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## Property Is a Two-Way Street: Personal Copyright Use and Implied Authorization

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**ARTICLE**

**PROPERTY IS A TWO-WAY STREET: PERSONAL  
COPYRIGHT USE AND IMPLIED  
AUTHORIZATION**

*Michael Grynberg\**

*When we use the Internet, we know that copyright law limits our freedom. We know, for example, that downloading popular music is legally risky. Those who want to get moralistic about it argue that illegal downloading violates a “property” right of the copyright holder. But what about our property rights in our computers? Even if copyright is a form of property, it maintains a parallel existence as an intrusion upon property rights. This intrusion is increasingly a part of daily life, as copyright’s literal scope sweeps broadly enough to threaten a range of everyday activities that social norms regard as acceptable.*

*These observations form the basis of a “moral” critique of copyright law, but they do not figure prominently in modern doctrine. This Article looks to the common law property rights of copyright users to develop a framework for limiting copyright’s reach. If we take seriously traditional rules governing the interplay between statutes and preexisting common law rights, courts have room to incorporate user property rights into copyright doctrine. First, the common law provides a baseline against which the Copyright Act should be construed. Courts should be reluctant to interpret the statute in a manner that negates longstanding expectations that personal property may be used in conjunction with copyrighted material for personal purposes.*

*Second, the property rights of copyright users offer a new foundation for implied license doctrine. Instead of looking solely to the conduct of the licensor (i.e., the copyright holder) to determine whether an implied license to use copyrighted content exists, courts should appreciate the reasonable expectations of consumers in their control of personal property used to*

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\* Associate Professor of Law, Oklahoma City University School of Law. My thanks to Kelly Baldrate, Andy Spiropoulos, Deborah Tussey, and Steven Willborn for their helpful comments and to Oklahoma City University for the summer grant that supported my research. Earlier drafts were presented at faculty colloquia at Oklahoma City University and Seton Hall and at the Washington University Law School’s junior faculty regional works-in-progress workshop. The final product benefited from the resulting questions and conversations.

*interact with the protected works. Expanding our conception of implied license in this manner would help address the uneasy status of personal uses of copyrighted works under modern law.*

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## INTRODUCTION

When we venture online, we know that copyright law limits our freedom. We know, for example, that making and posting a mashup video that uses popular songs tempts litigation. If we want to get moralistic about it, we might say that the risk comes from using the “property” of copyright holders. Fair enough,<sup>1</sup> but what about our property rights in our computers? Copyright law cannot exist without limiting them.

The same is true of “intellectual property” (IP) generally. Authors, inventors, and other creators of ideal goods have entitlements with some of the attributes of property,<sup>2</sup> but these powers come at the expense of the

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1. For the sake of argument, anyway. *But see infra* note 127 and accompanying text.

2. *See, e.g.*, 17 U.S.C. § 201(d) (2006) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”); 35 U.S.C. § 261 (“Subject to the provisions of this title, patents shall have the attributes of personal property.”). The label intellectual “property” is itself controversial because it carries the rhetorical implication that patents, copyrights, and their like deserve treatment as property in the same way as do land and personal property. For that reason, opponents of strong intellectual property (IP) rights often favor different nomenclatures. *See, e.g.*, MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2008); Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. 523 (2008).

A number of articles discuss restrictions imposed by IP holders on the objects embodying their protected right as being a form of servitude. *See* Mark D. Janis, *A Tale of the Apocryphal Axe: Repair, Reconstruction, and the Implied License in Intellectual Property Law*, 58 MD. L. REV. 423, 506 n.479 (1999) (collecting sources). Although I note analogous examples in developing my theory of implied authorization, *see, for example, infra* notes 159–61 and accompanying text, my focus is elsewhere. This Article focuses on the manner in which IP law regulates not property that embodies protected content, but

property rights of others. Third parties cannot use their tools, be they printing presses or computers, to tread upon IP rights.<sup>3</sup> In effect, IP exists as a negative easement.<sup>4</sup>

While the insight that intellectual property burdens third-party property rights is not new, its ramifications are surprisingly scarce in modern doctrine. This Article addresses the gap in copyright law. Copyright's modern expansion casts doubt on the legality of a wide range of everyday copyright uses. Greater sensitivity to the property rights of copyright *users* offers new avenues for protecting personal use rights. First, common law property rights provide a baseline against which the Copyright Act may be construed. Courts should be reluctant to interpret the statute in a manner that negates longstanding consumer expectations of a right to use personal property in conjunction with copyrighted material.

Second, the property rights of copyright users present a new foundation for an expanded implied license doctrine. Instead of looking solely to the conduct of the licensor to determine whether an implied license to use copyrighted content exists, courts should appreciate the reasonable expectations of copyright users in their control of personal property used to interact with protected works. Enlarging our conception of implied license—for convenience, I call this expanded understanding implied authorization—would help address the uneasy status of personal uses under modern copyright doctrine.

Part I explains the problem facing personal copyright uses. Modern copyright law suffers from a split personality. Copyright's literal scope sweeps so broadly as to apparently prohibit a range of everyday activities.<sup>5</sup> But we nonetheless engage in them as a matter of course. By our actions, we may trust that we have a right to copy purchased music for personal use, but when push comes to shove—when there may be legal ramifications—the true state of the law is muddy.<sup>6</sup>

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personal property used to interact with such content. My interest is in the record player, not the record.

3. See 15 U.S.C. §§ 1114, 1125 (trademarks); 17 U.S.C. § 106 (copyrights); 35 U.S.C. § 271 (patents).

4. See *infra* Part II.A.

5. See, e.g., John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–48 (describing a hypothetical day in the life filled with ordinary activities that collectively incur \$12.45 million in potential liability under the Copyright Act).

6. Compare, e.g., *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (comparing space shifting to time shifting blessed in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)), with *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (rejecting space shifting argument applied to My.MP3.com as “simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation”). And those of us who are sure are not necessarily sure as to why. See Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 597 (2008) [hereinafter Litman, *Goo*]; Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1903 (2007) [hereinafter Litman, *Lawful Personal Use*] (noting that there were many

Two well-documented trends spurred the increased prominence of copyright's law/norm mismatch. First, copyrights are more robust than a century ago. They are stronger, last longer, and cover more works.<sup>7</sup> Second, the Internet's popularization increased both the ease and notoriety of potential infringements.<sup>8</sup> Public collisions between legal interpretation and socially acceptable practice are increasingly likely.

This law/norm divide is especially problematic with respect to personal uses of copyrighted matter.<sup>9</sup> Individuals are ill-equipped to navigate the difficulties of either licensing or litigating access to copyrights. The effort can flummox the most sophisticated, well-capitalized parties.<sup>10</sup> To be sure, most personal uses of copyrighted works go unchallenged by rights holders. It is problematic, however, for everyday activities to depend on the potentially fickle toleration of copyright owners. And if everyday life becomes a more digitally mediated experience, the toleration model is an unstable basis on which to rest future cultural development.<sup>11</sup>

Copyright law has not developed an effective response. The fair use doctrine offers an obvious safety valve for some personal uses,<sup>12</sup> but the doctrine is unpredictable in application. Supreme Court precedent directs lower courts to apply the doctrine in a case-specific manner, which stifles the development of clear guidelines for acceptable and non-acceptable unauthorized copyright uses.<sup>13</sup> And even if fair use's potential is undersold, advocates of strong personal use rights may well wonder at the wisdom of placing too many eggs in a single doctrinal basket.

Some suggest greater use of implied licenses as an alternative to fair use. Implied copyright licenses traditionally ameliorated difficulties arising from copyright law's division of ownership between a copyright and the work that embodies protected expression. A party who commissions a work but fails to bargain for the copyright may still claim a license to use the work even if the use implicates rights protected by the Copyright Act.<sup>14</sup>

Implied licenses may sweep more broadly in the online world, but efforts to expand their use suffer from a core weakness. Even broad licenses may be revoked. Traditional understandings do not support a doctrine robust

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personal uses to be challenged, "[c]opyright lawyers may disagree on what theory the copyright owner should lose, but not about the ultimate result").

7. *See infra* Part I.A.

8. *See infra* Part I.A.

9. This Article uses Jessica Litman's definition of personal use. A personal use is "a use that an individual makes for herself, her family, or her close friends." Litman, *Lawful Personal Use*, *supra* note 6, at 1894.

10. *See generally* *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998) (litigating whether a 1939 music license allowing use of composition in film also authorized use in video version of the film).

11. *See infra* Part I.A.2.

12. 17 U.S.C. § 107 (2006).

13. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

14. *See infra* Part I.C.

enough to overcome such revocations. If copyright implied license is to be broadened, another legal basis is needed.<sup>15</sup> Otherwise, reform efforts based in implied license will be vulnerable to a plausible formalist objection: section 106 of the Copyright Act vests in the copyright holder the exclusive right to authorize acts regulated by the statute.<sup>16</sup>

Part II responds by arguing that with respect to copyright users, the Copyright Act is not the only relevant law. Whatever the status of copyright as “property” in the same sense as land or chattels, copyright is simultaneously an interference with property rights.<sup>17</sup> Each copyright holder has an effective negative easement in the tools others might use to interact with copyright-protected material. This characterization brings into play the common law property rights of copyright users. They are important for three reasons. First, they make clear that a copyright action is more than an effort to prevent a “trespass” to property rights, but is simultaneously a mediation of competing property interests. Second, judges construe statutes against the baseline created by common law principles and rights. Courts are traditionally reluctant to read legislation as interfering with expectations based in the common law absent a clear statutory command. Third, even when a statute alters the common law baseline, traditional understandings remain a source of law to fill gaps in the displacing statute.<sup>18</sup>

Part III explores the consequences of these observations. The common law property rights of copyright users provide the basis both for a narrowing construction of the Copyright Act and for a revised copyright implied license doctrine. A complete doctrine would incorporate not only the conduct of the copyright licensor, but also the property-based expectations of the putative licensee. Although copyright law necessarily displaces and limits a user’s common law property rights and expectations, it does not extinguish them. They remain a part of the baseline against which the Copyright Act writes. When construing Congress’s handiwork, it is appropriate to interpret the statute against this baseline, particularly with respect to establishing what uses are “authorized.” The reasonable expectations of copyright users about their rights to their own property help determine when a particular use would be perceived as permitted.

What then defines the reasonable expectations of copyright users? Courts may look to governing social norms that they are prepared to ratify as reasonable. Using a computer to space shift music from a CD to an iPod might be acceptable in a way that surreptitious use of a video camera inside a movie theater is not. In this manner, courts may account doctrinally for the lack of congruence between copyright rights as perceived by their holders and actual public practices. These practices can help shape judicial interpretations of what a user may reasonably assume is within the scope of

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15. *See infra* Part I.C.2.

16. 17 U.S.C. § 106.

17. *See infra* Part II.A.

18. *See infra* Part II.E.

her rights when using copyrighted works, as well as the level of conduct required of copyright holders to “revoke” that authorization through the assertion of rights under the Copyright Act.

This latter point is essential. To be viable, the approach advocated here must respect Congress’s delegation to copyright owners of the exclusive right to authorize the protected acts of section 106. But while the statute gives copyright holders the exclusive right to authorize certain acts, it does not define authorization or the manner in which authorization is to be implemented. A statutory gap exists. And in fact, copyright owners engage in a range of choices with respect to enforcing their copyrights. When courts evaluate what these choices authorize or forbid, they should look to the reasonable property-backed expectations of licensees as an indispensable part of the analysis.

### I. COPYRIGHT AND THE PROBLEM OF “TOLERATED” USES

This part sketches the problem of copyright’s expansion and the potential ramifications for personal copyright liberties. The story is a familiar one, and more extensive accounts are available elsewhere.<sup>19</sup> The purpose here is neither to win converts to the anti-expansionist cause nor defend it against counterattacks. My concern is with the doctrinal challenge of limiting copyright’s growth, assuming the premise that the enterprise is a worthy one. After considering the structural difficulties of reform and the limitations of the fair use doctrine, this part concludes by considering proposals to bolster the use of implied licenses as a check to broad assertions of copyright.

#### A. *The Challenges of Modern Copyright*

Copyright’s potential scope exists uneasily alongside many everyday, unauthorized, and arguably infringing uses of copyrighted material. This collision of law and norms—more precisely, its current prominence—is the culmination of two trends: copyright’s expansion and the Internet’s popularization. Infringement is both simple and public in a digital, networked environment. Cracking down on infringement may harm personal use rights because copyright doctrine has done a poor job of developing safeguards to protect them.

#### 1. Copyright’s Growth

Both Congress and the judiciary may claim credit for the growth in copyright’s scope.

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19. See, e.g., Litman, *Goo*, *supra* note 6, at 591–96.



*a. Congress*

Congress consistently strengthened the power of copyright over the last four decades.<sup>20</sup> Its handiwork makes copyrights easier to obtain,<sup>21</sup> more powerful,<sup>22</sup> longer lasting,<sup>23</sup> and buttressed by laws that control access to copyrighted works when technology alone cannot do the trick.<sup>24</sup> To be sure, the Copyright Act also checks copyright's reach.<sup>25</sup> And it has been argued that the 1976 Act's rewrite of copyright law was intended largely as a conservative enterprise that would preserve the traditional balance of interests between copyright users and owners.<sup>26</sup> Unfortunately, there is a

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20. Two key milestones are the 1976 revision of the Copyright Act, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, and the addition in 1972 of a distinct copyright in sound recordings, rather than simply in the musical composition. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.

21. The 1976 Act reduced the importance of copyright formalities by liberalizing the requirement that a copyright holder affix a notice of copyright on her work. Copyright Act of 1976, Pub. L. No. 94-553, § 405, 90 Stat. 2541. Congress later dispensed with the requirement altogether, Act of Oct. 31, 1988, Pub. L. No. 100-568, 102 Stat. 2853, and opened the door for foreign authors to reclaim U.S. copyright to works that were unprotected due to a failure to adhere to domestic formalities. 17 U.S.C. § 104A.

The 1976 Act further liberalized copyright law by providing that copyright subsists "in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). Under the predecessor 1909 Act, copyright extended only to works published with proper notice. Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified as amended at 17 U.S.C. § 9 (1909), renumbered § 10, repealed 1978). The 1976 statute also eliminated the distinction between published works, which received federal protection, and unpublished works, which until then had not.

22. The 1976 Act added a new right of public display and defined public performance broadly enough to supersede a narrow construction given the right by the U.S. Supreme Court. See Litman, *Goo*, *supra* note 6, at 592 n.35; *infra* Part III.D.1.b.

23. Under the 1909 Act, the copyright term lasted twenty-eight years and could be renewed for an additional twenty-eight years. 17 U.S.C. § 24 (1909) (repealed 1978). The 1976 Act extended the term to the life of the author plus fifty years or, in the case of works for hire, the shorter of seventy-five years from publication or 100 years from creation. 90 Stat. 2541. In 1998, Congress further extended the term to the life of the author plus seventy years or the shorter of ninety-five years from publication or 120 years from creation in the case of works made for hire. Pub. L. No. 105-298, Title I, § 102(b), 112 Stat. 2827 (codified as amended at 17 U.S.C. § 302 (2006)).

24. The Digital Millennium Copyright Act (DMCA) proscribed the unauthorized circumvention of technological measures designed to control access to copyrighted works and restricted the development and distribution of tools designed to circumvent technological measures that control access or protect copyright rights held by the copyright owner. 17 U.S.C. § 1201. Critics contend the statute interferes with the ability of users to engage in fair and otherwise legal uses of copyrighted content. See, e.g., *Unintended Consequences: Ten Years Under the DMCA*, ELEC. FRONTIER FOUND., 6 (Oct. 28, 2008), <http://www.eff.org/files/DMCAUnintended10.pdf>.

25. See, e.g., 17 U.S.C. § 110 (precluding copyright rights over performance and display from applying to certain activities). Professor Litman notes that in revising the copyright statute, Congress generally sought to preserve the status quo with respect to established copyright uses with specific carveouts of the sort found in § 110. See Litman, *Goo*, *supra* note 6, at 591-96.

26. Litman, *Goo*, *supra* note 6, at 593 ("Congress's rewording of the reproduction, adaptation and distribution rights were understood as simplification and codification of the scope of those rights under the law as construed by the courts, and not as enhancements of their reach or strength.").

mismatch in the textual specificity of these two sides of the copyright coin. The statute uses broad language to define copyright rights. Section 106 of the Act gives copyright holders exclusive rights to “reproduce,” “distribute,” “perform,” “display,” and “prepare derivative works based upon” copyrighted works.<sup>27</sup> These broad grants leave courts with discretion to enforce powerful copyrights.<sup>28</sup>

In contrast, copyright’s limitations—with the notable exception of fair use, discussed below<sup>29</sup>—are tightly cast.<sup>30</sup> Compare, for example, the broad definition of the performance right with its exceptions.<sup>31</sup> Many of the latter are written as narrow carveouts not designed for the public at large.<sup>32</sup> Similar examples dot the statute.<sup>33</sup>

Moreover, the overlapping nature of the rights granted by section 106 undermines the Copyright Act’s limitations. Litigation over Cablevision’s efforts to provide customers with off-site DVRs is an example.<sup>34</sup> Copyright holders maintained that keeping DVR storage capacity at Cablevision’s facilities rendered the company directly liable for infringement.<sup>35</sup>

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27. 17 U.S.C. § 106.

28. Some of these terms are defined elsewhere in the statute, but broadly. *See* 17 U.S.C. § 101 (defining “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be *recast, transformed, or adapted*”) (emphasis added). *Compare* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343–44 (9th Cir. 1988) (concluding that lawfully purchased prints that were glued onto tiles and resold constituted derivative works), *with* *Lee v. A.R.T. Co.*, 125 F.3d 580, 583 (7th Cir. 1997) (disagreeing with *Mirage* on similar facts).

29. 17 U.S.C. § 107; *see infra* Part I.B.1.

30. Litman, *Goo*, *supra* note 6, at 593 (“By articulating exclusive rights in general, broad language and delineating exceptions in narrow, detailed, specific language, the drafters of the statute time-proofed the exclusive rights, while leaving the specific exceptions vulnerable to obsolescence.”). Professor Litman traces the mismatch to the process behind the statute’s drafting, describing it as a negotiation between industry interests. Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 280–81 (1989).

31. *Compare* 17 U.S.C. § 101 (“To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”), *with id.* § 110.

32. *See, e.g., id.* § 110(5)(B) (setting size and device limits for establishments permitted to communicate transmissions made by broadcast or radio); *id.* § 110(10) (exempting performances of nondramatic literary or musical works “in the course of a social function which is organized and promoted by a nonprofit veterans’ organization or a nonprofit fraternal organization to which the general public is not invited” if the proceeds are used for charitable purposes). To be sure, other provisions of section 110, applying to personal users, are somewhat broader. *See, e.g., id.* § 110 (5)(A).

