Pub'g Inc.*, No. 1:12-CV-1355, at \*3-7 (M.D.N.C. December 21, 2012) (seeking declaratory judgment for noninfringement of work when complied with Creative Commons license); Amended Complaint for Damages, *Dell v. Woodstream Corp.*, No. 09-CV-1010, 2009 WL 1952693 (N.D. Ga. April 21, 2009) (copyright infringement claim based on use of work licensed under a Creative Commons license); Original Complaint, *St. Luke's Episcopal Health Sys. v. 3 Lions Pub'g, Inc.*, No. 4:12-cv-3134, 2012 WL 5362417 (S.D. Tex. Oct. 22, 2012) (seeking declaratory judgment for noninfringement of work when complied with Creative Commons license); Complaint, *O'Neill v. John Wiley & Sons, Inc.*, No. CV11-8193, 2011 WL 4802875 (C.D. Cal. Oct. 3, 2011) (seeking punitive damages for use of photograph in violation of Creative Commons license); *see also infra* note 153.

151. *See, e.g.*, *Promedical*, No. 1:12-CV-1355, at \*3-7 (claiming that 3 Lions was a "copyright troll" that used Creative Commons licenses as bait); *see also St. Luke's*, 2012 WL 5362417.

152. The license is supposed to terminate upon breach. *See, e.g.*, *Creative Commons Attribution 3.0 United States License Legal Code*, <http://creativecommons.org/licenses/by/3.0/us/legalcode/> (last visited July 25, 2014).

153. *See, e.g.*, First Amended Complaint, *GateHouse Media, Inc. v. That's Great News, L.L.C.*, No. 10CV50165, 2010 WL 2960003 (N.D. Ill. June 30, 2010) (suing for both copyright infringement and breach of contract for the violation of a Creative Commons license and the commercial use of copyrighted news stories); *Gatehouse Media Mass. I, Inc. v. N.Y. Times Co.*, No. 1:08-12114-WGY, 2009 WL 301807 (D. Mass. Jan. 22, 2009) (same); *cf. Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) (holding that limits on use of copyrighted work provided in alternative license were conditions the violation of which could give rise to an action for copyright infringement). Creative Commons filed an amicus brief in *Jacobson* advocating for the position that the Federal Circuit ultimately took. Violations of Creative Commons licenses give rise to copyright-infringement actions. Brief for Creative Commons Corporation et al. as Amici Curiae Supporting Plaintiff-Appellant at 6, 11, *Jacobson*, 535 F.3d 1373. The brief did not address the question of whether there could

Another concern with Creative Commons licenses that I have previously observed is that courts may import Creative Commons norms into evaluating the scope of copyright more broadly.<sup>154</sup> It would not be surprising, particularly as Creative Commons licenses become more popular, for courts to suggest that because a Creative Commons license is available and an author did not adopt one, that the copyright holder wants a stronger form of copyright. Again, this is not the intention of Creative Commons, but it nevertheless may influence courts' analysis. Courts should not consider the fact that a person has chosen not to employ a Creative Commons license as somehow revealing a narrower scope of fair use or a broader view of copyright.<sup>155</sup>

Government agencies have begun to recognize the popularity of Creative Commons licenses and the possibility that alternative licensing regimes will layer on top of existing copyright law.<sup>156</sup> The government, however, has not provided an in-depth analysis of how formal law should address these agreements. The Copyright Act could explicitly state that violations of such licenses—say by sharing, but not sharing alike—should not weigh in favor of finding copyright infringement, rejecting a fair use defense, or making a finding of willful infringement. An added provision that excludes consideration of licensing and private guidelines could also exclude consideration of alternative licensing mechanisms available to authors in the context of fair use evaluations.<sup>157</sup> The statute could also clarify when a breach of contract involving a copyrighted work gives rise to a copyright infringement claim and a contract claim, or only one or the other. As I will discuss in the following Part, such language could also address the broader issue of violations of consumer contracts. The Creative Commons legal team could address some of these concerns privately by agreeing to defend or at least file supporting amicus briefs on behalf of defendants who risk additional penalties or the rejection of a fair use defense on the basis of a violation of a Creative Commons license. Nevertheless, having copyright law directly tackle the issue may provide greater support for these alternative

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be a separate breach-of-contract claim nor the effect on licensors who may unreasonably seek to recover for copyright-infringement damages even when a party has complied with a Creative Commons license. These issues are likely to be litigated over the next few years, but Congress may wish to anticipate some of these likely conflicts.

154. Rothman, *supra* note 7, at 1979–80.

155. *See, e.g.*, First Amended Complaint at n.11, *Korpi v. Apple, Inc.*, No. 11CV00906, 2012 WL 3137659 (W.D. Tex. May 16, 2012) (noting that plaintiff did not choose to distribute her work under the more liberal Creative Commons license).

156. Pallante, *supra* note 1, at 333–34; DEP'T OF COMMERCE, *supra* note 4, at 29 (suggesting Creative Commons licenses could be a useful way to authorize remixes).

157. *See* discussion *supra* at Section II.C & *infra* Section VI.A.

regimes. In addition, as I will discuss in Part VI, the Copyright Office could provide more choices for authors to opt in or out of particular aspects of copyright law through the registration process, potentially including a Creative Commons license option.<sup>158</sup>

## V. USING TECHNOLOGY AND CONTRACTS TO ALTER COPYRIGHT'S TRADITIONAL BOUNDARIES

The last category of private ordering I will address is the effort by content creators to enforce their copyrights in the online and digital environment, as well as to restrict uses of those works, including uncopyrightable aspects. There are two dominant mechanisms for doing so: using technology to restrict uses and expand enforcement, and using contract law to limit permissible uses. The shift to digital formats has facilitated the use of technology to monitor and control uses of works. It also has allowed works to be distributed subject to clickwrap (or browsewrap) licenses that limit uses of those works.<sup>159</sup> This digital shift has often moved consumers from owners of physical copies to mere licensees of digital files.