33. *See id.* §§ 108–22.

34. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

35. *Id.* at 124 (“[T]he RS-DVR allows Cablevision customers who do not have a stand-alone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a ‘remote’ location.”). They did so even though consumer experience of the service resembled that provided by home-based DVRs like TiVO, which, in turn, arguably

Cablevision convinced the Second Circuit that it was not making “copies” under the statute when the DVR copies were made at consumer direction.<sup>36</sup> That did not exhaust the claims against it, however, as the copyright plaintiffs also claimed a violation of their reproduction rights (because of transient cache copies made by Cablevision) and their performance right (arising when Cablevision transmitted the consumer-saved copies back to its customers). Though both claims failed as well,<sup>37</sup> they highlight the statute’s potential to take away with one provision what it gives with another.<sup>38</sup> In a similar vein, the Digital Millennium Copyright Act (DMCA) purports to preserve fair use rights, but makes illegal distributing tools used to circumvent technological access controls even if the purpose is to facilitate fair use.<sup>39</sup> Ripping a DVD to create a backup copy may be fair use, but the right means little if Congress prohibits commerce in the necessary tools.<sup>40</sup>

These features of the Copyright Act have been criticized for being unresponsive to technological change while creating barriers to entry for new technologies.<sup>41</sup> But the deeper problem is that Congress’s disparate treatment of copyright holders and copyright users gives courts more leeway to expand copyright rights than to constrain them.<sup>42</sup> The copyright statute inconsistently mixes delegating and non-delegating language.<sup>43</sup> Its broad provisions cannot be applied without judicial interpretation of their

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resemble the VCR approved by the Supreme Court in *Sony*, but the fair use issue was off the table as was a theory of contributory infringement. *Id.*

36. *Id.* at 133 (“[C]opies produced by the RS-DVR system are ‘made’ by the RS-DVR customer, and Cablevision’s contribution to this reproduction by providing the system does not warrant the imposition of direct liability.”).

37. *Id.* at 130 (“[W]orks in this case are embodied in the buffer for only a ‘transitory’ period, thus failing the duration requirement.”); *id.* at 139 (“Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances ‘to the public,’ and therefore do not infringe any exclusive right of public performance.”).

38. *Cf. id.* at 134 (“[W]e note that our conclusion . . . that the customer, not Cablevision, ‘does’ the copying does not dictate a parallel conclusion that the customer, and not Cablevision, ‘performs’ the copyrighted work.”); see also David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 26 (1996). Current litigation over the sale of ringtones is another example of attempts to leverage the Copyright Act’s multiplicity of rights. See generally *In re Cellco P’ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (rejecting argument that distribution of ringtones to customers results in a public performance requiring licensing fees). This multiplicity, moreover, creates significant licensing issues when the various copyright rights are fragmented among multiple owners.

39. 17 U.S.C. § 1201 (2006); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001).

40. See generally *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (granting preliminary injunction against distribution of DVD copying software).

41. See, e.g., *Endangered Gizmos*, ELEC. FRONTIER FOUND., <http://w2.eff.org/endangered> (last visited Oct. 23, 2010).

42. I have argued elsewhere that a similar problem exists in trademark law under the Lanham Act. See Michael Grynberg, *Things Are Worse Than We Think: Trademark Defenses in a “Formalist” Age*, 24 BERKELEY TECH. L.J. 897, 903–24 (2009).

43. 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 2:8 (2009).

proper scope, inviting effective “common law development,” and potential expansion, by the courts.<sup>44</sup> Countervailing provisions, again with the exception of fair use,<sup>45</sup> are written with language that is not similarly open to adaptive judicial interpretation. These choices have ramifications for judges independent of their view of the relative merits of strong copyrights.<sup>46</sup> Courts may or may not accept the invitation of copyright plaintiffs to construe the Act expansively, but they have fewer doctrinal levers with which to aid defendants.

#### b. Judicial Interpretations

A Copyright Act susceptible to broad interpretation is necessary but not sufficient for broad copyright law. Judges must accept the invitation of the statute’s open text to provide a liberal interpretation of copyright rights.<sup>47</sup> Many have.

Courts have liberally interpreted the various exclusive rights given copyright holders by section 106. Thus, the mere loading of a computer program from a disk into temporary memory for purposes of operating the machine is a reproduction.<sup>48</sup> Gluing purchased prints onto tiles may be a derivative work.<sup>49</sup> The ability to distribute a copyrighted work may substitute at trial for evidence of actual distribution.<sup>50</sup> In contrast, judges are sometimes miserly in interpreting copyright exclusions.<sup>51</sup> Other courts

44. Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 198 (2004).

45. *See infra* Part I.B.1.

46. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Sometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 546–47 (1983) (arguing that courts must respect legislative choices with respect to “creating or withholding gap-filling authority”).

47. Litman, *Goo*, *supra* note 6, at 596 (“Thirty years ago, an assertion that copyright law gave the copyright owner the exclusive right to ‘use’ its copyrighted work would have been dismissed as an obvious misunderstanding. Recently, it’s become almost respectable as a description of the rights copyright owners do control, or should.” (citing ALAN LATMAN, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS (1958), *reprinted in* 2 COPYRIGHT SOCIETY OF THE USA, STUDIES ON COPYRIGHT 781 (1963))).

48. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993) (holding that a copy is created for purposes of the Copyright Act when a program is loaded from a disc into a computer’s RAM in order to operate the program).

49. *See supra* note 28.

50. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (stating that “[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public” even if no evidence of public use exists). The music industry has made similar arguments in pursuing defendants who have uploaded music files into the “shared” folder of file sharing programs, but where evidence is lacking of actual copies made as a result. Litman, *Goo*, *supra* note 6, at 595 n.59.

51. For example, the Third Circuit found a “public” performance where a video store made available to customers private booths for viewing rented cassettes. *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63–64 (3d Cir. 1986). Interpretation of the DMCA is another example. The statute provides that it shall not be construed to limit fair use rights.

see the scope of the commercial monopoly granted by the copyright statute as a broad one, affecting their interpretation of fair use claims.<sup>52</sup> Indeed, the specificity of copyright's exclusions may be used to *broaden* the scope of rights granted in section 106.<sup>53</sup>

The pattern of rulings in favor of strong copyright rights is not uniform,<sup>54</sup> and copyright should not be defined by its most extreme judicial interpretations. But legal uncertainty has a similar effect on potential defendants as a more uniformly extreme view.<sup>55</sup> Moreover, the rights/restriction mismatch created by the statute allows judicial interpretation to function as a ratchet in favor of strong copyrights. Courts do not always adopt the broadest possible view of copyrights, but statutory language makes them better copyright expansionists than restrictionists. For good or ill, Congress is the one that has placed a thumb on the scale, and the courts have balanced predictably.

## 2. Increasing Collisions Between Norms and Law

Modern copyright law does not want for critics. Some ask fundamental questions of whether copyright really “promote[s] the progress” of authorship or is mere rent seeking.<sup>56</sup> Others focus on burdens to expressive or other interests of users of copyrighted content.<sup>57</sup> Nestled in this latter

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17 U.S.C. § 1201(c)(1) (2006). Some courts have nonetheless concluded that the statute's protection of “access-control” measures do not run afoul of that limitation, even if the purpose of the circumvention is the exercise of fair use rights. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (“[1201(c)(1)] simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.”); *id.* at 459 (“Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.”).

52. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); Litman, *Lawful Personal Use*, *supra* note 6, at 1913–14 (“If any use that allows a person to get for free something she would otherwise need to pay for is a commercial one . . . then most lawful unlicensed uses would be commercial.”).

53. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799–805 (6th Cir. 2005) (interpreting the Copyright Act's limitation on the scope of the sound recording copyright as a reason for giving owner of a sound recording copyright the exclusive right to sample the work).

54. *See, e.g.*, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (concluding cable company operator of off-site DVRs was not directly liable for creation of copies ordered by customers because “volitional conduct is an important element of direct liability”), *cert. denied*, 129 S. Ct. 2890 (2009).

55. *See, e.g.*, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 887–95 (2007).

56. U.S. CONST. art. I, § 8, cl. 8; *see, e.g.*, MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 7 (2008). Copyright skepticism predates the 1976 Act. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *HARV. L. REV.* 281, 284 (1970) (“Taken as a whole, the evidence now available suggests that, although we should hesitate to abolish copyright protection, we should equally hesitate to extend or strengthen it.”).

57. *See, e.g.*, Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004).

critique is the positive observation that the world of rights set forth under current copyright doctrine bears only a tangential relationship with the way content users live their lives. Regardless of what the lawyers say, blithe copyright infringements fill our daily lives.<sup>58</sup>

To this claim, one might ask, “So what?” After all, most of these infringements go unnoticed, let alone litigated. And it is true that rights holders are unlikely to pursue the broadest possible copyright claims against individual users.<sup>59</sup> Such litigation may be a financial loser,<sup>60</sup> provoke a public backlash, or face unsympathetic judges who may balk at extreme claims, even if the reason for balking is unclear.<sup>61</sup>

Even so, the current mismatch between norms and law is problematic. It might sow disregard for provisions of the copyright statute that would otherwise be perceived as legitimate, or, worse, undermine the rule of law in general. More pragmatically, even underenforced law may deter users who wish to engage in socially beneficial activities, but fear potential litigation. The law/norm mismatch also feeds the impression that certain copyright uses, which arguably should be (or are) legal, exist only as the product of benevolence on the part of rights holders. For many copyright critics, this impression is precisely the problem.<sup>62</sup> After all, when the rights holder claims, “This is infringing, but I’ll let it go,” the consumer lacks the

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58. See Tehranian, *supra* note 5, at 543–48.

59. Though it bears noting that the RIAA’s litigation campaign targeted a large number of downloaders. Nate Anderson, *Has the RIAA Sued 18,000 People . . . or 35,000?*, ARS TECHNICA (July 8, 2009, 2:50 PM), <http://arstechnica.com/tech-policy/news/2009/07/has-the-riaa-sued-18000-people-or-35000.ars>. And sometimes the wrong target is hit. See, e.g., Nate Anderson, *Using Faulty Data to Demand Settlements from Innocent Surfers*, ARS TECHNICA (Nov. 30, 2009, 7:22 PM), <http://arstechnica.com/tech-policy/news/2009/11/using-faulty-data-to-demand-settlements-from-innocent-surfers.ars>.

60. Steven Marks, *RIAA Responds: Nesson More like P.T. Barnum than David*, ARS TECHNICA (May 31, 2009, 11:30 PM), <http://arstechnica.com/tech-policy/news/2009/05/riaa-responds.ars> (op-ed by Recording Industry Association of America general counsel arguing that litigation against file sharers has lost money). But see Nate Anderson, *The RIAA? Amateurs. Here’s How You Sue 14,000+ P2P Users*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars> (last updated June 2010) (describing pursuit of copyright litigation as business model of “the US Copyright Group, a set of lawyers who have turned P2P prosecution into revenue generation”).

61. See *infra* note 90 and accompanying text. And, of course, rights holders have an incentive to resist litigation declaring a user’s rights *ex ante*. See, e.g., *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1080–82 (N.D. Cal. 2007) (rejecting copyright holder’s motion to dismiss author’s action seeking declaratory judgment that planned use of copyrighted materials would be legal); *Edelman v. N2H2, Inc.*, 263 F. Supp. 2d 137, 137–39 (D. Mass. 2003) (holding that plaintiff who sought declaration of right to reverse engineer Internet blocking software lacked standing).

62. Litman, *Lawful Personal Use*, *supra* note 6, at 1920 (arguing that even if unenforced, an expansive view of the statute is distortive because it “encourages copyright owners to expect too much, and . . . snookers judges into reinterpreting the language of the statute to give effect to the perceived intent of Congress, expanding copies to include RAM copies, and commercial uses to include any use a copyright owner might otherwise charge for” (footnotes omitted)).

incentive or ability to mount a vigorous defense. The cumulative effect of such assertions, however, may distort copyright policy.

Perhaps the greatest danger of the tolerated use approach is that it aids efforts to use copyright law to control technologies that may be used to “infringe.” This is not a new problem,<sup>63</sup> but litigation continues over the extent to which the providers of technological tools may be liable for the purported infringing activities of their customers.<sup>64</sup> And the argument that the public engages in a vast amount of infringement shapes public debate over technology policy.<sup>65</sup> Providers of technologies used to interact with copyrighted materials who want to avoid charges of aiding infringement face pressure to limit their products’ availability or functionality,<sup>66</sup> or to introduce anti-piracy technologies that raise technical or privacy concerns.<sup>67</sup>

### 3. The Problem of Personal Use

Copyright presents particular problems with respect to personal uses of copyrighted material. As the online world continues to expand, everyday activities are more likely to implicate the copyright statute because so many interactions with digital content might constitute an unauthorized “reproduc[tion],”<sup>68</sup> “performance,”<sup>69</sup> or “display”<sup>70</sup> of a copyrighted work and because so many digital technologies rely on copying for their

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63. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

64. See, e.g., *UMG Recordings, Inc. v. Veoh Networks Inc.* 665 F. Supp. 2d 1099, 1100–04 (C.D. Cal. 2009); *Endangered Gizmos*, ELEC. FRONTIER FOUND., <http://w2.eff.org/endangered/> (last visited Oct. 23, 2010). Most prominently, YouTube is in litigation with copyright holders as to whether it does enough to prevent the uploading of infringing content.

65. See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 705–08 (D.C. Cir. 2005) (striking down FCC’s broadcast flag regulation); Matthew Lasar, *Warner Video Shows Hollywood Doesn’t Need HDTV Blocking*, ARS TECHNICA (Nov. 5, 2009, 2:11 PM), <http://arstechnica.com/telecom/news/2009/11/warner-video-shows-hollywood-doesnt-need-hdtv-blocking.ars> (describing movie industry efforts to obtain authority to block analog outputs of home electronic devices).

66. See, e.g., Eric Bangeman, *Schools Take Wait-and-See Approach After Ohio U Bans P2P Traffic*, ARS TECHNICA (Apr. 27, 2007, 12:31 AM), <http://arstechnica.com/tech-policy/news/2007/04/schools-take-wait-and-see-approach-after-ohio-u-bans-p2p-traffic.ars> (reporting on Ohio State University’s decision to ban file sharing programs after RIAA identified the school as a leading site for copyright infringement).

67. See, e.g., Nate Anderson, *Deep Packet Inspection Under Assault over Privacy Concerns*, ARS TECHNICA (May 12, 2008, 1:03 PM), <http://arstechnica.com/old/content/2008/05/deep-packet-inspection-under-assault-from-canadian-critics.ars> (discussing privacy and net neutrality concerns surrounding deep packet inspection technology).

68. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (holding that a copy is created for purposes of the Copyright Act when a program is loaded from a disc into a computer’s RAM in order to operate the program).

69. See, e.g., *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2007 WL 79311, at \*4 (N.D. Tex. Jan. 9, 2007) (finding violation of performance right where defendant provided an “unauthorized ‘link’ to . . . live webcasts”).

70. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159–62 (9th Cir. 2007) (discussing display right in Internet context).

operation. Copying is not only more likely online; it is more detectable and traceable.<sup>71</sup> And technological controls like digital rights management create the potential for greater use of metering arrangements. That is, content providers may license their works for single uses rather than providing copies for repeated reading or other consumption by the purchaser. Whatever the merits of such efforts, they have the potential to run counter to consumer expectations.<sup>72</sup>

Setting aside debates over the harm done by modern technology to the core markets of copyright holders and the proper policy response,<sup>73</sup> many modern personal uses are the sort that were traditionally not the concern of copyright law. Children who once would have played Batman in the schoolyard may now create Batman-like avatars online, provoking litigation against the providers of the digital playground.<sup>74</sup> Broad interpretations of copyright law now endanger interactions with copyrighted material that never posed a legal problem in the past, upsetting the previous balance of interests between copyright creators and users. As noted above, even if actual suits against individual consumers are rare, the legal characterization of personal uses as infringing but for copyright holder indulgence has ramifications for the ability to create tools that may be used to interact with the digital world more generally.<sup>75</sup>

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71. The DMCA provides procedures for a copyright holder to obtain a subpoena to force an Internet Service Provider to give identifying information regarding alleged infringers. 17 U.S.C. § 512(h) (2006). And the music industry has used services that connect to peer-to-peer networks to search for Internet Protocol addresses of the hosts of protected material. These addresses then become the basis of subpoenas. *See, e.g.*, Nate Anderson, *Thomas Judge Bars Fair Use Defense, OKs MediaSentry Evidence*, ARS TECHNICA (June 11, 2009, 5:12 PM), <http://arstechnica.com/tech-policy/news/2009/06/thomas-judge-bars-fair-use-defense-oks-mediasentry-evidence.ars>; Nate Anderson, *MediaSentry Weighed in the Balance, Found Wanting*, ARS TECHNICA (Mar. 5, 2009, 5:25 AM), <http://arstechnica.com/tech-policy/news/2009/03/mediasentry-weighed-in-the-balance-found-wanting.ars>; Eric Bangeman, *Marshall University Fails to Block RIAA's P2P Subpoenas*, ARS TECHNICA (Apr. 16, 2008, 7:15 AM), <http://arstechnica.com/tech-policy/news/2008/04/marshall-university-fails-to-block-riaas-p2p-subpoenas.ars>.

72. *See, e.g.*, Eric Bangeman, *DirectTV DVR Clampdown: A Sober Reminder of DRM Suckitude*, ARS TECHNICA (Mar. 20, 2008, 8:27 PM), <http://arstechnica.com/old/content/2008/03/directv-dvr-clampdown-a-sober-reminder-of-drm-suckitude.ars> (reporting that subscribers to DVR service were advised that functionality of DVRs would be compromised so that recorded pay-per-view movies would become unwatchable after twenty-four hours).

73. *See, e.g.*, Nate Anderson, *"Fair Use" Generates Trillions in the US Alone*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/04/fair-use-generates-trillions-in-the-us-alone.ars> (last updated April 2010); Julian Sanchez, *750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy*, ARS TECHNICA (Oct. 7, 2008, 11:30 PM), <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>.

74. *See* *Marvel Enters., Inc. v. NCSoft Corp.*, No. CV 04-9253RGKPLAX, 2005 WL 878090, at \*1 (C.D. Cal. Mar. 9, 2005) (litigation over computer game allowing users to create and play with superhero characters that alleged that resulting characters infringed copyrights). This is not to say that kids shouldn't get out more.

75. Litman, *Lawful Personal Use*, *supra* note 6, at 1877 (cautioning that after its victory over Grokster, the record industry increased efforts to halt CD burning while "both the motion picture industry and the recording industry seek laws requiring consumer electronics companies to incorporate copy prevention technology into digital televisions and radios).



Although traditional conceptions of copyright law carved space for personal uses,<sup>76</sup> these openings have not kept pace with evolving doctrine. Today, many commonplace personal uses appear to be legally questionable notwithstanding their routine quality.<sup>77</sup>

### B. Reform Difficulties

Addressing the problems identified by the last section through the courts is difficult. First, as currently applied, the fair use doctrine is unlikely to live up to the promise of the breadth of its language. Second, the Copyright Act's mismatch between copyright rights and limitations is a fact of text that judges implementing the Copyright Act cannot ignore.<sup>78</sup>

#### 1. The Limitations of Fair Use

The fair use doctrine appears to provide precisely the sort of open pro-defendant statutory language that the Copyright Act otherwise lacks. Fair use shields certain uses of copyrighted material even when they nominally fall under the scope of the exclusive rights granted by section 106.<sup>79</sup> Congress codified fair use, which had been a judicial creation, in its 1976 copyright revision.<sup>80</sup> The term nonetheless remains undefined; the statutory factors, imprecise. This vagueness was deliberate, as Congress intended

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Thus, the effort to capture control over personal uses is moving further and further into consumers' homes.").

76. *See id.* at 1883–93 (describing cases protecting user copyright liberties).

77. *Id.* at 1872 ("Every time a study of copyright law queries the scope of lawful personal use, it concludes that the answer to the question whether any particular personal use is lawful is indeterminate."); *id.* at 1897–98 (describing routine personal uses in which author and her circle engage and noting their ambiguous legal status).

78. A third possibility, invoking the First Amendment, is difficult insofar as the Supreme Court has generally taken the view that the fair use doctrine in conjunction with limitations on copyrightable subject matter provides a built-in safeguard against copyright's intruding on free speech. *See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("[W]hen . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."). *But see Golan v. Gonzales*, 501 F.3d 1179, 1192–94 (10th Cir. 2007) (concluding that restoration of copyright in certain foreign works required First Amendment scrutiny); *Golan v. Holder*, 609 F.3d 1076, 1090–94 (10th Cir. 2010) (concluding that restoration survives intermediate scrutiny).

79. 17 U.S.C. § 107 (2006).

80. H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N 5659, 5679 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible . . . ."); *see also Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (Story, J.) (No. 4,901) ("This is one of those intricate and embarrassing questions . . . in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases."). Calling the defense "equitable" raises some hackles. *Compare Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (characterizing fair use as "entirely equitable"), *with* 4 PATRY, *supra* note 43, § 10:3 ("Fair use is not an equitable doctrine or an equitable defense. As history reveals, it is a legal defense which may, and frequently is, decided by a jury . . . ." (footnotes omitted)).

that courts continue the common law development of the doctrine that had preceded its codification.<sup>81</sup>

Several aspects of fair use limit its ability to mitigate copyright's expansion or provide clear protection for personal use.<sup>82</sup> Most importantly, its unpredictability provides little *ex ante* certainty about its application.<sup>83</sup> The Supreme Court has consistently cautioned against looking to the doctrine for categorical rules, instead directing case-by-case application.<sup>84</sup>

The ambiguity benefits copyright owners because courts treat fair use as an affirmative defense whose establishment is the defendant's problem.<sup>85</sup> And personal uses that cannot be characterized as new authorship are not easily accommodated. Several scholars note that copyright law tends to consider the merits of non-consumptive users through the restrictive prism

81. H.R. REP. NO. 94-1476, at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5680 (“[T]here is no disposition to freeze the doctrine . . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

82. “[I]f we limit our conversation to a room full of copyright lawyers and copyright scholars, fair use remains a doctrine that permits a relatively narrow swathe of exceptional, rather than everyday, uses.” Litman, *Goo*, *supra* note 6, at 590–91.

83. The divergence of scholarly opinion over the legality of artist Shepherd Fairey's use of an AP photo as raw material for the iconic Barack Obama “Hope” poster nicely illustrates fair use's uncertainty. *See generally* Dave Fagundes, *Art, Licensing Markets, and the Limits of Unauthorized Appropriation*, PRAWFSBLAWG (July 23, 2009), <http://prawfsblawg.blogs.com/prawfsblawg/2009/07/art-licensing-markets-and-the-limits-of-unauthorized-appropriation-shepard-fairey-conversation-at-th.html> (blog post detailing conflicting opinions of various law professors). The frequent uncertainty raised by assertions of fair use rights supports Lawrence Lessig's quip describing fair use as little more than “the right to hire a lawyer to defend your right to create.” LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004).

84. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 & n.31 (1984); 1976 Copyright Act's legislative history)). To be fair, 'twas ever thus. *Folsom*, 9 F. Cas. at 344 (“This is one of those intricate and embarrassing questions . . . in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases.”).

The Supreme Court did hold in *Sony* that recording television in order to “time-shift” program viewing was fair. *Sony*, 464 U.S. at 455–56. Some express doubt, however, that the case would be decided the same way today. Litman, *Goo*, *supra* note 6, at 590 (“In the question-and-answer session following Paul Goldstein's keynote speech at this symposium, an audience member asked whether *Sony* would be decided the same way today. Professor Goldstein was confident that it would not, and nobody in the audience took issue with his conclusion.”). And some opinions contain suggestions to the same effect. *In re Aimster Copyright Litigation*, 334 F.3d 643, 647–48 (7th Cir. 2003) (describing use of a recording device to skip commercials as the creation of an unauthorized derivative work).

85. *Campbell*, 510 U.S. at 590; *Harper*, 471 U.S. at 561. One could read section 107 as placing the burden of demonstrating that the challenged use is not fair on the plaintiff. 17 U.S.C. § 107 (2006) (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”). That's not the way the Supreme Court sees it.

of authorship.<sup>86</sup> This view treats the user as another author who builds on prior works. In this conception, courts balance an author's interest in a strong copyright against her need for access to a public domain that fuels further creativity.<sup>87</sup> But copying can serve interests—such as autonomy and non-authorial self-expression—that extend beyond fodder for fresh authorship.<sup>88</sup> Modern fair use doctrine has relatively little to say about such uses.<sup>89</sup>

## 2. The Matter of the Text

Fair use's shortcomings have not curbed academic enthusiasm for judicial intervention to curtail copyright's scope. But if fair use is at least partially off the table, what can judges do?<sup>90</sup>

The question implicates larger debates over the proper judicial role in statutory interpretation. Jessica Litman objects that copyright scholars have abetted copyright's expansion by uncritically accepting a view of the Copyright Act as nominally giving rights holders all that they might want. An unduly literalist view of the statute leads to an almost perverse delight at the extremity of the resulting conclusions.<sup>91</sup>

86. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 405 (2003).

87. *Id.*

88. See, e.g., *id.* at 406–20; Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 348–49 (2005); Tushnet, *supra* note 57, at 562–82.

89. Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 177 (2007) (“Fair use is much too busy protecting *The Wind Done Gone* and trying to figure out what to do with Google Book Search to be able to support the copyright interests of millions of everyday readers, listeners, and viewers.”).

90. Professor Litman proposes a range of options while favoring a focus on what Congress intended to be understood about its enacted rights:

An individual who rips a CD to her iPod, turns on her brother's computer, fast forwards through objectionable portions of a television show or DVD, or plays music with the windows open isn't violating the copyright law, despite the plain language of § 106. People disagree on the rationale. It might be fair use; it might be implicitly licensed by copyright owners; it might be that the harm caused by each consumer is *de minimis*, or it might be, as I argue, that Congress intended the § 106 rights to be interpreted subject to the understanding that copyright prohibits unauthorized exploitation but not unauthorized enjoyment.

Litman, *Lawful Personal Use*, *supra* note 6, at 1908 (footnote omitted). In a sense, the argument favored by this Article parallels this final comment, but seeks to doctrinally ground it in the common law of property and Congress's failure to explicitly override it. See *infra* Part III.A.

91. Professor Litman states:

Section 106 means what it says, we tell our students. Any reproduction, creative alteration, or distribution, any performance or display outside of the home, we tell them, is copyright infringement unless it comes within some statutory or judge-made exception. We are even kind of gleeful at the implausible results that follow from the premise. “That's how the statute sets things up,” we say, as if our hands were tied.

Litman, *Creative Reading*, *supra* note 89, at 180; *cf. id.* at 181 (“Copyright owners . . . have seized on the expansive literal reading and made it their own. Some courts are enforcing it, and copyright scholars are questioning it only faintly and half-heartedly.”).

It may well be true that courts have run with the Copyright Act's language in a manner that the drafters of the 1976 Act never contemplated,<sup>92</sup> but that is hardly a litigation trump if courts do not care about legislative history, at least where textual signposts are roughly discernable.<sup>93</sup> This is especially so if we are in a jurisprudential moment that elevates textualist methods of interpreting statutes at the expense of alternative tools of construction, particularly those that seek to recapture the intentions of Congress and implement the legislature's purpose.<sup>94</sup> This characterization is debatable, both generally and in copyright case law in particular.<sup>95</sup> And in any case, statutes contain many ambiguous or vague terms that require judicial construction, opening the door to pragmatic considerations.<sup>96</sup>

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92. See, e.g., *id.* at 180; Litman, *Lawful Personal Use*, *supra* note 6, at 1907 ("Congress has consistently viewed copyright as securing copyright owners' opportunities to exploit works without invading individuals' liberties to enjoy works.").

93. For example, Professor Litman notes that Congress intended the Audio Home Recording Act to give consumers a "free pass to make any copies of recorded music that technology would allow." Litman, *Goo*, *supra* note 6, at 590 (citing H.R. REP. NO. 102-873(I), at 24 (1992), reprinted in 1992 U.S.C.C.A.N. 3578, 3594; William F. Patry, *Section 1008*, PATRY COPYRIGHT BLOG (Aug. 17, 2005, 9:44 AM), <http://williampatry.blogspot.com/2005/08/section-1008.html>). In isolation, the provision looked to have done the job. Section 1008 provides:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

17 U.S.C. § 1008 (2006). Unfortunately, the statute elsewhere gives restrictive definitions of "digital audio recording device" and "digital audio recording medium" so as to limit the exemption provided by the American Home Recording Act (AHRA) such that it does not apply to the vast majority of devices used to make digital music recordings. *Id.* § 1001. For his part, Patry writes, "[O]ur subjective intention and that of the Committee, expressed in the Committee report, was to exempt all noncommercial private copying. Because we failed to express that intention in the statute, I accept that our intention is irrelevant." Patry, *supra*.

As Professor Litman notes, judicial neglect of Congress's intent applied not only to section 1008, but to attempts to appeal to the animating principle in the fair use context. "Eight years [after the AHRA], Napster sought to make precisely those arguments: that consumer copying of recorded music was either fair use under *Sony*, permissible under the Audio Home Recording Act, or both. The court didn't think the arguments merited serious consideration, and resolved them against Napster summarily." Litman, *Goo*, *supra* note 6, at 590 (footnotes omitted).

94. See, e.g., Grynberg, *supra* note 42, at 929 n.152 (collecting sources). To say that there may be a greater reliance on textualist methodology is not to say that other considerations do not continue to inform statutory interpretation. See, e.g., FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 158 (2009).

95. See 1 PATRY, *supra* note 43, § 2:37 (collecting examples of legislative history use in copyright cases and contending that "[r]egardless of the polemical effect of Justice Scalia's attacks on legislative history, an empirical study of the use of legislative history in copyright cases demonstrates that Justice Scalia's criticism has had no discernible effect").

96. See, e.g., Leval, *supra* note 44, at 196-98 (discussing delegating and non-delegating statutes).

But sometimes Congress speaks clearly. It is the textual mismatch between those statutory provisions that expand copyright's scope and those that limit it that creates the most mischief.<sup>97</sup> Textual checks to copyright—fair use aside—lack the openness of those terms that empower copyright holders. Courts may be mistaken to equate the loading of software from a disc with an actionable reproduction,<sup>98</sup> but the breadth of the Copyright Act's definition of "copies" makes it hard to claim that they are usurping Congress's authority.<sup>99</sup> Copyright restrictionists may not lose every battle, and perhaps a good deal remains up for grabs, but the statute's broad scope requires them constantly to play defense.

Opportunities for offense are more limited. Restrictive doctrines need some legal basis. If fair use is limited, then those who would craft doctrines to limit copyright are at a disadvantage. It is well and good to argue that non-commercial use of music should be legal as a matter of policy, legislative intent, or the underlying purposes of copyright.<sup>100</sup> But it is a good deal harder to claim that it *is* legal. In light of the specificity of the statute's textual exclusions, courts appear to have scant room to improvise.<sup>101</sup>

### C. *The Promise and Limitations of Implied Licenses*

In response to the problems of fair use, some copyright restrictionists suggest expanding the use of implied licenses. This approach's promise is limited by the doctrine's strong focus on copyright holder conduct. It is too easy for copyright holders to "revoke" any implied license.

#### 1. Implied Licenses Generally

Implied licenses traditionally fill gaps in contracts where the failure to accommodate copyright's peculiarities might deprive a party of the benefit of her bargain.<sup>102</sup> A copyright is distinct from the object that embodies the

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97. See *supra* Part I.A.1.

98. See *supra* note 48 and accompanying text.

99. 17 U.S.C. § 101 (2006) (defining copy as a material object "in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

100. See *supra* note 93.

101. Hayden v. Pataki, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting) (noting that "some scholars, myself included, have suggested that it might be a good idea if . . . courts were permitted to read the law according to what they perceived to be the will of the current Congress, rather than that of a long-gone-by one," but conceding that "such an arrangement in the abstract . . . is simply not a part of our legal system" (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982))).

102. Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 276–77 (2009) (commenting that in copyright law, implied license resolves "two conflicts: the tension between the owner of a tangible object in which a work is incorporated and the owner of the copyright for that work, and the tension between the creator of a work (and/or the copyright owner) and his or her transferee (e.g., the work's commissioner)").

protected expression, and copyright transfers must satisfy a federal statute of frauds.<sup>103</sup> This complicates transactions for the careless and unaware. A movie producer might commission copyrighted material for inclusion in a film, but neglect to obtain a written transfer of copyright or secure a work-made-for-hire agreement.<sup>104</sup> In response, a court may imply a license to use the work to implement the intention of the parties.<sup>105</sup>

Courts also use implied licenses to vindicate reasonable consumer expectations.<sup>106</sup> Implied license enables the purchaser to use his purchase in a reasonable manner even if the use necessitates treading upon a protected copyright right.<sup>107</sup>

These two patterns characterize the bulk of implied license cases.<sup>108</sup> In both, the implied license can be found in the intent of the copyright owner, and that is where the doctrine focuses its attention.<sup>109</sup>

Several commentators recommend broadened reliance on implied licenses as a means of harmonizing copyright doctrine with user norms.<sup>110</sup> Some of these recommendations apply traditional implied license reasoning to the Internet context. They focus on the reasonable implications of direct interaction between the copyright holder and the “licensee.”<sup>111</sup> Others are

103. 17 U.S.C. § 202 (2006) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”); *id.* § 204 (“A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”).

104. *Id.* § 101 (defining work made for hire); *id.* § 201(b) (vesting copyright ownership in employer for works made for hire).

105. *See, e.g.*, *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990) (holding that copyright holder’s creation and delivery of work at request of moviemaker constituted an implied license for use of the work in defendant’s film); 2 PATRY, *supra* note 43, § 5:131.

106. Many such expectations have since been protected by statute. The traditional first-sale doctrine, codified by the 1909 Act, 17 U.S.C. § 27 (1909) (repealed 1976), preserved the ability of purchasers of copyrighted works to “sell or otherwise dispose” of them. 17 U.S.C. § 109; *see* 4 PATRY, *supra* note 43, § 13:19.

107. For example, the sale of a computer program may carry with it a license to copy its contents into the computer (rather than simply running the program off of a CD). As Patry explains:

[P]urchasing a used CD cannot be deemed to convey an implied license for reproduction. By contrast, sale and purchase of a computer program does convey an implied license for internal reproduction because the purpose of the program is use in a computer, a use that necessitates the making of a copy (at least during installation, and likely repeatedly thereafter in RAM storage), a right reserved to copyright owners.

2 PATRY, *supra* note 43, § 5:131; *see also* 17 U.S.C. § 117.

108. *See* Afori, *supra* note 102, at 281.

109. 2 PATRY, *supra* note 43, § 5:131 (“Under the classic implied license, the author actually creates the work for the defendant, intending the defendant to use the work . . .”).

110. *See, e.g.*, Afori, *supra* note 102, at 290; Raghu Seshadri, *Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap*, 2007 UCLA J.L. & TECH. 3; John S. Sieman, Comment, *Using the Implied License to Inject Common Sense Into Digital Copyright*, 85 N.C.L. REV. 885, 921 (2007).

111. *See, e.g.*, Nimmer, *supra* note 38, at 20 (“By virtue of the business transaction that led to ownership of the CD-ROM, the buyer of *Nimmer on Copyright* has an implicit license

more ambitious and suggest that implied licenses can bridge the gap separating copyright practices from the norms that have evolved among users.<sup>112</sup>

## 2. The Limitations of Implied License

These latter proposals may falter when faced with transactions outside the bilateral setting of traditional implied license doctrine.<sup>113</sup> Sometimes non-face-to-face transactions may be akin to traditional cases. For example, an Internet user may reasonably assume that a website's public status conveys a license to engage in copying activities that are necessary to view it.<sup>114</sup> But what if such assent cannot be inferred or is explicitly withheld?

The primary problem with increased reliance on implied licenses is the doctrine's focus on licensor intent. The potential of implied licenses is limited indeed if a copyright owner can negate any prospective license simply by affixing a notice that prohibits duplication. But that's what current precedent suggests.<sup>115</sup>

Recognizing the problem, Orit Fischman Afori proposes removing implied license from its contractual roots.

Once the doctrine is fully acknowledged as a pure judicial standard for infusing reasonableness into intellectual property law without the need to track the subjective or even the objective intent of the copyright owner, it will pave the way for the emergence of an implied license doctrine as a key principle of intellectual property law.<sup>116</sup>

In calling for implied licenses to inject a reasonableness criterion into copyright, Professor Afori notes that most discussions of broadening the role of implied license in copyright doctrine have hewn to a traditional contractual framework.<sup>117</sup> And for good reason. Reliance on traditional contract law principles gives implied license a legal basis. Abandoning that framework leaves proponents with a legitimacy difficulty.