In contrast to the other types of private ordering discussed thus far, these practices are driven primarily by content providers that seek to expand the control they have over their copyrighted works. Much has already been written about this aspect of private ordering and an in-depth engagement with these myriad complex issues is beyond the scope of this project.<sup>160</sup> Nevertheless, it is a vital area to identify and address as part of any project to revise copyright law. I will briefly discuss the role of technology and contracts, and suggest that the Copyright Act needs to intervene to prevent copyright law and its underlying public-minded policy goals from becoming obsolete.

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158. See discussion *infra* Subsection VI.B.2.

159. Clickwrap licenses require online users to click to indicate their agreement to various license terms. A browsewrap license is provided on a website, but consumers may or may not read it and do not ever explicitly agree to its terms; instead, the website operator claims to bind the user merely by virtue of the user visiting the website.

160. See, e.g., Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008); Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495 (2004); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 93 (1998); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93 (1997).

A. TECHNOLOGICAL PROTECTION MEASURES AND DIGITAL RIGHTS MANAGEMENT

Content creators and owners have increasingly turned to technology to limit uses of their works and to prevent unlawful mass copying of their content online. Technology has been used in a variety of ways to restrict what can be done with copyrighted works and to identify, track, and remove uses of copyrighted works online. Often such technology is put under the broad term of technological protection measures (“TPM”), which applies to many different types of technology that control both access to and uses of copyrighted works. Sometimes the term digital rights management (“DRM”) is also used to describe technology that manages access to works, and tracks and limits uses of those works.<sup>161</sup> Manufacturers embed works with various digital marks when they are initially distributed. For example, CDs, DVDs and other digital audio and video files are often digitally watermarked. The watermarking allows content owners and others to trace back copies to their original source. Television studios also embed shows with digital bits (known as broadcast flags) that can be used to scan for these files if they are copied or uploaded online.

TPM and DRM make a lot of sense in the online world and pave the way for a workable and highly profitable online environment for professional content providers. They also allow content creators to price-discriminate based on the types of uses consumers would like to make of copyrighted works. These are all valuable features that are worth permitting. However, if left unchecked, these technologies threaten to profoundly alter the way we engage with copyrighted works and not always for the better.

Restrictive TPM and DRM raise a variety of concerns. First, content owners can use technology to effectively eliminate the first sale doctrine in the online context, by preventing the sharing or future sale of books and music—historically permissible and protected activities. When a person purchases a physical copy of a book, she can pass it on to a friend, mate, or her heirs after her death. The book can provide continued intellectual sustenance to second-comers and a shared experience across generations. Now, an individual cannot easily give a book downloaded to a Kindle or other digital device to a friend (unless the friends use devices that are registered to the same account) and it is not entirely clear whether a Kindle

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161. TPM is also sometimes referred to as “technical protection measures.” The terms TPM and DRM are often used interchangeably, although DRM can be used more broadly for digital rights management that includes notices of rights or contract terms (sometimes this is also called RMI or “rights management information”). For purposes of this discussion, I am focusing primarily on the terms’ overlapping areas of meaning.

library can be passed on to heirs.<sup>162</sup> In fact, users do not even own the books downloaded to a Kindle but simply license them.<sup>163</sup> Libraries are particularly concerned that this shift from an ownership world to one of licensees may prevent libraries from loaning books in the future—at least in digital formats.<sup>164</sup> This sea change in the way we interact with books may be acceptable and market pressures may provide consumers with a variety of choices in the long run, but we should carefully consider the broader implications and whether this is the system that we want.

Second, TPM can limit the ability to make fair uses of works. For example, TPM prevents (or at least significantly restricts) professors from copying excerpts of DVDs for use in class, documentarians from using clips for illustrative or other purposes in a film, and average citizens and artists from making a collage of digital magazine photos for fun, for a class project, or in an artwork. Each of these uses is likely fair, but various technologies prevent or at least obstruct such uses. The Digital Millennium Copyright Act (“DMCA”) worsens this problem by criminalizing the circumvention of TPM, even if the underlying uses of the works would otherwise be permissible—such as copying facts or making a fair use of a work. Although the Copyright Office has approved some exceptions to the anticircumvention provisions through the regulatory process (including exceptions for documentary filmmakers and educators), these exceptions are limited in scope and temporary.<sup>165</sup>

Not only does TPM limit how one can use copyrighted works, but these technologies also fundamentally alter the landscape of enforcement of copyright law. Uses that were never traceable in the analog world are easily identifiable and stoppable in the digital world. Content-identification software allows content owners and Internet service providers to easily identify and remove copyrighted works from the Internet even if the uses of those works are fair. Programs can identify copyrighted songs, images, and videos. Viacom and Google (on behalf of YouTube) recently made a deal to

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162. Susan from 29, *e-Books: Who Owns My Digital Library?*, DAILY KOS (May 8, 2013, 11:00 a.m.), <http://www.dailykos.com/story/2013/05/08/1205979/-e-books-who-owns-my-digital-library/>. I note that some sharing of books that are in the public domain may be permitted.

163. See generally Michael Seringhaus, *E-Book Transactions: Amazon “Kindles” the Copy Ownership Debate*, 12 YALE L.J. & TECH. 147 (2009) (arguing that ebook transactions should be treated as sales to promote public welfare).

164. *Digital Rights Management (DRM) & Libraries*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/advocacy/copyright/digitalrights> (last visited June 17, 2014).

165. See, e.g., Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

remove copyrighted Viacom material from YouTube—without considering whether various uses might be fair, rather than infringing.<sup>166</sup> This technology is driven by legitimate efforts to stop online piracy (which I define as the wholesale taking and distribution of entire copyrighted works with the intent of supplanting the market for the original). However, the software sweeps much more broadly. For example, the software may remove video clips that have copyrighted music playing in the background while a child shows off his dance moves or that contain brief excerpts of Fox News broadcasts that have been gathered together to point out various factual errors.<sup>167</sup> Not all content-identification software removes material. One alternative business model, often adopted by record labels, is to advertise alongside the use of the copyrighted work—either to generate ad revenue or to sell downloads of the song that is used in a video—rather than to remove the unlicensed uses.

The software that identifies and removes copyrighted content could be programmed to allow some breathing room for fair uses, but often it is not. For example, NBC developed very successful software to stop piracy of its coverage of the 2012 London Olympic games. NBC designed the software to remove all material no matter how short in length. If a person posted to her blog a short clip of an amazing vault from the women's gymnastics competition that she found inspirational, NBC would have it taken it down. If a father posted the last lap of his son's winning freestyle gold medal swim, the software would take it down. NBC could have designed the program to allow such short clips, but it did not.<sup>168</sup> Major content providers simply are not concerned with preserving a space for fair use by consumers, even if they are interested in being able to rely on fair use themselves.

Not every one of the examples I have given in this discussion is uncontroversially fair, but many similar uses have historically been permitted

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166. See Meg James, *Viacom and Google Settle Massive Copyright Lawsuit*, L.A. TIMES (Mar. 18, 2014), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-viacom-and-google-settle-copyright-lawsuit-20140318-story.html> (describing as part of the settlement agreement a private deal to monitor and remove Viacom's copyrighted works, a deal that has been made with approximately 5000 other copyright holders).

167. Cf. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), *appeal docketed*, No. 13-16107 (9th Cir. May 31, 2013) (seeking a declaratory judgment of noninfringement of Prince's song after UMG sent a take-down notice for her video of her son dancing to Let's Go Crazy). To see the original video and consider whether it was a substitutionary use of Prince's song, take a look at <http://www.youtube.com/watch?v=N1KfJHFwIhQ>. Also consider the video at <http://www.youtube.com/watch?v=gYsGCNMdvzU> (lampooning various Fox News errors in their graphics).

168. This information is based on a series of conversations with Glenn Reitmeier, Senior Vice President for Advanced Technology, NBC Universal, during *The Evolving Internet* symposium at the University of Pennsylvania on October 19–20, 2012.

(offline), even if only because of enforcement hurdles.<sup>169</sup> Current and developing technology combined with the shift to digital formats will make many uses of copyrighted works that we used to take for granted very difficult, if not impossible. As part of the review process we need to do some serious soul searching about whether we want personal uses of copyrighted works to be a thing of the past or be limited only to the analog world. If we take seriously the needs of “readers, viewers, listeners, watchers, builders and inhabitants,” as Jessica Litman has powerfully advocated, then the law needs to protect a space for both personal and other fair uses in the digital arena.<sup>170</sup> Although I do not think that all personal uses should be exempted from copyright enforcement, there must be some breathing room built into copyright law that protects self-expression, freedom of speech, historical documentation, cultural and intimate communication, and religious worship.<sup>171</sup> Concerns over piracy are legitimate, but must be balanced with concerns over the harms that follow from what Lawrence Lessig has dubbed a “lock[ed] down culture.”<sup>172</sup>

The current Register of Copyrights, Maria Pallante, has recognized that some of these “voluntary [DRM] initiatives” may be helpful in the enforcement of copyright.<sup>173</sup> The Department of Commerce has “encourage[d] stakeholders to continue to work together to develop identification and filtering systems . . . .” However, the Department of Commerce importantly added that these efforts should be “consistent with rights to due process and free expression.”<sup>174</sup> Unfortunately, thus far, the content industries are not proactively providing space for fair use online. Given the market failure in this arena and the importance of allowing individuals to engage with copyrighted works in a variety of ways in the digital space, statutory intervention may be necessary to assure that content providers respect the needs of their viewers, listeners, readers, and other creators. Revisions to the Copyright Act must engage with this tension,

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169. See Rothman, *supra* note 76, at 472–73.

170. See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1880 & *passim* (2007). Although I agree with Professor Litman’s overarching point, I have argued that the private-public dimensions and commercial-noncommercial dimensions of the analysis should not determine whether uses are personal. See Rothman, *supra* note 76, at 472–74.

171. See generally Rothman, *supra* note 76 (promoting a liberty-based lens for copyright law and suggesting preferred categories of uses of copyrighted works).

172. Lessig, *supra* note 10.

173. Pallante, *supra* note 1, at 326.

174. DEP’T OF COMMERCE, *supra* note 4, at 67.

rather than avoid the issue and simply let the market take care of itself.<sup>175</sup> Given the underlying goals of promoting progress and incentivizing new works, as well as the important constitutionally protected values of free speech, liberty, and privacy, copyright law should build in protections for fair use. Content owners and providers should not be able to terminate fair use in the digital sphere.

#### B. CONTRACTING AROUND COPYRIGHT

Consumer contracts have augmented and expanded the lock-down world created by these technological measures. Nonnegotiable contracts of adhesion have become the standard way to disseminate copyrighted works on digital platforms. Most consumers never read these contracts (even when they click a box agreeing to the terms) and do not realize that the contracts fundamentally alter what they can do with copyrighted works. Many contracts prohibit sharing the work with other family members, reselling the work, using the underlying data, reverse-engineering, or making any other fair use of the work.<sup>176</sup> All of these uses are otherwise expressly permitted by the Copyright Act.<sup>177</sup> Even outside the mass-market context, parties have tried to secure rights through contracts that are broader than copyright provides.<sup>178</sup> Some of these contracts potentially create negative externalities for society and stand in opposition to the public-minded goals of copyright law.

Courts have come to a variety of conclusions about the legitimacy and implications of these types of contracts. In *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit upheld a shrinkwrap license provision that restricted the copying of uncopyrightable facts.<sup>179</sup> Other courts and commentators have disagreed with the holding of *ProCD* in similar contexts.<sup>180</sup> The question of

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175. See generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998) (criticizing the *Lochner*-like approach to digital rights management and advocating for greater protection of broader "social welfare").

176. See generally Viva R. Moffat, *Super Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45 (2007) (recommending preemption as a solution to these pernicious adhesion contracts); Michael E. Kenneally, *Commandeering Copyright*, 87 NOTRE DAME L. REV. 1179 (2012) (examining and largely criticizing the widespread use of contracts to "reassign, on a massive scale, the entitlements initially assigned by copyright").

177. See 17 U.S.C. §§ 102, 107, 109 (2012).

178. Cf. *C.B.C. Dist. & Mktg. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (Major League Baseball sought unsuccessfully to enforce a contract provision that precluded the future right of C.B.C. to use players' names and team names in a fantasy sports league), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

179. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). A shrinkwrap license is one that is agreed to by opening the packaging of a product, often computer software.