Professor Afori's response is to treat the term "implied license" as a starting point that may then be elaborated into a "pure judicial standard for infusing reasonableness" through common law decision making that treats

to boot up; Jolly Roger does not."); *id.* at 32 (suggesting similar reasoning for forwarded e-mail).

112. Seshadri, *supra* note 110, at 30, ¶ 59.

113. *Cf.* Janis, *supra* note 2, at 499–500 (discussing implied licenses of intellectual property in bilateral settings).

114. *See, e.g., id.* at 501 n.460.

115. *See, e.g.,* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026 (9th Cir. 2001) ("Courts have found implied licenses only in 'narrow' circumstances where one party 'created a work at [the other's] request and handed it over, intending that [the other] copy and distribute it.'" (alterations in original) (citations omitted)).

116. Afori, *supra* note 102, at 290.

117. *Id.* ("To date, however, the few scholars who have focused on the potential of the implied license doctrine as a means to resolve many of the current problems in copyright law, especially in the context of the Internet, have stuck to the doctrine's traditional contractual framework.").

the phrase “implied license” as a metaphor.<sup>118</sup> This begs the question, discussed above, of whether courts have the authority to engage in such flights of creativity.<sup>119</sup>

Implied licenses face another difficulty. A copyright holder’s ability to revoke licenses reintroduces the problem of tolerated use.<sup>120</sup> Treating certain uses as tolerated reinforces the perception that copyright holders can (and should) control how users employ the works.<sup>121</sup> What is needed is a basis for the doctrine that is not wholly dependent on the rights holder’s behavior. Traditional conceptions of implied licenses cannot play this role.<sup>122</sup>

## II. PERSONAL PROPERTY AND THE COMMON LAW BASELINE

There is another basis for protecting personal use, but the Copyright Act is the wrong place to look. Copyright law—and intellectual property law generally—operates by interfering with common law property rights. Though this observation is the basis of several critiques of intellectual property regimes, there have been relatively few efforts to integrate it into copyright doctrine. The first step is to appreciate that user property rights in the tools used to interact with copyrighted material are part of the common law baseline that copyright law alters. Judges often note that courts should interpret statutes in harmony with the preexisting common law absent clear legislative text to the contrary. This truth has been used to

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118. *Id.* at 290; *id.* at 295 (“Why, then, use the term ‘implied license,’ which clearly indicates a contractual concept? One way of answering this question is to regard the introduction of the implied license doctrine into copyright law as a metaphor.”); *id.* at 297 (“[T]raditional use of the implied license doctrine was to infuse reasonableness into intellectual property law when the contractual framework enabled it. Thus, an almost natural evolution of this doctrine would be to keep its aim, tradition and terminology, despite moving it out of the contractual framework.”).

119. *See supra* Part I.B. Professor Afori analogizes her approach to what courts have done with certain open terms in the statute. Afori, *supra* note 102, at 298–99. But those terms have the benefit of actually being in the statute. Professor Afori contends that implied license doctrine is nonetheless legitimate because the concept is already a part of copyright. *Id.* at 299 (“The proposed new meaning of the implied license doctrine fits the existing pattern of evolution in copyright terminology described above, since it builds on an already existing copyright term which is still not fully or clearly defined.”). That may be, but in its traditional conception the doctrine has plausible legal bases in traditional contract and licensing principles. If detached from that foundation, as Professor Afori proposes, something new is needed if the revised doctrine is to stand.

120. *See supra* Part I.A.2.

121. Litman, *Creative Reading*, *supra* note 89, at 179 (“Relying on implied license to permit fan fiction and fan video reinforces the obvious negative pregnant: if it is not the sort of thing copyright owners have a clear interest in permitting, copyright law should not allow it.”).

122. *Id.* at 178 (“[W]e could treat fannish creations as implicitly authorized derivative works. The implicit authorization flows from releasing a work in the mass media for which the buzz generated by fannish activity is likely to mean a huge increase in the bottom line . . . .”). Professor Litman notes that this view would not “undermin[e] the core understanding that the copyright owner is entitled to decide whether or not to allow fans to engage in creative embroidery.” *Id.*



expand copyright's scope,<sup>123</sup> but it has not penetrated judicial or scholarly analysis of the potential of implied licenses.

Reading the Copyright Act against the backdrop of preexisting property rights of copyright users provides a basis for weaving these rights—and the longstanding norms that they reinforce—into the fabric of copyright law. First, personal property rights may form the basis of a limiting construction for the Copyright Act. Second, the common law baseline may serve as a source for rules needed to fill gaps in the statute.

#### A. Intellectual Property as Property Regulation

Copyright's growth has been described as the transformation of a limited commercial monopoly into a broader property right.<sup>124</sup> One finds similar characterizations in the debate about whether intellectual property is "property" despite the many differences separating real and personal property from IP.<sup>125</sup> My focus is less on the question whether IP, specifically copyright, is property and more on the effect of intellectual property rights—whatever their claim to property status—on the property rights of others.

To assume, arguendo or otherwise, that intellectual property is traditional property is to mask its extraordinary character. While governments impose any number of regulations on our property, intellectual property laws give private actors regulatory power over the private property of others. Holders of these "intellectual privileges" may invoke the coercive apparatus of the state to regulate private conduct.<sup>126</sup> And unlike land easements or servitudes, these intrusions are not bargained for or otherwise avoidable. They exist as an intrusion into private property rights. This observation has long formed part of the "moral" critique of intellectual property law,<sup>127</sup> but it has broader implications for the question of user rights.

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123. See *infra* Part II.E.3.

124. See, e.g., L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703, 707 (2001) ("Copyright, in short, has been changed from a marketing monopoly to a proprietary monopoly that gives the copyright holder as much control over a copyrighted work as the title to realty gives the titleholder over a plot of land.").

125. For a canvass of these differences, see, for example, Bell, *supra* note 2, at 532–40.

126. See *id.* at 526–27 ("In particular, the Copyright Act entitles a copyright holder to enlist agents of the state in prima facie violations of non-owners' rights. Absent copyright, we would remain free to employ our persons and property in echo of others. Copyright sharply limits those, our natural and common law rights." (footnotes omitted)).

127. See, e.g., THOMAS BABINGTON MACAULAY, 1 SPEECHES BY THE RT. HON. THOMAS BABINGTON MACAULAY, M.P. 394 (1853), available at <http://name.umdl.umich.edu/ABA0947.0001.001> ("The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures . . ."); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 865 (1990) ("[T]he attempt to generate profit opportunities by legislatively limiting access to certain ideal goods, and therefore to mimic the market processes governing the allocation of tangible goods, contains a fatal contradiction: It violates the rights to tangible goods, the very rights that provide the legal

### B. Three Objections

Not everyone will agree that characterizing intellectual property as an interference with property (or liberty)<sup>128</sup> is productive.

#### 1. Doesn't All Property Affect Property?

The first objection is to dismiss the claim as banal. Any property right or legal entitlement may be described as a check on the property of others.<sup>129</sup> Take the law of trespass, for example. My freedom to aim my car anywhere I please ends at your property line.

True enough. But this example assumes that trespass is the proper analogy for intellectual property infringement.<sup>130</sup> Not so.

First, analogizing copyright infringement to trespass overlooks the impact of intellectual property's protection of non-rivalrous matter. Intellectual property may be shared (trespassed upon) by many people at once without dispossessing anyone. Giving the powers of property to the owners of non-rival goods radically expands the breadth of those powers and the number of people likely to be directly affected by their exercise.<sup>131</sup>

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foundations with which markets begin.”); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHL.-KENT L. REV. 841, 862 (1993) (“It sounds a lot less pleasant if, instead of saying we are rewarding authors, we turn the matter around and say we are imposing *duties*, restricting *freedom*, and inflicting *burdens* on certain individuals for the sake of the greater social good.”). Of course, supporters of intellectual property rights also make normative claims alongside the utilitarian. See generally Palmer, *supra* (discussing normative claims in favor of intellectual property rights). Others, while agreeing that there is a basis in natural rights arguments for the recognition of intellectual property rights, argue these same arguments counsel greater respect for the public's interest in copying than generally appreciated. 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, 1535 (1993) (“When the limitations in natural law's premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests.”).

128. This Article focuses on IP's consequences to property rights, not liberty interests. See *infra* note 211.

129. Cf., e.g., Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 719 (1917) (“If A owns and occupies Whiteacre, not only B but also a great many other persons . . . are under a duty, e. g., not to enter on A's land.”); *id.* at 722 (“all rights *in rem* are against persons”).

130. Cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (“The right to exclude others is generally one of the most essential sticks in the bundle of rights that are commonly characterized as property. With respect to a trade secret, the right to exclude others is central to the very definition of the property interest.” (citation omitted) (internal quotation marks omitted)); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (“‘Anyone who violates any of the exclusive rights of the copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, ‘is an infringer of the copyright.’”); *id.* (discussing and citing 17 U.S.C. § 501(a) (2006)). Even if trespass provides an arguable analogy, the question remains whether the analogy is best drawn to trespass to real property or to chattels, the remedies for which are less absolute. Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 983–84 (2007).

131. Cf. Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 95 (2009) (“Why do we differentiate between nuisance and trespass? . . . The concern

In contrast, third parties generally experience traditional property rights as a direct restriction when they are in proximity to something tangible.<sup>132</sup> Because IP rights reach non-tangible “goods” that may be held simultaneously by many actors, the powers exercised by the holder of the entitlement extend beyond those in proximity to a parcel of land or chattel.

Consequently it is often harder to avoid infringing an IP right than a traditional property entitlement. The information costs of learning what is permitted are relatively low in the classic trespass setting in which the regulated party must simply respect a property line. Knowing the boundary of the permissible is harder when, as in a nuisance case, both property owners have property claims and the interference, if any, with property rights is non-possessory in nature.<sup>133</sup> Matters may be even more complicated in the IP context.<sup>134</sup>

This point can be illustrated with a silly, but not entirely fanciful, example. Suppose you own both a cat and a laser pointer. Knowing that Fluffy is fascinated by light, you decide to use the pointer to give her some exercise. You are not allowed to enter your neighbor’s property to do so. And if you make too much noise or carelessly aim your beam through your neighbor’s window he might pursue a nuisance action. If it happens that he also owns U.S. Patent Number 5,443,036, covering this particular method of cat exercise, he has the ability to enjoin not only you (even if you pull your shades), but also every other person who owns both a laser pointer and a cat.<sup>135</sup> Trespass law prevents you from going into your neighbor’s house for Fluffy’s workout. Nuisance law stops you from making too much noise. Intellectual property law forecloses the activity, period, but with added difficulty in determining whether the property right exists in the first place.<sup>136</sup>

Second and relatedly, other property doctrines may better characterize IP rights. Copyrights and patents also function as negative easements.<sup>137</sup>

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raised by such a drastically enforced right to exclude is that landowners would be vested with tremendous veto power over a wide range of uses for any neighboring land.”).

132. The rivalrous quality of the tangible world creates a zero sum game in some contexts. Someone has the property; someone does not. Not so with non-rival goods, which can be held by multiple parties at once. This is not to deny the existence of the utilitarian case for treating non-rival goods as rivalrous in order to encourage their production.

133. Newman, *supra* note 131, at 102 (“The ability to accurately identify non-possessory use conflicts in advance is subject to much greater uncertainty than is the ability to accurately identify the future need for possessory use of resources.”).

134. *See, e.g., id.* at 105–06 (“To avoid infringing a patent, it is not sufficient to avoid appropriating or coming into contact with any particular physical objects . . . . [I]t is only through extremely detailed evaluation of uses that anyone is able to determine whether or not actions transgress the ‘boundaries’ of the patent.”).

135. By the way, U.S. Patent Number 5,443,036 is real. U.S. Patent No. 5,443,036 (filed Nov. 2, 1993).

136. For example, evaluating whether the patent is invalid due to obviousness or lack of novelty.

137. A negative easement is an “easement that prohibits the servient-estate owner from doing something, such as building an obstruction.” BLACK’S LAW DICTIONARY (9th ed.

They limit the rights of others to use their own property. Unlike a government regulation, these easements are constantly springing into existence with each patent grant or fixation of an original work of authorship. This is not to argue that such grants are illegitimate or unjustified, though there is a rich literature that makes both contentions, but to note the function of intellectual property law as vesting private actors with the power (dressed in the property form) to regulate private property. And the method used—the imposition of de facto servitudes in personal property—is one that the common law traditionally viewed as suspect.<sup>138</sup> Because limiting doctrines, like fair use in copyright law, offer a check to these powers, much of intellectual property law can be seen as the mediation between competing property rights. In this an infringement action may also be seen as a form of nuisance, rather than servitude, law. Both the infringer and infringe have incompatible, property-backed claims that need to be reconciled.<sup>139</sup> The information costs of avoiding a property rights violation matter here, too, because of uncertainty as to the scope of the entitlement, such as the line separating fair use from infringement, or the extent to which the holder of the entitlement may be reasonably expected to enforce it.<sup>140</sup>

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2009). I am not the first to characterize IP rights in this manner. Newman, *supra* note 131, at 68, 106–07.

138. See, e.g., Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 954 (1928) (discussing failure of such servitudes to take hold in either England or the United States); *id.* at 981–82 (citing, but disputing, authority that “[i]t is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice” (quoting *Park v. Hartman*, 153 F. 2d, 39 (6th Cir. 1907))); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 906 (2008) (“The conventional wisdom, as described by contemporary commentators, is that personal property servitudes are seldom enforceable.”).

139. Compare RESTATEMENT (SECOND) OF TORTS § 826 (1979) (calling on court considering a nuisance claim to weigh the “gravity of the harm [against] the utility of the actor’s conduct”), with 17 U.S.C. § 107 (2006) (fair use factors require evaluating the “purpose and character” of the copyright use and “effect of the use upon the potential market for or value of the copyrighted work”).

140. Cf. Van Houweling, *supra* note 138, at 914–16 (discussing information costs as possible reason for skepticism of servitudes on personal property). As Professor Newman observes:

Indeed, when translated into their practical effects on the tangible property rights of others, IP rights can be seen to constitute a radical departure from the traditional principle of *numerus clausus*. IP rights amount to a form of a negative easement—a restriction on the uses owners can make of their tangible property. They violate, however, several traditional limitations on such servitudes. At common law, only a few specific types of activity could be restricted by the use of a negative easement: conduct that blocked the flow of light, air, or water in an artificial stream, or conduct that denied support to buildings or structures. These limitations protected a specific tract of adjacent property, making negative easements appurtenant by their nature. For the most part, the refusal of the common law to enforce negative easements in gross against subsequent owners of land has survived to the present day; while the *Third Restatement of Property* abandons this restriction, the recent innovation of conservation easements generally required specific legislation to make them enforceable. In practice, IP rights are negative

Nothing in these observations is incompatible with calling intellectual property “property,” but appreciating the countervailing property rights of users affects how that property is treated. In a property dispute, it matters whether the defendant is alleged to have committed a trespass, caused a nuisance, or violated a servitude. These classification issues are not swept away by claiming that copyright is property.<sup>141</sup>

## 2. Taking the Bitter with the Sweet

A second objection is to dismiss such interferences as irrelevant because they would not exist but for the creation of the intellectual property in the first instance.<sup>142</sup> That is, your inability to rip a DVD copy of, say, *The Matrix* is not much of an interference in your property rights if the film did not exist prior to its creation, fixation, and protection by copyright. You have “lost” something that you never had. There are several responses to this objection. First, IP rights may have the effect of precluding independent creation. To be sure, in copyright law, unlike patent law, independent creation negates copyright infringement, and the idea/expression dichotomy forecloses protection of “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>143</sup> That does not, however, prevent copyright plaintiffs from attempting to extend their rights to encompass what may be characterized as ideas,<sup>144</sup>

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easements in gross that are not limited to real property and that can be used to restrict an extremely broad range of uses. Once acquired, they make servient estates of every chattel and every person within the territorial reach of the law. These rights are freely transferable, and there are no requirements that the person initially acquiring them stand in any sort of privity to the tangible property burdened or that the interests protected in any way “touch and concern” that property.

Newman, *supra* note 131, at 106–07 (footnotes omitted).

141. Tom Bell goes further in response to the banality objection by arguing that the copyright privilege is inferior by pedigree to the property rights with which it interferes:

Nonetheless, the definition tendered here does helpfully clarify that copyright holders claim special immunities from the obligations that each of us has, in a state of nature and at common law, to respect others’ rights to peaceably enjoy their persons and properties. As Hohfeld would say, in other words, “a [copy]privilege is the opposite of a duty [to respect others’ natural and common law rights], and the correlative of a ‘no-right’ [suffered by defendants in infringement suits].” That offers a more fully and fairly positivist description of copyright, and one more true to Hohfeld’s project than descriptions blandly observing that all rights limit each other. To the contrary, our common law and natural rights carry more normative weight, and thus more legal weight, than the special rights created by the Copyright Act. A thoroughgoing positivist committed to clarity would therefore do best to call copyright not simply property, nor (with all due respect to Hohfeld) a liberty relation, but rather a type of privilege.

Bell, *supra* note 2, at 530–31 (alterations in original) (footnotes omitted).

142. See, e.g., Gordon, *supra* note 127, at 1566–67 (explaining argument).

143. 17 U.S.C. § 102(b) (2006).

144. See, e.g., *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 559 (C.D. Cal. 2005) (allegation that television program *Trading Spouses* infringed British show *Wife Swap*); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974–78 (2d Cir. 1980) (interpretation of facts surrounding explosion of the Hindenburg).

facts,<sup>145</sup> procedures,<sup>146</sup> or methods of operation<sup>147</sup> or from asserting their rights when a defendant claims independent creation in good faith, but may be responding to the plaintiff's work on a subconscious level.<sup>148</sup>

Indeed, the defendant who engages in subconscious copying has suffered an interference with her creative capacities. This leads to a second response to the irrelevance objection: the creation of works that receive copyright protection may leave the public worse off than if they had never been created. Many copyright holders work hard to ensure the ubiquity of their works. Their handiwork may displace non-protected alternatives from public consciousness. Such efforts are unnecessary, however, for a living culture. Culture in general, and works of authorship in particular, would exist without copyright. In a world without IP, people would still make use of these works, with some works becoming more prominent than others. Just so in our world of copyright protection, except that those who expend great effort in placing their works at the cultural forefront also try to control their subsequent use. Participants in cultural life may be in an inferior position than they would have been absent copyright if, without copyright, an unprotected substitute would have filled the same cultural niche. Think of a painter in a field with a blank canvas. It is one thing to tell her, "Don't paint my building" if it is a speck in the distance (let's leave 17 U.S.C. § 120 aside for a moment).<sup>149</sup> It is quite another if you have paved the field and your construction dominates the horizon.<sup>150</sup>

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145. *See, e.g.*, *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 699–702 (2d Cir. 1998) (copying of page numbers in Westlaw's printed court reporters is not copyright infringement).