180. See, e.g., *Veeck v. Southern Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (holding that a defendant could copy and distribute building codes despite license that

the validity of these contracts and, more broadly, contract provisions that exceed the limits of copyright law is still unresolved.

The issue of what remedies are appropriate for breached copyright licenses is also unclear. In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, the Ninth Circuit held that a defendant who had violated a contract provision could be held liable for breach of contract, but not copyright infringement, because the violation was of a covenant, not a condition.<sup>181</sup> The Ninth Circuit distinguished between conditions of licenses and covenants, holding that only a violation of the former could be held to infringe a copyright. The court, concerned about unreasonable expansions of copyright law to the detriment of the public, limited copyright infringement to violations of the contract that implicated one of the exclusive rights provided by copyright.<sup>182</sup> If an exclusive right provided for by copyright law was not violated, only a breach of contract claim would remain. How this rule will be applied in future cases and whether other courts should or will agree with the Ninth Circuit's analysis has not yet been resolved, and it may well be an issue that is better resolved legislatively than judicially.

Another issue raised by contracts in the digital sphere is whether there is a digital first sale doctrine. The first sale doctrine offline permits purchasers of copyrighted works to sell or give those works to others.<sup>183</sup> The question of whether this doctrine should translate to the digital world is contested. In the digital context, consumers often think they are purchasing works when they are instead only granted a license to use them. These licenses restrict the ability to transfer works. Courts have struggled with the question of whether licenses (particularly those distributed online) can limit the first sale doctrine. In *Vernor v. Autodesk, Inc.*, the Ninth Circuit rejected the idea of a digital first sale doctrine (at least where a license was involved) and held that the defendant was a licensee rather than the owner of computer software that he had purchased.<sup>184</sup> In that decision, the Ninth Circuit left it to Congress to

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limited such uses); *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (holding clickwrap license unenforceable); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (holding that shrinkwrap license did not form an enforceable contract); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 3.04[B][3][a] (2014); Mark Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995).

181. *MDY Indus., LLC v. Blizzard Entm't, Inc.* 629 F.3d 928 (9th Cir. 2010).

182. *Id.* at 940–41.

183. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (holding that a copyright owner could not control the distribution right after a sale despite a notice in the front of the book that it could not be resold for less than one dollar). The Supreme Court in *Bobbs-Merrill* did not decide whether a license could be used instead of a sale to limit uses and preclude a transfer of ownership. At least some appellate courts think that such licenses would be permissible. *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

184. *Id.*

address some of the broader policy questions at issue—both whether the first sale doctrine should be preserved in the digital environment and also whether licensing could be used to circumvent it.<sup>185</sup> This treatment contrasts with recent decisions in the offline context. For example, the Ninth Circuit rejected a claim by the record labels that promotional CDs were only provided under a licensing regime and held that the recipients could transfer the CDs without infringing copyrights.<sup>186</sup> Both the Department of Commerce and Register of Copyrights have recognized that the limitations on the first sale doctrine in the digital context require further study and review.<sup>187</sup> Maria Pallante has suggested that “Congress may not want a copyright law where everything is licensed and nothing is owned.”<sup>188</sup> The primary mechanism to prevent such a future is through copyright legislation.

In sum, the vast control asserted by content providers through contracts and technology is growing and threatens the limiting principles of copyright law. Revisions to the copyright act must address these aspects of private ordering to prevent much of copyright’s public-minded framework from fading into the background.

## VI. LEARNING FROM PRIVATE ORDERING

Private ordering can serve as a laboratory for the development of different approaches to addressing the challenges presented by copyright. Many use communities have developed a variety of norms and practices that suggest some common preferences for how people would like their creative works to be used. These norms have developed in the shadow of the law, but are not always driven by efforts to conform to the law or to limit legal exposure. Some of these privately generated understandings are uncontroversial and merit codification. At other times, private efforts jeopardize the delicate balance of our copyright ecosystem and their reach must be limited.

In this final Part, I make some preliminary recommendations for addressing the issues raised by private ordering in the context of revisions to the formal law. I do not intend this section to provide a comprehensive list of preferred revisions to copyright law. Instead, I focus only on suggestions

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185. *Id.* at 1115.

186. *See, e.g.,* UMG Recordings, Inc. v. Augusto, 628 F.3d 1175 (9th Cir. 2011) (upholding ownership transfer and applicability of first sale doctrine in the context of promotional CDs sent out by record labels that bore the message that only a license was being provided to the recipient).

187. *See* Pallante, *supra* note 1, at 331–32; *Dep’t. of Commerce, supra* note 4, at 35–38, 101–02.

188. Pallante, *supra* note 1, at 331–32.

that address private ordering. I focus on three main categories of changes: first, those that seek to rein in the downsides of current private efforts; second, those that codify good ideas that have emerged from the private sector; and finally, those that address some of the unsettled or problematic areas of the current legal regime that have generated some of the private approaches.

#### A. LIMITING THE EXCESSES OF PRIVATE ORDERING

Throughout this Article, I have identified specific areas of overreaching by private parties and various downsides of private ordering. I will provide some suggestions of how to limit these excesses.

##### 1. *Limiting the Role of Customary Licensing, Fair Use Guidelines, and Alternative Licensing Schemes in Fair Use Evaluations*

The Copyright Act should continue to provide room for parties to license (regardless of whether such licensing is required), develop fair use guidelines (such as those put out by American University), and provide alternative licensing schemes (such as Creative Commons). However, the Act should carefully circumscribe the role of these private efforts to prevent them from altering copyright's boundaries without robust public debate. The clearance culture in the publishing and film worlds should not influence courts' independent analyses of whether particular uses are fair. Nor should a small cross-section of documentary filmmakers decide when fair use applies in that context. Creative Commons licenses can encourage the use of copyrighted works in ways that creators support, but the fact that a use breaches such a license should not weigh against a finding of fair use.

One possible solution to these concerns is to add language to the fair use provision in § 107 that limits the consideration of such information when evaluating fair use. For example: "Private guidelines, contracts, and customary licensing practices should not be considered when analyzing whether a particular use is fair." Additional language could clarify that courts may nevertheless consider the existence of a feasible and reasonably-priced licensing market as one among several considerations when evaluating market harm.<sup>189</sup>

##### 2. *Adding Clarity about Contracts*

The question of whether clickwrap, browsewrap, or shrinkwrap licenses are enforceable remains open, as does the broader question of whether

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189. See discussion *supra* Section II.C.

contracts can protect uncopyrightable aspects of works. Congress should revise the Copyright Act to address these and other vexing questions about contracts involving copyrighted works. Congress needs to provide parties and courts with greater guidance.

There are a variety of ways to address these issues. One approach is to clarify the applicability of copyright preemption to overreaching contracts by revising § 301, the preemption provision of the current Act.<sup>190</sup> Preemption, however, may be too blunt an instrument and may not be able to accommodate price discrimination on the basis of different types of uses.<sup>191</sup> The statute could also limit contract terms to prevent restrictions on the public domain. In the mid-1990s, Representative Rick Boucher suggested something along these lines and proposed that the following language be added to the Copyright Act: “When a work is distributed to the public subject to non-negotiable license terms,” the terms should not be enforced if they “limit the reproduction, adaptation, distribution, performance or display” of uncopyrightable material (such as facts or ideas) or restrict fair use, the first sale doctrine, or other permissible uses provided for in sections 107 through 114 and 117 and 118 of the Copyright Act.<sup>192</sup> Although the suggestion died in committee when initially proposed,<sup>193</sup> it is worth revisiting some of his suggestions.

The Copyright Act could also clarify if (and when) violations of licensing arrangements involving copyrighted works can give rise to copyright-infringement claims versus breach-of-contract claims. This would not only facilitate the protection of fair use zones, but also support uses of Creative Commons licenses by adding clarity and predictability for both creators who use the licenses and the licensees.

### 3. *Protecting a Fair Use Zone*

Absent statutory intervention, private efforts to expand copyright powers threaten to make formal copyright law and fair use largely irrelevant, at least in the digital space.<sup>194</sup> Thus far, the market has been largely unwilling to

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190. 17 U.S.C. § 301 (2012). I note that § 301's language is confusing and obscure, and more generally needs revising regardless of the issue of contracts. See Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 225–36 (2002) (reviewing the language and legislative history of § 301 and determining that it is hopelessly unworkable in its current form).

191. Kenneally, *supra* note 176, at 1200.

192. Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. § 7 (1997).

193. See Kenneally, *supra* note 176, at 1199–1200.

194. Cf. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001) (suggesting that the DMCA

protect fair uses in the digital environment. Revisions to the Copyright Act should disrupt this trajectory.

Fair use is not an evil to be tolerated, but something that sits at the heart of copyright's underlying objectives. Congress should add an explicit fair use zone to the statute: the Act should specifically require that TPM and DRM provide breathing room for fair use; content identification systems must provide latitude for fair use. Contracts should also be prohibited from restricting fair uses of copyrighted works or the use of uncopyrightable aspects of those works.

Congress should also facilitate fair uses by codifying and expanding the exemptions to the DMCA anti-circumvention provision. At the very least, the statute should codify exemptions that have repeatedly been renewed (such as the exemptions for educators and documentary filmmakers). Ideally, the exemptions would be broader than they currently are and allow circumvention for fair uses in derivative works, regardless of whether those works are commercial.

#### B. NORMS WORTH CODIFYING

There are a variety of areas in which private ordering suggests appropriate approaches that deserve codification. I will focus on three of these norms—faculty ownership of scholarship and course materials, alternative licensing mechanisms, and attribution.

##### 1. *Faculty Ownership of Scholarship and Course Materials*

Most, though not all, universities have adopted explicit policies vesting ownership of copyrighted works in the faculty. Universities that have not explicitly adopted such policies still usually conform to a long-standing custom of allowing faculty to retain copyright ownership over their scholarship and course materials.<sup>195</sup> University policy statements often justify the academic copyright regime by referring to “established academic

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“has killed” copyright as we know it by discarding copyright’s focus on the promotion of the public interest).

195. See, e.g., HARVARD UNIV., OFFICE OF TECH. DEV., STATEMENT OF POLICY IN REGARD TO INTELLECTUAL PROPERTY (2013), available at <http://otd.harvard.edu/resources/policies/IP/> [hereinafter Harvard IP Policy]; UNIV. OF CAL., OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA POLICY ON COPYRIGHT OWNERSHIP (1992), available at <http://policy.ucop.edu/doc/2100003/CopyrightOwnership/> [hereinafter U.C. Ownership Policy]; *Virginia Policy*, *supra* note 101; WASH. UNIV. IN ST. LOUIS, COMPLIANCE & POLICIES, INTELLECTUAL PROPERTY POLICY (2013), available at <http://wustl.edu/policies/intelprop.html>.

*traditions.*"<sup>196</sup> In part because of the reliance on customary practices regarding copyright ownership, some universities treat computer software copyrights differently than other scholarly works.<sup>197</sup>

These policies and practices, however, do not generally meet the requirements of § 201 of the Copyright Act, which requires that any exception from the work-for-hire rules be set forth in a writing signed by both parties.<sup>198</sup> If copyrighted works by faculty are viewed as prepared in the scope of employment (not an uncommon conclusion), then "unless the parties have expressly agreed otherwise in a written instrument signed by them," the university should own most works produced by faculty under current copyright law.<sup>199</sup> There is little dispute that university faculty members who produce scholarly books and articles are fulfilling expected job tasks. One could, however, argue that the works are not prepared "at the direction" of the employer since professors determine the subjects on which they write as well as the content of the works.