146. *See, e.g.*, *Open Source Yoga Unity v. Choudhury*, No. C 03-3182 PJH, 2005 WL 756558, at \*4 (N.D. Cal. Apr. 1, 2005) (concerning yoga sequences claimed to have health promoting property).

147. *See, e.g.*, *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995) (holding that a spreadsheet menu command hierarchy for a computer spreadsheet program was an uncopyrightable "method of operation"), *aff'd by an equally divided court*, 516 U.S. 233 (1996).

148. *See, e.g.*, *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976) (concluding that copyright infringement may be subconscious); Waldron, *supra* note 127, at 882–83 ("[A]voiding the sort of subconscious influence that the judge traced in the *Harrisongs* case would require the most rigorous and stultifying self-scrutiny. . . . [A] duty to ensure that one is avoiding subconscious imitation in a world resonating with 'original' . . . is in fact very burdensome.").

149. The statute precludes efforts to use a copyright in an architectural work "to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place." 17 U.S.C. § 120 (2006).

150. *Cf.* Gordon, *supra* note 127, at 1568 ("Or consider a landscape photographer. As each bit of the natural landscape is replaced by buildings, statues, and other human artifacts, the only way her interest in the common can remain 'as good' is if she is given the freedom to photograph her new surroundings."). *See generally id.* at 1567–70 (discussing how IP may leave the public worse off); Waldron, *supra* note 127, at 885–86 ("[W]e must address one another using, not only the resources of a common language and vocabulary, but, in a larger sense, whatever images and catch-phrases there are in the world, to provide points of mutual understanding and orientation . . ."). Professor Waldron also notes the failure of the "no hardship" argument to account for the prospect that would-be copiers would not see a world

As a matter of policy, copyright's incentive to produce works offsets this displacement effect. Perhaps this deal is a good one for society at large; perhaps not. But it is a bargain that limits the ability of citizens to use their property to participate fully in the culture around them.

### 3. Is Copyright Part of the Common Law Backdrop?

Nor is it an answer to argue that the long history of intellectual property rights makes them a part of the common law fabric such that we need not balance competing interests. The Supreme Court long ago made clear that IP entitlements exist *outside* the common law property framework.<sup>151</sup> Moreover, the fact that federal statutory IP rights have long limited private property rights does not mean that property-backed expectations do not

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without the copyrighted work as the relevant baseline for comparison. In such instances, they might experience the inability to copy legally as a hardship, one leaving them worse off than if the work had never been created. *Id.* at 866–67.

151. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539 (1852). One might ask whether the existence of state common law copyright regimes, which protected unpublished works and, later, sound recordings, undermine the strength of user property expectations. *But cf.* 1 PATRY, *supra* note 43, § 1:16 n.2 (“Professor [Oren] Bracha also states, ‘There is no known American case that applied or even discussed common law copyright’ in the pre-1790 era.” (quoting Oren Bracha, *The Ideology of Authorship Revisited* 44–45 n.116 (Univ. of Tex. Law, Pub. Law Research Paper No. 82), available at <http://ssrn.com/abstract=869446>)). The answer is no. First, common law rights were weak, divestible as they were by a work's publication. LEON H. AMDUR, COPYRIGHT LAW AND PRACTICE 64 (1936) (“Strictly speaking it is not the fact that statutory copyright had been acquired which is instrumental in abrogating common law rights, but the fact that there had been a general publication.”). There was therefore traditionally little room for action at the state level to shape the property expectations of copyright users. To be sure, this argument is weaker with respect to the pre-1972 treatment of sound recordings, depending on whether one views the development of sound recording as a late technology, compare *infra* notes 153–57 and accompanying text, or the possibility of state copyright in non-tangible expressions. Thomas J. Griffin, *Common-Law Copyright in the Spoken Word*, 32 A.L.R.3d 618, 618 (1970) (discussing limited authority on subject and observing that “the courts in a number of cases . . . have indicated that an idea or intellectual production is susceptible of common-law copyright only if it is embodied in writing or otherwise reduced to tangible form”); see MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 11.1 (1976) (arguing against common law tangibility requirement). Second, the protection at state common law of unpublished works is consistent with the protection of user property rights. Prior to publication, works embodying creative expression are most likely to be within the control of their creator. Protecting an author's rights to such works will generally go hand in hand with protecting the author's personal property. AMDUR, *supra*, at 32 (“The rights of an author, in his unpublished works, is as much protected at common law as other property in his possession.”). Once the work is published (and divested of state protection), however, the competing property claims of the public recipients of the work come into play. See *infra* Part III.B.4.b. Even before publication, other property interests required balancing in setting the scope of common law copyright. Compare, e.g., AMDUR, *supra*, at 41 (“An absolute, unqualified sale of the manuscript or other unpublished work passes the entire property therein, including the common law rights of copy.”), with *id.* at 44–49 (describing status of private letters insofar as common law copyright was generally retained by author though title over physical copy resides in recipient). Third, to whatever extent a state common law copyright tradition existed, it was excised by the 1976 Act's removal of publication as a requirement for copyright protection (with the limited exception of sound recordings created prior to February 15, 1972). See 17 U.S.C. § 301.

persist, especially when one remembers that the scope of copyright was traditionally narrower.<sup>152</sup>

To see why, consider the Supreme Court's regulatory takings jurisprudence. *Lucas v. South Carolina Coastal Council*<sup>153</sup> held that a regulation that effectively "wipes out" a property's value constitutes a taking requiring just compensation. The majority allowed that nuisance control is an exception to the rule, on the logic that property ownership is understood to encompass the duty to refrain from uses that constitute nuisances.<sup>154</sup> But it limited this exception to regulated conduct that would have been recognized as a nuisance early in the common law of property. That is, even though the government traditionally regulated activities that could be considered nuisances, expanding the reach of such government regulations does not alter the common law expectations of property owners.<sup>155</sup>

Just so with intellectual property law. Although IP entitlements have long coexisted with common law property expectations, the expansion of those entitlements in the last century does not rewrite the common law of property or alter expectations of the legality of longstanding practices.<sup>156</sup> Changes in IP's scope may diminish property rights, but the baseline has an independent life. So it is even with respect to property that is created and purchased *after* applicable IP entitlements are on the books.<sup>157</sup>

### C. The Role of User Property Rights in Modern Copyright Law

Scholarship calling attention to copyright's role as an interference with private property generally uses the observation as a springboard for critiquing copyright law more generally.<sup>158</sup> But the "private property" critique plays only a limited role in actual doctrine. To be sure, the

152. *See supra* Part I.A.1.

153. 505 U.S. 1003 (1992).

154. *Id.* at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

155. *Id.* at 1031 (explaining that nuisance exception means more than the state's "proffer[ing] the legislature's declaration that the uses [the landowner] desires are inconsistent with the public interest . . . . [It must instead] identify background principles of nuisance and property law that prohibit the uses").

156. *Cf. id.* at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . ."). Proponents of strong personal use rights make the analogous point that certain unlicensed uses have long been the norm. *See supra* note 76 and accompanying text.

157. In a similar vein, the Supreme Court held that acquiring property after the date of a regulation's implementation does not bar a regulatory takings claim. *Palazzolo v. Rhode Island*, 533 U.S. 606, 628–32 (2001).

158. *See, e.g.,* Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 229 (2003) ("[U]nderstanding copyright as a form of authors' welfare suggests the need for, and potential shape of, reforms to end copyright as we know it."); *cf.* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 82–144 (2004) (calling for new defenses to IP liability based on limits found in traditional property doctrines).



Copyright Act contains some accommodations to user property rights.<sup>159</sup> Most prominently, the first-sale doctrine protects user interests in copyrighted material to the extent that a lawful copy—i.e., a piece of personal property—embodies that material.<sup>160</sup> One could even describe the doctrine's pre-codification emergence as an example of judicial protection of common law property expectations.<sup>161</sup> In this light, the doctrine looks less like an exception carved from copyright law and more a vindication of a discrete set of legal interests.

In a similar vein, the Copyright Act limits exclusive rights to perform or display a copyrighted work by exempting non-public performances and displays.<sup>162</sup> This limitation respects user property rights in two ways. First, it insulates a wide range of basic personal uses of tangible copies and phonorecords from legal scrutiny. Second, it protects a user's right to play with copyrighted material in the comfort of her own home qua home (i.e., not as a staging ground of a commercial enterprise). Section 110's carveouts to a copyright holder's right to control performance and display of her work respect private property by exempting communication of transmissions received by "a single receiving apparatus of a kind commonly used in private homes" and by permitting members of households to obtain edited audio and video content.<sup>163</sup> The Audio Home Recording Act's exemption of non-commercial analog and certain digital copying of music is to the same effect.<sup>164</sup>

Generally speaking, however, user-based private property considerations play a limited role in copyright doctrine. And what attention there is focuses largely on property in the copies and phonorecords that embody protected material.<sup>165</sup> Copyright law's creation of easements in private property is largely ignored. So much the worse for personal use rights. Copyright's claim to be a socially beneficial incentive to create is strongest when considering the copies of works that copyright protection supposedly brought forth. The surface case for allowing copyright to interfere with property rights might appear weaker if the property in question were not so closely tied to copyright's purported bounty.

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159. The statute's division of interests between a copyright and a copy may protect user property rights. *See, e.g.*, 17 U.S.C. § 202 (2006) (providing that transfer of copyright ownership does not "convey property rights in any material object").

160. *Id.* § 109.

161. And I do. *See infra* Part III.D.1.a; *see also* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1302 (2001) ("Put another way, physical copy owner 'rights' are defined primarily by the law of personal property, with copyright law imposing a few limited restrictions. The idea of physical copy ownership thus seems to provide a simple and intuitively appealing explanation for the incidents of physical copy ownership.").

162. 17 U.S.C. §§ 101, 106(4)–(6).

163. *Id.* § 110(5), (10).

164. *Id.* § 1008.

165. *Cf. Patterson, supra* note 124, at 712–14 (explicating distinction between work and copyright and how overlooking it broadens the rights of copyright holders).

The absence of private property considerations from copyright parallels the relative inattention paid to copyright uses that are neither simple consumption nor authorial transformation.<sup>166</sup> Similar inattention applies to the user's personally owned tools that enable copying. Even if courts do not target individual users of such equipment, a narrow judicial understanding of legal copyright use may ultimately endanger consumer access to such products.<sup>167</sup>

#### *D. Why User Property Rights Matter*

Paying more attention to private property rights could aid the future development of personal copyright use rights. First, common law property rights provide a legal basis for claiming the existence of user rights independent of the Copyright Act. Absent a regulation to the contrary, and subject to the property rights of others, personal property ownership carries with it the familiar bundle of rights commonly associated with property. One is free to use, exclude, transfer, gift, sell, or otherwise dispose of her property as she wishes.<sup>168</sup> This is no less true of property subject to copyright's negative easements. Stated another way, if the Copyright Act neglects to give copyright owners the power to forbid a particular copyright use, users have that right as part of their basic common law rights, *not* as a matter of federal neglect or statutory vacuum.<sup>169</sup>

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166. *See, e.g.*, Liu, *supra* note 86, at 401 (“[C]opyright law contains at least two primary conceptions of the consumer: the consumer as passive consumer and the consumer as author.”); *supra* notes 86–89 and accompanying text.

167. *See supra* Part I.A.2.; *cf.* Liu, *supra* note 86, at 428 (arguing that “courts, in dealing with new technologies, should acknowledge and give some weight to consumer interests in autonomy, communication, and self-expression,” particularly when considering if “new kinds of uses (such as those enabled by new technology like MP3 players, TiVo, ad-stripping software, and web browsers) constitute fair use”).

168. *See, e.g.*, *Jazz Photo Corp. v. Int’l. Trade Comm’n*, 264 F.3d 1094, 1102 (Fed. Cir. 2001) (“The purchaser of a patented article has the rights of any owner of personal property, including the right to use it, repair it, modify it, discard it, or resell it, subject only to overriding conditions of the sale.”); *City of Tiffin v. McCormack*, 34 Ohio St. 638, 644 (1878) (“Undoubtedly, the right to use property as the owner may please, provided that reasonable care is taken not to do unnecessary injury to others, is the ordinary rule.”); *Johnson v. Mount Ogden Enters.*, 460 P.2d 333, 336 (Utah 1969) (“[E]very person has a right to use his own property as he sees fit so long as that use does not invade the rights of his neighbor unreasonably and substantially.”); *Mayer v. Grueber*, 138 N.W.2d 197, 204 (Wis. 1965) (“It is elementary that the owner of private property may make any proper use of it so long as he does not interfere with the rights of the public.”); 63C AM. JUR. 2D *Property* § 1 (2009) (“[P]roperty’ [in a thing] does not consist merely in its ownership or possession, but also in the lawful, unrestricted right of its use, enjoyment, and disposal.”).

169. *Cf.* *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109, 2122 n.7 (2008) (citing *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 666 (1895) (“Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.”)) (noting that patentees may bargain for use restrictions on sold products, but such rights cannot arise under patent law).

Second, and relatedly, user property rights provide the baseline against which federal copyright law acts. Copyright is a creature of statute.<sup>170</sup> But the Copyright Act cannot answer every question concerning the copyright's functioning. Courts must play a role, determining whether settled expectations remain intact and filling statutory gaps when necessary. As discussed in greater detail below, when they do, they should do so cognizant of the common law backdrop against which they interpret the statute. For user rights, the applicable common law baseline should be clear: owners of personal property may use their property in a lawful manner. Absent the interposition of copyright or another limiting doctrine, the presumption is that individuals have the right to use their property as they see fit. Longstanding common law property rights are properly part of any court's interpretation of what the Copyright Act removes from property law and what remains.

Last, while this Article leaves aside the question whether copyright should be described as property, rhetoric matters. The more copyright, or any exclusive IP entitlement, is characterized as "property" rather than, say, "monopoly," so much the better for the holder of the entitlement. Judges are prone to engage in moralizing once talk turns to a trespass on a plaintiff's property.<sup>171</sup> Apprehension of copyright's dual status as an interference with property rights offers at least a partial corrective to this temptation.

### *E. Background Principles and Statutory Interpretation*

Background principles of property law may find their way into copyright doctrine in at least two ways. First, judges could take seriously the principle that courts do not lightly depart from common law baselines. Appreciating the baseline rights that copyright users held as property owners prior to the adoption of the 1976 Act should guide interpretation of the extent to which the statute supersedes them. Second, judges may draw from common law principles in filling interstitial gaps in the Copyright Act with respect to the powers of copyright owners.

#### 1. Departing From the Baseline

*Community for Creative Non-Violence v. Reid*<sup>172</sup> is the textbook example of the importance of common law principles to statutory interpretation in

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170. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

171. As commentators have often noticed:

As one court explained, "The First Amendment is not a license to trammel on legally recognized rights in intellectual property." The court did not, however, examine "the legally recognized rights" and as its smug assertion suggests, a major harm of copyright as a proprietary monopoly is that it obscures the sacrifice of free speech rights on the copyright altar.

*Patterson*, *supra* note 124, at 719 (footnotes omitted) (quoting *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)).

172. 490 U.S. 730 (1989).

copyright law.<sup>173</sup> In *Reid*, the Supreme Court looked to the common law to interpret the meaning of the word “employee” in the statute’s work-for-hire provision.<sup>174</sup>

But common law precedents provide more than a statutory glossary. They form the baseline against which legislatures modify traditional understandings of rights and entitlements. Given the ubiquity of such understandings, and the difficulties inherent in drafting legislation that contemplates every contingency, courts are reluctant to assume that statutes casually discard well-established legal principles absent a clear legislative directive.<sup>175</sup>

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173. For textbook usage, see, for example, ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 447 (rev. 4th ed. 2007).

174. *Reid*, 490 U.S. at 741 (“[T]he term ‘employee’ should be understood in light of the general common law of agency.”). *Reid* could be characterized as an example of federal common lawmaking. See, e.g., Dane S. Ciolino, *Why Copyrights Are Not Community Property*, 60 LA. L. REV. 127, 148 (1999) (describing *Reid* as creating federal common law); William Patry, *Choice of Law and International Copyright*, 48 AM. J. OF COMP. L. 383, 415 (2000) (“This is a common law of a very limited kind, and it may, in fact, be more accurate to describe the Court’s approach as an interpretation of a statute rather than the creation of a body of law.”). Federal common law is discussed in greater detail below, so some precision is required with respect to language. I would draw a distinction between situations in which courts look to the common law to help define a term as a matter of statutory construction and the “judicial filling of statutory interstices.” Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964); see also Jay Dratler, Jr., *Common-Sense (Federal) Common Law Adrift in a Statutory Sea, or Why Grokster Was a Unanimous Decision*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 413, 420 (2006) (“When a statute speaks on a subject and comes close to giving an answer, but requires extrapolation to new or unanticipated circumstances, statutory interpretation is appropriate. In contrast, when the statute is silent and the legislative history suggests a huge open issue . . . federal-common-law analysis is appropriate.”). The line between the two situations is often hard to draw, as an undefined term is arguably a gap. See, e.g., Grynberg, *supra* note 42, at 948–53.