Even though these university policies do not meet the statutory requirements set forth in § 201, several courts have pointed to the customary "faculty exception," which places authorship in the hands of the university faculty, as a basis to give disputed copyrights to faculty rather than

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196. *1983 NYU Policy*, *supra* note 104 (emphasis added); *see also* YALE UNIV., OFFICE OF COOPERATIVE RESEARCH, YALE UNIVERSITY COPYRIGHT POLICY (2014), *available at* <http://ocr.yale.edu/faculty/policies/yale-university-copyright-policy/> ("[T]he University will generally disclaim ownership of traditional copyrightable materials created by a faculty member . . .") (emphasis added); *U.C. Ownership Policy*, *supra* note 195 (stating that the policy "is intended to embody the spirit of academic tradition, which provides copyright ownership to faculty for their scholarly and aesthetic copyrighted works") (emphasis added); *see also* UNIV. OF CHICAGO, IT SERVICES, IT POLICIES, NEW INFORMATION TECHNOLOGY AND INTELLECTUAL PROPERTY AT THE UNIVERSITY (1999), *available at* <https://itservices.uchicago.edu/policies/new-information-technologies-and-intellectual-property-university/> ("By long-established practice, individual faculty members enjoy the royalties on any book that they write . . .") (emphasis added).

197. *See, e.g., Harvard IP Policy*, *supra* note 195; *1983 NYU Policy*, *supra* note 104 (deferring to practices within the discipline and to individual departments to determine ownership of computer software).

198. The work-for-hire doctrine vests ownership of works of authorship in an employer rather than an employee when the work is produced in the scope of employment and at the direction of the employer. 17 U.S.C. §§ 101, 201 (2012); *Cmt. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737–51 (1989).

199. *See* 17 U.S.C. § 201 (2012).

universities.<sup>200</sup> To address the potential conflict between these widely accepted norms and § 201, Congress should add a specific provision to clarify that works produced by university and college faculty are not works for hire. It would also be appropriate to extend such a provision to educators more generally (such as elementary and secondary school teachers) and to original classroom materials and lectures, as well as scholarship. There is widespread agreement in this area and the law should settle the matter to avoid further uncertainty and litigation.

## 2. *À La Carte Copyright*

The Copyright Office could also learn from the success of Creative Commons.<sup>201</sup> The Office could allow copyright registrants to opt for Creative Commons licenses at the time of registration and could add this information to a searchable online database. The Office could go even further and allow parties to tailor copyright to their needs; for example, the Office could add checkboxes to registration forms allowing creators to opt out of or into certain preferences. Possible choices could be allowing all educational uses with attribution (without permission or payment), or donating the work to the public domain after twenty-five years. The current Register of Copyrights has expressed, at least in principle, a willingness to consider some alternative licensing arrangements.<sup>202</sup> The Creative Commons approach provides one possible approach for how the Office could do this. The alternative licensing approach would work best if potential users could easily search licenses and registrations online.<sup>203</sup>

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200. See, e.g., *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (describing the “universal assumption and practice” that academic writing belongs to the teacher not to the university, and concluding that if forced to decide whether the 1976 Act abolished the teacher exception, the court would hold “that the exception had survived”); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094–95 (7th Cir. 1987) (describing the tradition of faculty ownership of copyrights in works); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 597–98 (1987); cf. *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 185–86 (2d Cir. 2004) (suggesting that the faculty exception after the 1976 revisions may be limited to circumstances in which the university has written a policy so indicating). *But see* *Pittsburg State Univ. Kan. Nat’l Ed. Ass’n v. Kan. Bd. of Regents*, 122 P.3d 336, 345–46 (2005) (concluding that the teacher exception did not survive the 1976 revision); *Forasté v. Brown Univ.*, 290 F. Supp. 2d 234, 239 n.5 (D.R.I. 2003) (same).

201. See discussion *supra* Part IV.

202. Pallante, *supra* note 1, at 333–35.

203. The government has begun to recognize that it needs to improve the searchability of its copyright records. See DEP’T OF COMMERCE, *supra* note 4, at 90; Pallante, *supra* note 1, at 343; Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1203 (2010).

### 3. *Attribution Norms*

With the exception of the Visual Artists Rights Act of 1990, which confers a right of attribution on creators of visual art, U.S. copyright law does not require attribution.<sup>204</sup> Nevertheless, many norms in the copyright world favor providing authors with attribution. Attribution is by far the most-often-sought provision of the Creative Commons licenses. This preference was so ubiquitous that it is now included in all Creative Commons licenses.<sup>205</sup> Other use communities, such as fan fiction communities, chefs, and authors, when asked and in practice all seek and often follow norms of attribution.<sup>206</sup> Many of American University's best practices statements and codes require that attribution be provided when uses are made and attribution is feasible.<sup>207</sup>

The preference for attribution is not contested. Providing some recognition of this preference may be an appropriate place for legislation. Although a failure to provide attribution should never be dispositive of infringement and attribution may be infeasible in a variety of circumstances, it certainly is worth putting a thumb on the scale in the statute in favor of attribution. One possible way of doing this (perhaps the best way) is to explicitly add attribution as a consideration in the fair use analysis.

#### C. CLARIFYING FAIR USE AND ADDING SAFE HARBORS

The main driving force behind many of the practices that I have discussed is the uncertainty and anxiety about relying on the fair use defense. These concerns are the impetus behind the clearance culture and litigation-avoidance customs that I discussed in Part II, as well as the Classroom Guidelines and Best Practices Statements that I discussed in Part III. Some have argued that these private approaches are sufficient remedies for the unpredictability and expense of fair use litigation. I disagree. Our system does

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204. See 17 U.S.C. § 106A (2012). Not only is visual art narrowly defined, but the right can also be waived. See 17 U.S.C. §§ 101, 106A(e)(1) (2012).

205. Brief for Creative Commons as Amicus Curiae Supporting Respondents at 1, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 520502 at \*1.

206. See, e.g., JESSICA SILBEY, WHAT REAL PEOPLE THINK ABOUT IP: CREATIVE COMMUNITIES, INNOVATIVE INDUSTRIES AND THE IR(RELEVANCE) OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY (forthcoming 2014) (draft on file with author) (describing in Chapters 3 & 5 author's preference for attribution); Emmanuelle Fauchart & Eric Von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 193–94 (2008); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135, 155–56 (2007).