175. See, e.g., *United States v. Texas*, 507 U.S. 529, 534 (1993) (“‘Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.’ In such cases, Congress does not write upon a clean slate. In order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.” (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (citing *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)); *Astoria*, 501 U.S. at 108 (“[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’” (citations omitted) (quoting *Isbrandtsen*, 343 U.S. at 783)); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329 (11th Cir. 2006) (“While the text of [the Class Action Fairness Act] plainly expands federal jurisdiction over class actions and facilitates their removal, [w]e presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.” (quoting *United States v. Baxter Int’l, Inc.*, 345 F.3d 866, 900 (11th Cir. 2003)) (citing *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434–35 (11th Cir. 1997)); *Duvall v. Attorney Gen.*, 436 F.3d 382, 387 (3d Cir. 2006) (“Congress is expected to legislate against the backdrop of well-established common law principles. An accepted common law doctrine should be implied in a statutory scheme, despite the absence of express authorization, if application of the doctrine is consistent with the structure and

This principle does work in multiple intellectual property doctrines. In patent law, the patent exhaustion doctrine survives despite Congress's failure to codify it.<sup>176</sup> Similarly, the Supreme Court relied on traditional understandings of equitable remedies to reject the Federal Circuit's law of patent injunctions. Instead of a presumption in favor of equitable relief, the Court demanded a more context-oriented approach in accord with its conception of traditional injunction law and the principle that "a major departure from the long tradition of equity practice should not be lightly implied."<sup>177</sup>

Unfair competition law, to take another example, has long recognized the principle that functional matter cannot receive trademark protection. If a roadside sign uses a spring mechanism to prevent the wind from blowing it down, for example, the springs may not be trademarked.<sup>178</sup> This principle ran into difficulty because Congress codified a set of defenses to trademark claims brought by holders of registered incontestable trademarks.<sup>179</sup> That list omitted functionality, creating the danger that an *expressio unius* argument could defeat what trademark law had always recognized as a basis for attacking a trademark's validity. The Eleventh Circuit resisted that logic and held that incontestable marks may be canceled on functionality grounds. The court reasoned that the centrality of functionality to traditional trademark doctrine engendered doubt that Congress would lightly (and silently) eliminate it. Instead, the statute (as it stood at the time in question) made no mention of functionality, making the court "hesitant to read the Act as limiting the doctrine's reach" without a stronger textual signal.<sup>180</sup>

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purpose of that scheme." (citing *Astoria*, 501 U.S. at 108–11)); *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 764 (10th Cir. 2005) ("It is reasonable to assume that when Congress granted rights of way for the construction of highways across the unreserved lands of the West in 1866, it was aware of and incorporated the common law pertaining to the nature of public highways and how they are established."). "Clear" in this context does not mean explicit. *Astoria*, 501 U.S. at 108 ("This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme.").

176. See generally *Quanta Computer, Inc. v. LG Elec., Inc.*, 128 S. Ct. 2109, 2115–17 (2008) (outlining history of patent exhaustion).

177. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

178. See *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34–35 (2001).

179. 15 U.S.C. § 1115(b) (2006). On incontestable marks generally, see *id.* §§ 1065, 1115 (providing that if a registration has become incontestable, "the registration shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce").

180. *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1210 (11th Cir. 1999). The court explained:

Consequently, the mere fact that functionality is not enumerated in § 1115(b) is not sufficient to indicate congressional intent to eliminate the defense's applicability to incontestable registrations. Indeed, given the absence of any explicit reference to the functionality doctrine, which is a judicially created concept that predates the Lanham Act, we should be hesitant to read the Act as limiting the doctrine's reach.

## 2. Filling Interstices

The common law baseline also supplies substance to statutes. The modern federal “common law” tradition accepts that courts fill statutory gaps where necessary to implement congressional legislation, particularly in realms where the federal scheme is pervasive.<sup>181</sup> While such gaps are often filled by borrowing the rule of the state in which the interpreting court sits, courts also look to principles of general law to fill them, principles that naturally reside in common law traditions.<sup>182</sup>

## 3. Common Law Baselines and Copyright: Secondary Liability

The principles discussed above have already left their mark on copyright. The Supreme Court has used common law baselines to *expand* copyright’s scope beyond the clear terms of its authorizing legislation, reflecting the importance of the common law both as a basis for limiting the import of the Copyright Act’s text and as a source of rules to fill the resulting gaps in the statute.

*Sony Corp. of America v. Universal City Studios, Inc.*<sup>183</sup> is primarily remembered for two propositions: (1) Providers of tools used for copyright infringement are not liable for contributory infringement based only on their provision of tools capable of substantial non-infringing uses;<sup>184</sup> and (2) using a VCR to “time shift” broadcast programming is a non-infringing

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“The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”

*Id.* (quoting *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986)). To be sure, the Fourth Circuit disagreed. *Shakespeare Co. v. Silstar Corp. of Am.*, 9 F.3d 1091, 1099 (4th Cir. 1993). Congress ultimately clarified the matter by amending the statute to include a functionality defense and to incorporate the functionality principle into the federal trademark statute generally. Trademark Law Treaty Implementation Act, Pub. L. No. 105-330, § 201, 112 Stat. 3064, 3069–70 (1998) (providing for “technical corrections” to the trademark statute). *Wilhelm Pudenz* was an interpretation of pre-1998 law.

181. See, e.g., CHARLES A. WRIGHT ET AL., 19 FEDERAL PRACTICE AND PROCEDURE § 4514 (1996) (describing “situations in which neither Congress nor the Constitution has provided a rule of decision for the resolution of a federal question case that is properly within the subject-matter jurisdiction of the federal courts;” in such matters “it can be inferred from congressional or constitutional intent that the federal courts should supply the necessary rule of decision by pronouncing common law to fill the interstices of a pervasively federal substantive framework”); Friendly, *supra* note 174, at 421.

182. As Caleb Nelson has written, when federal courts engage in common lawmaking and do not feel constrained to adopt the rule of the local state, they are unlikely to engage in flights of judicial creativity. Rather, they will craft doctrine with an eye to “general law—rules whose content is not dictated entirely by any single decisionmaker (state or federal), but instead emerges from patterns followed in many different jurisdictions.” Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503 (2006).

183. 464 U.S. 417 (1984).

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

fair use.<sup>185</sup> These decisions would have been unnecessary had the Court not first determined that the Copyright Act provides a cause of action for indirect infringement.

To do so the Court had to overcome the statute's silence on third party liability, and the Court's own acknowledgement that the "remedies for infringement are only those prescribed by Congress."<sup>186</sup> The Court nonetheless formulated a contributory copyright infringement doctrine.<sup>187</sup> While nominally grounded in analogy to the Patent Act,<sup>188</sup> the third party liability rule relied on a line of precedents that based liability on the defendant's ability to control the direct infringer's conduct. The Court traced these results to basic common law principles of vicarious liability.<sup>189</sup>

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185. *Id.* at 454–55 (“[W]e must conclude that this record amply supports the District Court’s conclusion that home time-shifting is fair use.”).

186. *Id.* at 431 (“Thus, long before the enactment of the Copyright Act of 1909, it was settled that the protection given to copyrights is wholly statutory. The remedies for infringement are only those prescribed by Congress.” (citations and internal quotation marks omitted)).

187. To be sure, the legislative history contains language suggesting that the Copyright Act’s reference to the owner’s exclusive right “to authorize” statutorily prohibited uses opened the door to third party liability. H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 (stating that “[u]se of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers” and using as an example a lawful purchaser of an authorized motion picture copy who “engages in the business of renting it to others for purposes of unauthorized public performance”). *Sony* at least nods in this direction, though the core of its reasoning on third party liability is elsewhere. *Sony*, 464 U.S. at 435. And indeed, it is difficult to stretch the meaning of “authorization” to capture third party liability outside the vicarious liability context. *Cf.* BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “authorize” as, “To give legal authority; to empower <he authorized the employee to act for him>. 2. To formally approve; to sanction <the city authorized the construction project>.”). In *Sony* no such supervisory relationship existed with respect to the VCR maker and its customers, as the Court acknowledged. *Sony*, 464 U.S. at 437–38 (noting that in earlier cases “the ‘contributory’ infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner” but that the present case “plainly does not fall in that category. The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale.”). Small wonder then that the Court’s later return to secondary liability principles in *Grokster* made no mention of this argument. *But see* Note, Central Bank and Intellectual Property, 123 HARV. L. REV. 730, 745 (2010) (arguing that “the ‘authorize’ clause justifies *Grokster* and liability for intentional contributions, but not necessarily liability for knowing contributions”).

188. *Sony*, 464 U.S. at 442 (in both patent and copyright law “the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible”).

189. *Id.* at 437 (“In such cases, as in other situations in which the imposition of vicarious liability is manifestly just, the ‘contributory’ infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.”). This conclusion was not inevitable. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994) (rejecting aiding and abetting suit under § 10(b) of the Securities Exchange Act and stating “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors”); *cf. id.* at 193 n.2 (Stevens, J., dissenting) (“When § 10(b) was enacted, aiding and abetting liability was widely, albeit not universally,

The resort to common law principles is clearer still in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,<sup>190</sup> which held that inducing copyright infringement creates liability under the statute.<sup>191</sup> While the Court looked again to the Patent Act for its standard,<sup>192</sup> *Grokster* based its holding in precedents grounded in common law third party liability rules: “at common law a copyright or patent defendant who ‘not only expected but invoked [infringing use] by advertisement’ was liable for infringement ‘on principles recognized in every part of the law.’”<sup>193</sup> In other words, traditional common law principles provide the standards for when a defendant may be liable for the acts of a third party. Although Congress failed to codify these principles, the Court refused to conclude that silence equaled abrogation. “Although ‘[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,’ these doctrines of secondary liability emerged from common law principles and are well established in the law.”<sup>194</sup>

*Sony* and *Grokster* also look to the common law to fill perceived gaps in the Copyright Act. Having determined that the statute does not displace common law third party liability principles, the Court implemented those very principles to provide content to the contributory infringement cause of action.<sup>195</sup> Because Congress did not legislate exhaustively (or, indeed, at all) about secondary copyright liability,<sup>196</sup> the Court looked to common law principles (as embodied in the patent statute) for guidance in fleshing out the statute.<sup>197</sup>

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recognized in the law of torts and in state legislation prohibiting misrepresentation in the marketing of securities. The courts’ reliance on common-law tort principles in defining the scope of liability under § 10(b) was by no means an anomaly.” (citations omitted)).

190. 545 U.S. 913 (2005).

191. *Id.* at 919 (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

192. *Id.* at 936 (“For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright.”).

193. *Id.* at 935 (quoting *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911)); *see also id.* at 934–35 (“[N]othing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.”).

194. *Id.* at 930 (citations omitted) (quoting *Sony*, 464 U.S. at 434).

195. Dratler, *supra* note 174, at 421 & n.37.

196. Of course one could argue that the absence of third party liability provisions in the statute is not an open question in need of a judicially supplied answer, but rather a congressional directive that third party liability principles *do not* apply to federal copyright law. *Cf., e.g.,* *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981) (“But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. . . . The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.” (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))).

197. *See supra* notes 181–82 and accompanying text; Dratler, *supra* note 174, at 421 (“Whether invited by Congress or not, the Supreme Court felt it had a duty to recognize and



## III. INTEGRATING USER PROPERTY RIGHTS INTO COPYRIGHT LAW

Just as invocations of common law principles have expanded copyright, so too may they constrain it. The property rights of copyright users could vindicate personal use rights in two ways. First, they are the source of a limiting construction to the rights given copyright owners by statute. Second, reasonable expectations of a right to use one's own property provide the basis of an expanded implied license doctrine.

A. *User Property Rights as Limiting Construction*

Taking common law personal property rights seriously means courts should be circumspect in reading the Copyright Act to reach conduct lying outside copyright's traditional scope. As discussed above, when legislation detracts from common law rights, the carveouts need to be clear.<sup>198</sup> This principle provides a legal basis for respecting copyright's historical boundaries. Historians of the Copyright Act contend that judges have long recognized that the statute's incursions into personal liberty must recognize and respect the existence of individual user rights. They argue that future interpretations of copyright should be consistent with those understandings, especially since nothing in the 1976 revisions explicitly targeted personal use rights.<sup>199</sup> Appreciating the common law baseline provides a doctrinal basis for this directive when the use in question implicates the user's property rights.

This sort of "copyright lenity" is consistent with the nature of copyright. As discussed above, copyright may be seen as a negative easement on personal property.<sup>200</sup> Servitudes of this sort are traditionally disfavored, suggesting the need for judicial caution regarding expansive interpretations of the Copyright Act.<sup>201</sup> Indeed, judicial skepticism of personal property servitudes already has left its mark upon intellectual property doctrine. In both the patent and copyright realms, judges—not legislators—were

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apply the universal principle of law that there are circumstances under which A may be liable for B's tort.").

198. See *supra* note 175.

199. Litman, *Lawful Personal Use*, *supra* note 6, at 1883–94 (describing older precedents); *id.* at 1913 (describing expansion of perceived commercial scope of copyright monopoly); Patterson, *supra* note 124, at 706 ("[D]uring the nineteenth, and much of the twentieth century, copyright was a regulatory monopoly limited to the marketing of works and could be defined as consisting of limited rights to which a given work was subject for a limited period of time.").

200. See *supra* Part II.A.

201. See, e.g., Chafee, *supra* note 138, at 954 (discussing failure of such servitudes to take hold in either England or the United States); *id.* at 981–82 (citing, but disputing, authority that "[i]t is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice" (quoting *Park v. Hartman*, 153 F. 24, 39 (6th Cir. 1907))).

initially responsible for crafting the exhaustion and first-sale doctrines that protected user rights in property that embodied protected IP.<sup>202</sup>

Attempts to read the post-1976 Copyright Act as forbidding use of personal property to engage in activities implicating copyrighted matter must therefore contend not only with traditional property rights but also traditional views of how copyright law mediates between the private property interests of copyright users and the entitlements granted to copyright owners by federal statute. If a copyright holder argues that today's Copyright Act abrogates a property right traditionally enjoyed by users, it should not be enough that the statute hints that copyright sweeps so broadly. The intent must "'speak directly' to the question addressed by the common law."<sup>203</sup>

This limiting construction of the statute could ameliorate the difficulties created by copyright's overlapping rights and the statute's mismatching language with respect to copyright and its limitations.<sup>204</sup> If the structure of the Act places a thumb on the scale in favor of expansive copyright, common law expectations may provide a counterweight.

One could argue in response that Congress *has* spoken with the requisite clarity in section 106's grant to the copyright holder of "exclusive rights to do and to authorize" any of the acts protected by the statute.<sup>205</sup> Assuming this argument negates any user claim of a common law "override" to the contrary, does this mean that the common law baseline is irrelevant? No. The contention here is not that the Copyright Act does not interfere with the property rights of users. Rather, the argument is that in situations in which the scope of that interference is unclear, courts should take into account the backdrop against which the Copyright Act is operating. There is little doubt, for example, that the statute gives the copyright holder the exclusive right to publicly perform a copyrighted work. That does not answer the question whether consumer-directed retrievals of television programming from an off-site facility constitute a public performance.<sup>206</sup> It is proper to look to background expectations where an unclear statute is applied to an unanticipated context that was technically unlikely at the time of enactment. And if Congress meant to radically rewrite the relationship between copyright holders and those engaged in non-commercial uses of

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202. Chafee, *supra* note 138, at 955 ("In the United States, although supported by a few state decisions, [price maintenance licensing requirements] ha[ve] been decisively repudiated by the Supreme Court even when applied to the subject matter of statutory monopolies."); *see also infra* Part III.D.1.a.

203. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (citing *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)).

204. *See supra* Part I.B.2.

205. 17 U.S.C. § 106 (2006).

206. *See generally* *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009); *see supra* notes 34–38 and accompanying text.

copyrighted works, it is reasonable to expect Congress to include a provision that explicitly says so.<sup>207</sup>

Moreover, even though section 106 vests certain rights in copyright holders at the expense of third-party property rights, that does not mean that those rights have no role to play in the statute's implementation. The common law also provides fodder for filling statutory gaps. What it means for a use to be unauthorized presents such a gap. This opening provides the basis for the expanded use of implied licenses in copyright law.

*B. Implied Authorization: A New Implied License Doctrine*

There is no doubt that the Copyright Act intrudes on the common law property rights of copyright users. Section 106 grants to copyright holders the exclusive right to reproduce, perform, display, distribute, or make derivative works from their copyrights and the right to "authorize" such actions.<sup>208</sup> The statute does not, however, explicate fully how authorization (or its revocation) operates in practice.

Implied license law to date represents an incomplete look to the common law to fill the gap. Courts incorporated common law principles found in ordinary contract transactions and licenses concerning rivalrous property to fill out the meaning and practice of authorization under section 106.<sup>209</sup> But because judges generally have not grappled with copyright's status as property regulation, their view of the relevant common law is unduly narrow.

A complete view would appreciate that authorization operates in a legal context in which the putative licensee *already* has the right under the common law of property to engage in the licensed activity but for the copyright holder's (often indeterminate) negative easement in the licensee's personal property. As a result, the licensee's baseline expectations are quite different than those found in the ordinary licensing context. Traditional expectations developed under the assumption that the licensee cannot act but for the permission of the licensor.

Defining and accommodating expectations in the copyright context opens the door to a richer view of implied licenses than previously contemplated. In considering the matter, courts must take into account the background rights and expectations of *both* sides of the transaction.

This Article proposes that courts may consider challenged instances of personal copyright use as follows: assuming the user has engaged in conduct falling under the scope of section 106, the court should consider whether she had an objectively reasonable expectation that her use of her own property was legal. This analysis would take into account prevailing

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207. See *supra* Part II.E.1. To the contrary, the statute implicitly endorses non-commercial uses. 17 U.S.C. § 107 (calling for consideration of market effect in fair use analysis).

208. 17 U.S.C. § 106.

209. See *supra* Part I.C.1.

norms with respect to the activity in question as well as any ambiguity about whether section 106 reaches the conduct. If the defendant user had an expectation of a right to engage in the activity, the analysis would then shift to consider whether the copyright holder had taken sufficient steps to assert his copyright—to “opt-out” as it were from the user’s plans for the copyright owner’s property<sup>210</sup>—in a manner that the defendant was obligated to honor. The remainder of this subpart fits this view of implied license into the analysis developed above.

### 1. Taking Intellectual Property’s Uniqueness Seriously

To say that copyright functions as a negative easement on the private property of copyright users is not to critique copyright’s existence, but simply to note its character. It is a regulation not only of individual liberty, but also property.<sup>211</sup>

If so, then the copyright user’s expectations cannot simply be defined by the copyright holder’s conduct. Even if we assume *arguendo* that copyrights are property, they are not the only property at issue. The background understanding that one has a right to use one’s own property (i.e., the tools used to engage in infringement) remains. That is the source of the copyright user’s authorization or license to engage in what might otherwise be perceived as an infringing act.<sup>212</sup> Rather than require an authorizing act of the copyright holder, some uses are, in effect, “pre-

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210. See *infra* Part III.D.2.c; see also Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008). Professor Wu cites several examples of situations in which a copyright holder should have to take action before liability could be possible and argues for greater use of such mechanisms. *Id.* at 621–22. His focus is more on why such mechanisms are a good idea and less on how they may be grounded in existing law.

211. See *supra* Part II.A; see also Gordon, *supra* note 127, at 1559–60 (“It is conceptually untenable to treat ‘property’ and ‘liberty’ as if they were fully separate categories. Every conventional private property right contains a ‘liberty to use,’ and some liberties are *public* property strong enough to keep conventional private property from forming.” (footnote omitted)).

Keeping in mind the continuity between property and liberty concepts, this Article focuses on property rights, rather than liberty interests, as a basis for promoting user rights for two reasons. First, the common law offers a richer tradition of protection of property rights as a specific body of law than it does a general common law of liberty (for example, there is no first-year course in “liberty” even though liberty interests are implicated by courses in property, contracts, etc.). Second, discussion of liberty interests naturally leads to talk of constitutional protections, specifically freedom of speech. But First Amendment defenses generally fare poorly in copyright litigation. See *supra* note 78. But see Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 465 (2010) (proposing approach “grounded in our understanding of the ‘liberty’ protected by the Fifth and Fourteenth Amendments” as a “foundation for certain types of uses by individuals that are integral to those individuals’ identities”).

212. This perspective addresses Professor Litman’s critique of other efforts to rely on implied license because they focus too much on the perspective of copyright owners rather than users. Litman, *Creative Reading*, *supra* note 89, at 179 (“[B]y ignoring the central importance of readers, listeners, viewers, and players in the copyright scheme, we have all but conceded that the essential policy question in determining whether a use of copyrighted material should be lawful is the way the use looks from the viewpoint of the copyright owner.”).

authorized,” especially if the state of the law is such that the user lacks notice that her property is encumbered by the copyright holder’s privilege.<sup>213</sup>

This does *not* mean that the text of section 106 does not mean what it says. It remains within the copyright holder’s power to forbid certain conduct, and she retains the power to revoke licenses that are implied under the framework discussed here.<sup>214</sup> What it does mean, however, is that full assertion of the copyright holder’s rights may demand that she take steps to assert that entitlement in an appropriate manner.<sup>215</sup>

Nor does this mean that anything goes for the user. Having property does not bring with it the assumption that one can do anything with it. One must determine the scope of the authorization that stems from owning property that may interact with copyrighted matter. It is here that norms respecting permissible uses of copyrighted matter may be integrated into doctrine. On one end of the spectrum, computer owners may forward e-mail without fear of an infringement claim. At the other end, the owner of a video camera should know not to videotape the latest *Transformers* movie from inside the theater.<sup>216</sup> The difference between the two situations is reflected by existing norms. Room for doctrinal development—for “infusing reasonableness” into copyright law<sup>217</sup>—lies between these extremes.

Other norms may similarly frame a court’s inquiry. For example, norms treating amateur fan fiction as a reasonable activity also scorn attempts to commercialize such works—partly due to fear of attracting greater resistance from holders of the copyright entitlement.<sup>218</sup> This suggests that attempts by the user to commercialize her activities will generally exceed the scope of her authorization.<sup>219</sup> Expanding our conception of implied licenses to include user expectations of personal property rights allows such norms room to operate within copyright law.<sup>220</sup> Stated another way, the

213. Cf. RESTATEMENT (THIRD) OF PROPERTY: SERVICITUDES § 7.14 (2000) (“The benefit of an unrecorded servitude, including a servitude created by prescription, implication, estoppel, or oral grant, is subject to extinguishment under an applicable recording act . . . .”); *id.* (providing an exception for “a servitude that would be discovered by reasonable inspection or inquiry”).

214. Though, of course, in traditional property contexts a license may become irrevocable. See, e.g., Janis, *supra* note 2, at 510.

215. As is true in the real property context as well. See *infra* note 253.

216. As a matter of aesthetics if nothing else. See *also infra* note 301.

217. Afori, *supra* note 102, at 290.

218. Steven A. Hetcher, *Using Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1884–87 (2009); cf. *id.* at 1887 (discussing putative norm among copyright holders that copyright holders will tolerate non-commercial remixes of their works but noting that “there is an ongoing battle between this more tolerant norm and one that does not tolerate such uses”).

219. See *also infra* Part III.D.2.a.

220. It is not uncommon for judges to allow such norms to guide development of the law, particularly if there is reason to believe that such customs are welfare maximizing. See, e.g., *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881). See generally ROBERT ELLICKSON, ORDER WITHOUT LAW 254 (1991). Ellickson’s account of norms, and the literature it inspired, is perhaps

permission to use the copyrighted material comes from the user's ownership of the tool she uses for the interaction. Whether that perception is objectively reasonable depends in part on the operative social norm and on the court's willingness to honor that expectation as reasonable.<sup>221</sup>

## 2. Harmonizing Copyright and Common Law

This view of implied license is consistent with the Copyright Act. So long as copyright holders retain their exclusive right to "authorize" uses of copyrighted material covered by section 106, the statutory minimum is met. But nothing in the statute evinces the intent to override the common law presumptions that attend ownership of personal property. Traditional tools of statutory construction favor construing the statute in a manner that respects these preexisting expectations.<sup>222</sup>

The Copyright Act does not define the term "authorize" or explain how authorization is supposed to operate. This gap gives courts room to create space for preexisting common law private property rights. Those rights, in turn, supply a backdrop for elaborating how authorization works in practice.<sup>223</sup> And the Act leaves many open questions on this front. What constitutes authorization? How is it perceived? When is it revoked, and when should a licensee be deemed as having notice of the revocation?<sup>224</sup>

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removed from the discussion here insofar as copyright owners and users are often not in a close-knit relationship, though it is worth noting that one of Ellickson's examples of norm evolution involves copyright. ELLICKSON, *supra*, at 258–64. The argument here, in any case, is directed not to how norms involving copyright evolve, but whether there is a legal basis for permitting their operation.

Relatedly, Jennifer Rothman has argued that intellectual property norms, or customs in her account, should be discounted as a basis for doctrinal guidance in part because rights holders have a disproportionate influence on the shape of custom. Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1957 (2007) ("The most powerful IP owners have the greatest influence on both the creation and establishment of IP customs. The end result of this inequitable evolution is that smaller players in the IP markets and the public at large are inadequately represented by the emerging customs."). In my view, the danger comes not from looking to custom, but from an overly narrow view of whose customs—and whose property-backed expectations—matter. *Cf. id.* at 1964 ("Neither the expectations of IP owners or risk-averse IP users should govern the scope of IP rights.").

221. There is nothing unusual about leaving a role for courts to interject conclusions as to whether norm-based expectations are objectively reasonable. *Cf. California v. Ciraolo*, 476 U.S. 207, 214 (1986) (rejecting Fourth Amendment claim despite subjective expectation of privacy where "respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor"); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

222. *See supra* Part II.E.1.

223. Or, alternatively, for the interpretation and construction of the statutory term "authoriz[ation]." *See supra* note 174.

224. One might ask what more Congress could have done to vest—if that was its intention—absolute authorization rights in the hands of copyright holders. Leaving aside that no such intention appears in the 1976 Act's legislative history, *see supra* note 92 and

Common law property rights respond to these questions by helping to define the licensee's expectations. These expectations are more important in the copyright context than in other implied license settings. A straightforward application of traditional understandings of implied licenses is therefore unsound. In traditional settings, like contract or real property, the licensee has no reasonable expectation of a license until the putative licensor acts—for example, there is no contract without a promise; going onto someone else's land without permission is trespass.

Copyright is different. Copyright's non-rivalrousness means that we cannot simply take as our paradigmatic licensee the rational actor at the other end of a negotiated, arm's length transaction. In the copyright context, the "licensee" is engaging in conduct that would be permissible at common law. We must therefore consider his expectations to determine whether notice has been given of the servitude placed upon his property.<sup>225</sup>

### 3. Personal Versus Commercial Uses

The logic of the preceding analysis applies to copying in support of both personal and commercial uses. It is appropriate, however, for courts to draw a distinction between the two. First, doing so is consistent with traditional understandings of copyright.<sup>226</sup>

Second, commercial entities are routinely expected to be aware that their activities may be regulated in a way that purely private actions are not.<sup>227</sup> Just so with respect to implied authorization. An entity that makes its living off of the commercial exploitation of copyrighted matter should understand the nuances of the Act and the scope of section 106 in a way that a purely private actor does not. Depending on the context, however, even a commercial user may have a reasonable expectation that a use is authorized notwithstanding the lack of direct contact with the copyright holder.<sup>228</sup> Property is property, and commercial entities have reasonable expectations in their rights to their chattels just as individual users do.

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accompanying text, the problem is that Congress was not writing against a clean slate. If it had, its language could well have been enough. But in light of the common law backdrop and technical realities of the time, it is not unreasonable to require Congress to have included language specifying, for example, that "the personal nature of a copyright use is irrelevant to determining whether an exclusive right of § 106 has been violated." Lest this seem an unreasonable requirement, recall that Congress's failure to disclaim explicitly a contributory infringement cause of action resulted in its recognition in *Sony* and *Grokster*. See *supra* Part II.E.3.

225. In the same way that servitude law requires notice, either record or inquiry, for a servitude to run with the land. See *supra* note 213.

226. See, e.g., *infra* note 281 and accompanying text.

227. See, e.g., *New York v. Burger*, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." (citations omitted)).

228. See *infra* Part III.D.2.c.

#### 4. What About the Copyright Owner's Rights?

Another element to consider is the copyright holder's "authorization" of use of his copyright. If the reasonableness of a user's belief in a right to use personal property to interact with copyrighted material depends on context, then the conduct of the rights holder matters as part of this context. Moreover, if copyright cases are the mediation of conflicting property claims, then courts should consider the actions of both parties to the conflict. The copyright holder makes a range of choices that directly affect the availability of his work. The more a work appears available for use and unencumbered by restrictions, the more reasonable the user's belief that she may interact with it.

##### *a. Create the Work*

Most fundamentally, authors choose whether to create the copyrighted work in the first instance. Since copyright exists to incentivize creation, it seems perhaps churlish to suggest that an author should be deemed as consenting to anything simply by the act of creation. But of course she does. Creation of a copyrighted work leaves the author vulnerable to the variety of fair uses that may be made of the work. And fair use's uncertainty cuts both ways. An author cannot determine *ex ante* precisely what uses of her work a court will determine are fair, and she creates despite that uncertainty.

In many cases the claim that copyright was meant to incentivize the work in question is suspect.<sup>229</sup> In others, the assertion of copyright may follow from a failure to utilize an alternative intellectual property regime.<sup>230</sup> Doctrines like the idea/expression dichotomy and the lack of copyrightability for facts go some distance to addressing these concerns.<sup>231</sup>

Last, it bears remembering that authors are not legally required to create. To the extent they choose to do so, they do so in a world in which exclusive control of their creativity ends at the moment of fixation.

##### *b. Publish the Work*

Publication is no longer required for copyright protection, but remains relevant in considering a copyright holder's expectations of control.<sup>232</sup> Most famously, in holding that advance publication of Gerald Ford's autobiography was not a fair use, the Supreme Court relied in large part on

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229. See, e.g., *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004) (rejecting effort to use copyright law to shield contents of e-mails regarding problems with manufacturer's voting machines).

230. Most famously, *Baker v. Selden*, 101 U.S. 99 (1879).

231. See generally 17 U.S.C. § 102(b) (2006).

232. In the past, creators avoided publication in order to avoid some of the tradeoffs inherent in the prevailing copyright statute. For example, Disney reportedly forewent for a time the profits possible from distributing movies in their catalog in order to keep the works from being published. Nimmer, *supra* note 38, at 14–16.



the argument that the challenged use prevented Ford from being the first to market.<sup>233</sup> The first fair use factor, purpose and character of the use, tilted in Ford publisher's favor because the manuscript had been stolen.<sup>234</sup> The second factor, nature of the copyrighted work, favored the publisher because Ford's work was unpublished.<sup>235</sup> Indeed, enough rode on Ford's control of the physical manuscript, and its theft, that one could view the Court's analysis as resting in part on private property considerations.<sup>236</sup>

An analogous analysis should apply in implied authorization cases. The right of first publication is powerful.<sup>237</sup> Before its exercise, the ability of others to interact with copyrighted matter is necessarily constrained. Interferences with the first publication right may require conduct that a court would find unreasonable. So one who posts large excerpts of, say, a stolen *Harry Potter* manuscript has little claim of a reasonable belief in a right to do so. There are, nonetheless, contexts in which courts may be less solicitous of the publication right given the nature of the material. For example, the maker of voting machines could not use copyright to suppress publication of documents detailing flaws in its product.<sup>238</sup> Copyright holders in similar shoes would have no reasonable expectation that a memoranda's contents would remain private if internal document control procedures were to break down.

But once an author has chosen the time and place of first publication, user expectations of what may be done with a work necessarily change. As argued above, when an author makes his work part of culture, he alters the environment of his audience.<sup>239</sup> Insofar as his work achieves an audience, it displaces other works or components of the public domain that might have otherwise engaged the public. And when a copyright holder *tries* to make his work culturally prominent, he assumes the risk that his audience may interact with it.<sup>240</sup> User expectations with respect to how they may interact with the world around them necessarily come into play.

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233. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552–53 (1985).

234. *Id.* at 563 (“The trial court found that The Nation knowingly exploited a purloined manuscript. Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification.” (citation omitted)).

235. *Id.* at 564 (“A use that so clearly infringes the copyright holder’s interests in confidentiality and creative control is difficult to characterize as ‘fair.’”).

236. The current version of § 107 makes clear that even uses of unpublished works may be deemed fair. 17 U.S.C. § 107 (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).

237. As noted by then-professor Breyer in his skepticism of the need to expand copyright protection. Breyer, *supra* note 56, at 299–300.

238. *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004).

239. *See supra* notes 149–50 and accompanying text.

240. *See* Waldron, *supra* note 127, at 885 (“[T]his environment, having been thrust upon us by those in whose interests cultural commodities circulate, is now the only one we have, so that it is now in a sense unfair to deny us the liberty to make of it what we will.”).

*c. Publish in an Easily Accessible Medium*

The medium of publication also affects reasonable expectations about what may be done with a copyrighted work. Regardless of the use to which the copy is ultimately put, there is a difference between copying a movie during its initial theatrical run and its DVD incarnation. Copyright holders naturally assume differing levels of risk that unauthorized use will be made of their work as it is made available in more accessible media.

Further gradations are possible within a medium. The governing norms of a submedium may bear on reasonable interpretations of an author's conduct. Publishing on the Internet carries different implications than publishing on paper. Within the Internet context, posting to a blog that is accessible to others via RSS feeds is different than publishing an encrypted e-book available for licensed downloading.<sup>241</sup>

*d. License Derivatives*

The displacement effect described above is especially acute when the rights holder engages in broad licensing of derivative works of the copyrighted creation. That is to say, the *Harry Potter Lexicon* is much more likely in a world of Harry Potter movies, action figures, and school lunchboxes than one without.<sup>242</sup> Current fair use law responds in a mixed manner to the consequences of ubiquity. Social prominence may make claims of transformation more palatable,<sup>243</sup> while also making a court more likely to view certain complementary markets as "belonging" *ex ante* to the copyright holder.<sup>244</sup> The implied authorization approach would recognize that personal users of copyrighted material are likely to involve works that appear across cultural media.

*e. Notice*

Part of the problem with relying on traditional implied license law to address personal use is the prospect that simple disclaimers of permission may suffice to negate any argument that a license has been granted.<sup>245</sup> As argued above, that solution is insufficiently respectful of user property expectations. That said, whether a rights holder gives notice of the scope of

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241. Cf. Nimmer, *supra* note 38, at 39 (noting that Usenet postings "are frequently written in an environment in which posting and sharing are the expected norms" and that the "universal expectation of netiquette is that these postings will be forwarded" but suggesting that the creation of other legal regimes may be appropriate to address the issue).

242. See Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (enjoining publication of Lexicon).

243. See, e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1272 (11th Cir. 2001) ("[*The Wind Done Gone*] uses several of [*Gone With the Wind*'s] most famous lines, but vests them with a completely new significance.").

244. See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998) (weighing market effect factor against maker of quiz book about *Seinfeld* even though copyright owner had not entered market).

245. See *supra* Part I.C.2.

permitted use of her work (and the prominence of that notice) is at least a factor to consider when determining the objective reasonableness of a use made of the work.

*f. Use of Access Controls*

Just as a publisher's choice of media affects the ease with which a copyist may interact with a work, so too does the use of digital rights management (DRM) or similar access controls. The more work needed on the user's end to engage in the desired act, the less reasonable a belief in a right to copy the material.

Of course, DRM raises important issues regarding fair use rights and consumer expectations.<sup>246</sup> Publishing copyrighted material with DRM or similar access controls should not be seen as necessarily precluding implied authorization. It is, however, indicative of an assertion of control in the copyrighted material that may suffice to negate the authorization implied by the simple ownership of copying tools by the user. And, indeed, use of such access controls may impose a cost on the copyright holder with respect to customer relations and product popularity.<sup>247</sup>

*g. Availability and Utilization of Takedown Procedures*

17 U.S.C. § 512 sets forth detailed procedures by which a copyright holder may direct an Internet Service Provider to remove purportedly infringing material from its network. As a result, web page viewers have reason to assume publically available websites that host third-party copyrighted content to be fair game for interaction. To illustrate, many websites make new music available for download.<sup>248</sup> A web surfer encountering such a site is likely to assume the right to download the music insofar as the website is public and has not been shut down (or had infringing content removed) by objecting copyright holders. The reasonable assumption, instead, is that the music is provided to the site to make available for download for promotional purposes (i.e., in hopes that consumers will then purchase the underlying albums or tickets to live performances). In contrast, one who encounters music on an anonymous peer-to-peer network could not reasonably make a similar assumption.<sup>249</sup>

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246. See *supra* note 24 and accompanying text.

247. See, e.g., Jacqui Cheng, *EMI Says DRM-Free Music Is Selling Well*, ARS TECHNICA (June 20, 2007), <http://arstechnica.com/old/content/2007/06/emi-says-drm-free-music-is-selling-well.ars> (detailing sales improvements after DRM dropped from for-sale music); Ben Kuchera, *Gamers Fight Back Against Lackluster Spore Gameplay, Bad DRM*, ARS TECHNICA (Sept. 8, 2008), <http://arstechnica.com/gaming/news/2008/09/gamers-fight-back-against-lackluster-spore-gameplay-bad-drm.ars> (describing user unhappiness with DRM of computer game *Spore*).

248. See, e.g., MBV, <http://www.mbvmusic.com> (last visited Oct. 23, 2010).

249. See also *infra* Part III.D.2.b.

*h. Cease and Desist*

Finally, copyright holders may both authorize use of their works under section 106 and withdraw such authorization. Whether the copyright holder has ordered the user to stop is obviously relevant to determining the reasonableness of a copyright use. This banal observation underscores a more important point. If part of the danger of excessively sweeping copyright rights is the *ex ante* chilling of socially beneficial activity, then a corrective is to treat uses that follow an explicit objection from a rights holder less leniently than those that precede such an objection.