207. See, e.g., *OPENCOURSEWARE CODE*, *supra* note 112, at 11–14; *FILMMAKER'S STATEMENT*, *supra* note 110, at 4–5.

not work if people are afraid to invoke fair use or if a plethora of alternative guidelines suggest different and contradictory boundaries of fair use. Fair use is not only a remedy for market failure, but also an important part of the copyright balance. Fair use serves to further the express constitutional directive of the copyright system to “promote the Progress of Science,”<sup>208</sup> and it deserves additional support and clarity. I suggest four ways that the Act could better support the assertion of fair use:

1. *Revising Fair Use Factors and § 107*

Even though I do not think that major revisions to the fair use factors are required or wise, some minor revisions to § 107 could be helpful. As I suggested earlier in subsection VI.A.1, a provision in the statute should state that the mere fact that licensing is customary or that the use exceeds a private guideline’s directives should not weigh against fair use, nor should conformity with those practices or guidelines automatically establish fair use.

Several other changes might lend greater clarity to the fair use provision and thereby disincentivize various practices that have burgeoned in the face of uncertainty. It would be useful, for example, to add transformativeness as an express consideration to the first fair use factor—the purpose and character of the use. Transformativeness is a consideration in fair use analysis that developed after the passage of the statutory fair use provision as part of the 1976 Copyright Act. Transformativeness focuses on whether the user has fundamentally changed, in other words “transformed,” the copyrighted work.

To provide greater guidance, the statute should clarify whether a different purpose counts as a transformative use or if only a fundamental alteration to the underlying work can be transformative.<sup>209</sup> For example, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, the Second Circuit held that the use of an unaltered Grateful Dead poster in a biography of the band was transformative because the poster was used for a very different purpose than that for which it was created.<sup>210</sup> Other courts, however, have concluded that unaltered photographs are not transformative even if they are used for a different purpose than the originals.<sup>211</sup> I think a transformative purpose

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208. U.S. CONST. art. I, § 8, cl. 8.

209. See Rothman, *supra* note 76, at 490–93 (discussing the confusion as to what is meant by transformativeness and how some interpretations leave many personal uses without fair use protection).

210. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608–11 (2d Cir. 2006).

211. See, e.g., *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012) (noting in rejecting a fair use defense for the publishing of minimally altered wedding photographs that using works for a different “purpose is not quite the same thing as

should often weigh in favor of fair use and would prefer codification of the more generous interpretation of transformativeness;<sup>212</sup> however, regardless of which approach is taken, some guidance on the distinction would be useful.

Other possible revisions to the fair use provision include adding more categories of preferred uses to the preamble of the section. Currently, the preamble sets forth preferred categories of uses—e.g., “criticism, comment, news reporting, teaching . . . , scholarship[, and] research.”<sup>213</sup> It would be helpful to explicitly prefer uses of copyrighted works that are incidentally captured during filming or recording, that are used to depict historical or current events, and that are used in religious worship.<sup>214</sup> As I will discuss, a safe harbor for such uses may work better than adding these considerations to fair use, but enumerating them in § 107 is also a potential option.

## 2. *Creating Additional Safe Harbors*

Even though I am skeptical that the fair use statute can be drafted with greater clarity without losing some of the advantages of its breadth and flexibility, the addition of some new safe harbors might help to facilitate the assertion of fair use. Congress should add additional safe harbors for particularly affected and worthy use communities, such as educators, students, libraries, documentary filmmakers, and news gatherers. Although the preamble to § 107 expressly prefers many of these categories and libraries already have some protections pursuant to § 108, some additional protections would help promote reasonable uses of copyrighted works. Any such additional safe harbors should explicitly indicate that they do not narrow or limit the fair use protections of § 107, as has been done in § 108.<sup>215</sup> An

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transformation”); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 628–29 (9th Cir. 2003) (affirming the district court’s holding that the use of some clips of Elvis’s films and performances in a video about Elvis was not transformative because the voice-over did not directly comment on those clips); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 198–200 (3d Cir. 2003) (holding that two-minute previews of copyright holder’s films were not transformative because there was no critical commentary nor any new material added); *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 142–43 (2d Cir. 1998) (declaring any transformative component of a book of trivia based on the *Seinfeld* television series as “slight to non-existent”).

212. Rothman, *supra* note 76, at 490–93. Cf. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (arguing that many nontransformative uses are valuable).

213. 17 U.S.C. § 107 (2012).

214. See Rothman, *supra* note 76, at 513–28 (describing categories of preferred uses of copyrighted works as including those that describe reality, promote intimacy, are cultural or linguistic uses, or that facilitate the practice of one’s religion).

215. Section 108 provides that “[n]othing in this section . . . in any way affects the right of fair use as provided by section 107.” 17 U.S.C. § 108(f)(4) (2012); see also *Authors Guild*,

exemption for incidental uses of copyrighted works would be particularly useful. Works that are captured during the filming of documentaries or news reporting and are being used as part of this documentation of reality should be exempted from liability for copyright infringement. Congress should also provide an exemption for the use of religious texts for purposes of worship.<sup>216</sup>

Congress also should develop a revised set of Classroom Guidelines, developed with greater input from faculty, students, and libraries. The revision should be expressly adopted as a safe harbor for certain educational uses of materials. Such a provision should address many of the current challenges in this arena, including the use of orphan works and online course reserves.<sup>217</sup>

### 3. *Limiting the Scope of Statutory Damages*

One of the primary ways to support assertions of fair use is to protect against the exposure to massive statutory damages (and potentially criminal liability) for reasonably, but wrongly, assessing whether a particular use is fair.<sup>218</sup> As discussed, it is sometimes difficult to predict fair use (especially in gray areas) and many individuals and smaller businesses may not be able to pay for legal-opinion letters that would insulate them from findings of willfulness for uses of copyrighted materials. Such a finding of willfulness would put infringers into the higher statutory damages category and expose them to criminal penalties.

Courts currently have the discretion to reduce statutory damages if an infringer proves that she “was not aware and had no reason to believe that . . . her acts constituted an infringement.”<sup>219</sup> However, the broader remittance provision, which applies when there are “reasonable grounds for believing” that a use was fair, only applies to employees or agents of nonprofit educational institutions, libraries, and archives (or those institutions themselves), and, in more limited circumstances, to public

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*Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 456–57 (S.D.N.Y. 2012) (rejecting plaintiff’s argument that library could not assert a fair use defense because of the more specific § 108 that governs library usage).

216. Rothman, *supra* note 76, at 526–28 (discussing the need to use copyrighted religious texts for worship).

217. Maria Pallante has also observed the need for renewed attention to creating some safe harbors for higher education. *See* Pallante, *supra* note 1, at 333; *see also* DEPT OF COMMERCE, *supra* note 4, at 3 (suggesting that the § 108 library exception needs updating).

218. *Cf.* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (criticizing the current system of statutory damages and suggesting a variety of judicial and legislative reforms).

219. 17 U.S.C. § 504(c)(2) (2012).

broadcasters.<sup>220</sup> Congress could expand this fair use remittance provision or at least provide some guaranteed—rather than discretionary—reduction in statutory damages for reasonable but erroneous fair use assessments by others. Only the most culpable actors, such as those engaged in large-scale piracy, should be subject to high statutory damages and criminal liability,<sup>221</sup> not those who have tried to stay on the right side of the law.

If an average person wrongly though reasonably assesses her chances of having a successful fair use defense, she should not have to pay wildly more than a reasonable licensing fee plus some fine.<sup>222</sup> The statutory damages should be sufficient to discourage unlawful copying and to incentivize copyright enforcement, but should not be so massive that they discourage future reasonable assertions of fair use.

It would also be helpful to clarify that a failure to conform to customary licensing or clearance practices cannot form a basis of a willfulness finding for purposes of assessing statutory damages or criminal liability. The Copyright Office's recent effort to provide an accessible database of fair use decisions also may facilitate the ability of parties who cannot afford legal counsel to make reasonable assessments of fair use that could insulate them from findings of willful infringement.<sup>223</sup>

#### 4. *Creating a Personal-Use Exemption or Preference*

The copyright system needs some public buy-in to work. Public support requires people to think that on some level copyright law is fair. When copyright law is wildly out of sync with community practices, there may be value in interpreting copyright to conform to those understandings or, better

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220. *See id.*

221. *See* Samuelson & Wheatland, *supra* note 218, at 509–10; Pallante, *supra* note 1, at 329 (suggesting retaining statutory damages, but considering tying them to actual harms or profits in contexts where large numbers of works have been copied); *Dep't of Commerce*, *supra* note 4, at 102 (suggesting that some “recalibration” of statutory damages might be appropriate in the context of “individual file-sharers” and “secondary liability for large-scale online infringement”).

222. For examples of recent large statutory-damage awards against individual infringers, see, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 68 (1st Cir. 2013) (upholding statutory-damages award of \$675,000 for the unlawful downloading of thirty songs); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901–02 (8th Cir. 2012) (permitting a \$222,000 statutory-damages award for making twenty-four songs available via peer-to-peer network), *cert. denied*, 133 S. Ct. 1584 (2013). I note that neither of these defendants had colorable fair use defenses, but these massive awards nevertheless deter other people from relying on fair use.

223. Statement by Jacqueline Charlesworth, General Counsel, U.S. Copyright Office, USPTO Roundtable, Loyola Law School, Los Angeles (July 29, 2014) (will be made available at <http://www.uspto.gov/ip/global/copyrights/>).

yet, amending the Copyright Act to reflect some of those norms. It may be appropriate to adopt some sort of exemption or fair use preference for limited personal uses. Not only has the public become accustomed to personal uses, but there are also compelling normative reasons to allow such uses. Personal uses promote self-expression, self-development, identification, communication, and intimacy.<sup>224</sup> Enforcing copyright against personal uses also often conflicts with our privacy values and the important goal of providing some surveillance-free zones.<sup>225</sup> When drafting a personal use exemption, Congress should focus on the motivation of the use and the likely substitutionary (or nonsubstitutionary) impact of the use. Whether the use is noncommercial or private should not be determinative.<sup>226</sup> If a parent puts up a video on YouTube of her child singing *Let It Go* from Disney's hit movie, *Frozen*, this is a public and potentially commercial use (advertising revenue could potentially stream to the parent and, of course, to YouTube). Nevertheless, this sort of use is motivated by an interest in sharing a real-world event and a parent's enjoyment of her child's singing. The use is not likely to substitute for the original work—particularly if it was recorded with the likely background noise of a chaotic household and is tied to the video image. The fact that the posting is public and potentially revenue-generating should not alter the analysis that this is a personal use.<sup>227</sup>

## VII. CONCLUSION

As I have previously noted in the context of reliance on customary practices in intellectual property, “[l]eft unchecked, customary practices threaten to swallow up IP law, and replace it with industry-led IP regimes that give the public and other creators more limited rights to access and use intellectual property” than were envisioned by the Constitution and Congress.<sup>228</sup> In copyright, these practices and other forms of private ordering, such as technological controls and contracts, are altering the boundaries of de facto copyright law every day. Some of these private efforts

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224. See generally Rothman, *supra* note 76 (advocating greater protection for uses of copyrighted works that promote mental integrity, intimate association, communication, and religious practice).

225. See generally Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (developing the argument for why intellectual privacy is essential to First Amendment values); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996) (raising concerns about the effect of digital rights management on our privacy and freedom of thought).

226. See Rothman, *supra* note 76, at 472–74, 528–32.

227. See *id.*

228. Rothman, *supra* note 7, at 1908.

are beneficial, but others threaten our ability to engage with copyrighted works.

Congress must confront private ordering as it revises the Copyright Act. Although copyright law should continue to provide breathing room for private experimentation, it cannot turn a blind eye to the negative consequences that flow from some forms of private ordering. Copyright law must prevent the lock-in of these alternative regimes and practices, and limit the extent to which parties can extend copyright law through burdensome private agreements and technologies that obliterate fair use. Codification of some of the widely accepted and uncontroversial insights of copyright's private ordering also would lend greater clarity and public support to the copyright regime. As we look forward to a Copyright Act for the twenty-first century, Congress must not only consider the interests of large content providers, but also those of the broader public. The Next Great Copyright Act must find ways to not only limit online piracy, but also to protect the public's vital space to engage with, comment on, and rework copyrighted material.