*C. Is this Fair to Rights Holders?*

Is the framework proposed herein “fair” to copyright holders? To some extent, the answer lies outside the scope of this Article and instead in the literature questioning whether copyrights are justified at their current strength. An argument that would, if implemented, lessen copyright’s power is more just if copyrights are already too powerful and less so if they are not. And, of course, the focus here is not on copyright holder rights but on vindicating independent property interests held by individuals in the tools they use to interact with copyrighted material.

That said, the argument presented here is, if not demonstrably just in the abstract, at least nothing radical in its respect for the property rights of copyright holders.<sup>250</sup> First, authorization rights remain with the copyright holders. Requiring rights holders to take steps to ensure that their property not be used in an objectionable way is consistent with traditional property conceptions. Property law accords less protection to owners who fail to maintain control of their property. Property may be lost through adverse possession or abandonment,<sup>251</sup> and others may gain use rights through implied or prescriptive easements or licenses that become irrevocable through reliance.<sup>252</sup> And the requirement that property owners opt-out of

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250. Once again assuming *arguendo* that copyrights are property.

251. *But cf.* Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 399 (2010) (observing that “[t]he conventional account holds that at common law, corporeal hereditaments like fee simple interests could not be abandoned but incorporeal interests (e.g., easements, mineral interests, and licenses) could” and criticizing common law hostility to abandonment of real property).

252. In discussing implied license in the patent context, Mark Janis points to cases in which the presence of waters on private property creates an implied license to navigate them until the owner remedies their presence. Janis, *supra* note 2, at 505 n.475; *cf.* Litman, *Lawful Personal Use*, *supra* note 6, at 1917 (observing that the “property law solution” to the “mess” of divisible copyright rights “is the easement by implication”). And outside the traditional property context, admiralty law provides salvors the right to demand compensation from owners of rescued property. 2 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 16-1 (4th ed. 2004) (listing formal elements of a general maritime law salvage claim: “(1) there must be a marine peril placing the property at risk of loss, destruction, or deterioration; (2) the salvage service must be voluntarily rendered and not required by an existing duty or by special contract; and (3) the salvage efforts must be successful, in whole or in part”).

uses of their property is not alien to the world of real property.<sup>253</sup> Similar principles should apply in intellectual property law.<sup>254</sup> Copyright holders who choose not to publish or decide not to publish widely will naturally receive greater protection. But those who wish to reap the benefits of releasing their work into the wild must take the bitter with the sweet.

Second, an objection focused on fairness to copyright holders must be specific about which copyright holders face unfair treatment. Many unauthorized or tolerated copyright uses benefit the copyright holder. So free distribution of an album may stimulate later demand.<sup>255</sup> Fan communities that make use of copyrighted material may enhance the popularity of a work and create demand for sequels or other derivative works.<sup>256</sup> But if fears of copyright enforcement deter such uses then authors who would benefit from them lose out from the assumption that nothing is permitted absent explicit consent. And that consent may be costly to give insofar as copyright holders face difficulty in precisely calibrating authorization so that it is understood without being seen as authorizing unacceptable works.<sup>257</sup> Further, many copyright holders no longer wish to assert control over their works, but will not or cannot expend effort to communicate that signal, contributing to the “orphan work” problem. Because there is no one to authorize use, projects are unable to proceed for fear that a lawsuit might arise after investment, creating the risk

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253. Tim Wu notes the example of requiring owners of rural property to post no trespassing notices for trespass liability to exist. Wu, *supra* note 210, at 621 (citing N.Y. ENVTL. CONSERV. LAW § 11-2115 (McKinney 2010)), 625; Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558 (2004) (noting that “twenty-nine states require posting to exclude hunters” and collecting statutes).

254. A trademark is abandoned, for example, when “its use has been discontinued with intent not to resume such use” or “any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark.” 15 U.S.C. § 1127 (2006). Abandonment is a defense to an infringement claim. *Id.* § 1115(b)(2). Three years without use is prima facie evidence of abandonment. *Id.* § 1127.

255. As was famously the case for the Wilco album *Yankee Hotel Foxtrot*. *Yankee Hotel Foxtrot*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Yankee\\_Hotel\\_Foxtrot](http://en.wikipedia.org/wiki/Yankee_Hotel_Foxtrot) (last visited Oct. 23, 2010).

256. To take a recent example of the former, a wedding video set to the tune of Chris Brown’s song *Forever* became a viral hit online. Because YouTube employs content management tools to aid copyright holders in monetizing content, Brown’s label was able to sell the song directly to viewers watching the video. Sales of the single shot up as a result of the user-generated content. Chris La Rosa & Ali Sandler, *I Now Pronounce You Monetized: A YouTube Video Case Study*, THE OFFICIAL GOOGLE BLOG (July 30, 2009, 9:32 AM), <http://googleblog.blogspot.com/2009/07/i-now-pronounce-you-monetized-youtube.html>.

The making of the movie *Serenity*, based on the short-lived science fiction series *Firefly*, is an example of fan culture stimulating further demand for copyrighted work. Jeff Jensen & Jeff Labrecque, “*Serenity*” *How?*, ENTM’T WEEKLY, Sept. 9, 2005, available at <http://www.ew.com/ew/article/0,,1102753,00.html>.

257. See Wu, *supra* note 210, at 628 (discussing potential efficiency of a copyright “No Action Policy” (internal quotation marks omitted)).

of a holdup.<sup>258</sup> In short, the fairness objection has to explain why one class of copyright holders is to be favored at the expense of others.

#### D. Applications/Implications

This section explores some of the implications of the above analysis by applying the implied authorization framework both to historic copyright debates and some modern issues.

##### 1. Past Applications

Looking back to the development of the first-sale doctrine and the pre-1976 history of the performance right reveals that there is nothing remarkable about the focus on user property rights discussed above. More recent precedents involving Google's search activities and the DMCA are in accord.

###### a. First Sale

In *Bobbs-Merrill Co. v. Straus*,<sup>259</sup> the Supreme Court established the first-sale doctrine by refusing to give effect to a notice printed in copies of a novel that forbade resale at less than retail price. The Court concluded that the copyright holder's statutory right to "vend" the work did not extend so far.<sup>260</sup> The Court styled its opinion as an exercise in statutory interpretation conducted "in the light of its main purpose to secure the right of multiplying copies of the work."<sup>261</sup> But the decision looks more like the preservation of user property interests against copyright encroachment.

The Court hinted that a plausible argument could be made that the right to "vend" extended to later sales,<sup>262</sup> but it did not tarry long over the prospect. Instead, it concluded that one sale constituted the full exercise of the right.<sup>263</sup> The need to protect common law property rights appears to have guided the conclusion that the right of vending only encompassed one sale.

What the complainant contends for embraces not only the right to sell the copies, but to *qualify the title of a future purchaser* by the reservation of the right to have the remedies of the statute against an infringer because of

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258. The problem is especially acute in the context of orphan works. See, e.g., U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

259. 210 U.S. 339 (1908). Congress codified the doctrine in the 1909 Act. 17 U.S.C. § 27 (1909) (repealed 1976); see 4 PATRY, *supra* note 43, § 13:19.

260. 210 U.S. at 350–51.

261. *Id.*

262. *Id.* at 351 ("True, the statute also secures, to make [the right of copying] effectual, the sole right to vend copies of the book . . .").

263. *Id.* ("[Plaintiff] has exercised the right to vend.")

the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice.<sup>264</sup>

The Court's concern for the clean "title" of downstream purchasers stemmed largely from copyright's limited nature. It exists only as "the special creation of the statute."<sup>265</sup> Common law property expectations could not so lightly be disturbed without actual privity of contract with the personal property owner (or a clearer directive from Congress).<sup>266</sup>

### *b. Performance Rights*

The federal courts considered the scope of copyright performance rights multiple times before the 1976 rewrite of the Copyright Act. These cases required ascertaining the extent to which copyright holders could control music once it was embodied in a licensed broadcast. Did listeners become performers simply by turning their radios on? The modern statute provides detailed rules for when the owner of a broadcast receiver becomes a performer.<sup>267</sup> But before Congress clarified matters, the courts adopted a view consistent with the implied authorization approach.

In *Buck v. Debaum*,<sup>268</sup> the plaintiff accused a café owner of infringement because the café customers could overhear music from an on-site radio. The California district court rejected the claim, focusing on the copyright holder's decision to license the copyright for broadcast. Once that decision was made, plaintiffs "impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception."<sup>269</sup> A copyright owner who wished to exercise full control over the "property" interest in the music composition had the option of refusing to authorize performance by the

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264. *Id.* (emphasis added).

265. *Id.*

266. *Id.* at 350 (noting that purchasers "made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book"); *cf.* 4 PATRY, *supra* note 43, § 13:18 (noting *Bobbs-Merrill* as indicative of judicial reaction "against attempts to impose restraints on the alienation of tangible property").

Similar logic supported the patent exhaustion doctrine. It relied on a demarcation between patent exclusion rights, created by federal statute, and rights to use an object, governed by state common law property rights. *See* *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852) ("And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress."); *id.* at 550 ("The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the State in which it is situated."); *id.* at 553 ("[I]t can hardly be maintained that Congress could lawfully deprive a citizen of the use of his property after he had purchased the absolute and unlimited right from the inventor, and when that property was no longer held under the protection and control of the General Government, but under the protection of the State . . .").

267. 17 U.S.C. § 110(5) (2006).

268. 40 F.2d 734 (S.D. Cal. 1929). Then-current copyright law gave the copyright holder the exclusive right to perform musical compositions publicly for profit.

269. *Id.* at 735.

broadcast station. Once so authorized, however, further control over the airwaves<sup>270</sup> or listener equipment was inappropriate.<sup>271</sup>

The Supreme Court curtailed *Debaum's* scope two years later in *Buck v. Jewell-La Salle Realty Co.*<sup>272</sup> and held that a hotel performed the plaintiff's copyrighted work when guests could hear broadcasts through the hotel's radio and loud speakers. The Court stopped short of abrogating *Debaum*, but rejected much of its reasoning. For the Court it was significant that the broadcast in *Jewell* was unlicensed. "It may be that proper control over broadcasting programs would automatically secure to the copyright owner sufficient protection from unauthorized public performances by use of a radio receiving set . . . ."<sup>273</sup> In other words, the Court held open the possibility that the implied license logic of *Debaum* would have prevailed had the broadcast been licensed.<sup>274</sup>

And indeed the Court steadily walked back its reasoning in *Jewell* in the twilight years of the 1909 Act. *Fortnightly Corp. v. United Artists Television, Inc.*<sup>275</sup> concluded that the operations of a CATV system, which used cable to transmit broadcast signals received from hill-mounted antennae to subscriber homes, did not constitute performances under the copyright statute.<sup>276</sup> The Court limited *Jewell* to its facts, noting that the case did not involve a situation in which the initial transmission was authorized.<sup>277</sup> The Court drew a distinction, based in part on *Debaum's* reasoning, between viewers and performers. Although user property interests did not overtly guide the opinion, the majority cited the role that viewer-owned equipment brings to the viewer/performer relationship. The Court recognized that people use property to interact with copyrighted material as members of the audience and doing so does not subject them to copyright's regulation.<sup>278</sup> The background right to use one's property as one chooses absent clear legal rules to the contrary is a component of this conclusion.

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative

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270. *Id.* at 736 (copyright holder who licenses work "must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition").

271. *Id.* (noting unreasonableness of expecting radio owners to turn dial if a copyright-protected music were broadcast in between unprotected matter).

272. 283 U.S. 191 (1931).

273. *Id.* at 199.

274. *Id.* n.5.

275. 392 U.S. 390 (1968).

276. *Id.* at 399–400; *see also* *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

277. *Fortnightly*, 392 U.S. at 396–97 n.18; *see also id.* at 401 n.30 (contending *Jewell's* application would "retroactively . . . impose copyright liability where it has never been acknowledged to exist before").

278. *Id.* at 398.



antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.<sup>279</sup>

*Twentieth Century Music Corp. v. Aiken*<sup>280</sup> pounded the final nail in *Jewell's* coffin by finding no public performance where a restaurant operator had connected his radio to ceiling loudspeakers. Once again, the opinion did not explicitly rely on user property rights but framed its conclusions to respect them. Like *Debaum*, *Aiken* emphasized the consequences to user property rights if the strong copyright argument were taken to its logical conclusion.

And a ruling that a radio listener 'performs' every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement *except by keeping his radio set turned off*. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else. Secondly, to hold that all in Aiken's position 'performed' these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. [§] 1(e).<sup>281</sup>

Congress would soon undo the Court's handiwork with respect to most commercial establishments.<sup>282</sup> But again, the argument here is not that Congress may not interfere with a user's property-based expectations. It is rather that courts may honor those expectations where the Copyright Act text is sufficiently open. Those expectations have some descriptive force in the performance rights cases. If a copyright holder chooses to authorize the transmission of her protected material, she assumes the risk that others will interact with it using their own property. To the extent those uses are reasonable, courts should not lightly conclude that the copyright monopoly extends to control the downstream property of those who encounter and then use the works.

### c. Chamberlain

The Federal Circuit has used user property rights to blunt some of the sharper edges of the DMCA. *Chamberlain Group, Inc. v. Skylink*

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279. *Id.* at 400.

280. 422 U.S. 151 (1975). The majority dismissed *Jewell* as perhaps applicable to a contributory infringement situation. *Id.* at 160 n.11.

281. *Id.* at 162–63 (emphasis added) (footnotes omitted).

282. 17 U.S.C. § 110(5) (2006); *cf. Aiken*, 422 U.S. at 164–65 (Blackmun, J., concurring in the result) (noting that defendant in *Aiken* was not a "mere listener" but benefitted commercially from use of the radio).

*Technologies, Inc.*<sup>283</sup> considered whether the DMCA creates liability for the manufacturer of a replacement garage door opener remote control.<sup>284</sup> The plaintiff contended that defendant's opener circumvented controls guarding "access" to the purportedly copyrighted computer code controlling its device.<sup>285</sup> The court held that copyright rights could not be leveraged in this manner to control the market for complementary goods.

The court's reasoning utilized a range of arguments. For present purposes, the relevant portion of the Federal Circuit's opinion concerned the requirement that a DMCA circumvention claim requires that the access in question must be taken "without the authority of the copyright owner."<sup>286</sup> The statute could be interpreted to mean that such authorization requires actual assent from the copyright holder. The court instead took a broader view of the relevant context.

Because lack of authorization is an element of a DMCA claim, the court concluded that the burden of establishing it rests with the plaintiff.<sup>287</sup> In determining whether access was unauthorized, the panel looked not to the statements of the copyright holder, but also considered what is generally authorized by copyright law.<sup>288</sup> Here, consumer property rights matter; garage-door purchasers are allowed to use the devices regardless of whether the sellers conveyed explicit authorization to do so.<sup>289</sup> They retain this right notwithstanding copyright. "Like all property owners taking legitimate steps to protect their property, however, copyright owners relying on the anti-circumvention provisions remain bound by all other relevant bodies of law," and the DMCA did not change "the legal landscape governing the reasonable expectations of consumers or competitors."<sup>290</sup> If the copyright holder wanted to deauthorize the use in question, its hopes would have to lie in an explicit contractual understanding.<sup>291</sup>

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283. 381 F.3d 1178 (Fed. Cir. 2004).

284. *Id.* at 1182–83.

285. *Id.* at 1185.

286. 17 U.S.C. § 1201(a)(3)(A).

287. *Chamberlain*, 381 F.3d at 1203–04.

288. *Id.* at 1193 ("The premise underlying this initial assignment of burden is that the copyright laws authorize members of the public to access a work, but not to copy it. The law therefore places the burden of proof on the party attempting to establish that the circumstances of its case deviate from these normal expectations . . .").

289. *Id.* To be sure, the panel did not see itself as broadening the understanding of what is generally deemed authorized copying (as opposed to *access*). *Id.* ("[D]efendants must prove authorized copying[,] and plaintiffs must prove unauthorized access.").

290. *Id.* at 1194. The opinion elsewhere expresses concern that an overly broad interpretation of the DMCA action would permit copyright holders to restrict consumer use of personal property. *Id.* at 1201 ("Chamberlain's proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial 'encryption' scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products.").

291. *Id.* at 1202 n.17 (noting that it is unclear whether DMCA liability exists for consumer who "circumvents a technological measure controlling access to a copyrighted work in a manner that enables uses permitted under the Copyright Act but prohibited by

## 2. Prospective Applications

This part concludes by considering some prospective implications of implied authorization.

### a. User-Generated Content

Implied authorization creates an alternative, non-fair-use-reliant basis for protecting user-generated content and communities dedicated to reimagining and repurposing characters and settings from popular works.<sup>292</sup> User created content is ubiquitous in part because users expect that they have a right to interact with the culture around them, albeit generally subject to a norm of non-commercial exploitation.<sup>293</sup> When fan-driven activities stay on the non-commercial side of the line, copyright holders often welcome their efforts.<sup>294</sup>

But not always. This creates uncertainty even when such appropriation may be beneficial or at least not harmful to the copyright owner. Edward Lee has proposed an approach for identifying which uses of this nature are appropriate.<sup>295</sup> The implied authorization framework goes further by providing a basis for viewing such uses as legal by bringing user rights and expectations into the picture.

Creators of non-commercial user-generated content are not pirates; they are fulfilling a natural impulse to engage in self expression. Copyright owners who expended effort to be part of the world of their audience have reduced grounds for complaint when the predictable happens. And allowing rights holders broad authority to go after users threatens the interests of other rights holders who benefit from such “tolerated” uses.<sup>296</sup>

To be sure, copyright holders have rights vis-à-vis fan and related communities. But it is reasonable to require the affirmative (as opposed to passive) exercise of those rights (e.g., by the use of notice-and-takedown

contract” but noting that plaintiff “did not attempt to limit its customers use of its product by contract” and reserving issue).

292. See generally Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

293. See *supra* note 218 and accompanying text.

294. See *supra* notes 255–58 and accompanying text.

295. See, e.g., Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1494–95 (proposing a five-factor test for informal copyright practices to identify situations in which the “development of an informal copyright practice [is] more likely and more legitimate”). Several of Professor Lee’s factors would be relevant to the question of implied authorization. His non-exhaustive list of factors is:

- (1) unlitigated use and the absence of settled case law finding the practice or type of practice in question constitutes an infringement;
- (2) the existence of a novel issue of law, such as one involving a new technology;
- (3) the existence of a colorable fair use defense, or other exemption or defense;
- (4) high transaction costs in obtaining formal licenses from copyright holders; and
- (5) no express objection by the copyright holder as to the particular use in question or the type of practice, or some indication that the copyright holder might allow it.

*Id.* at 1494.

296. See *supra* notes 255–57 and accompanying text.

procedures) *before* creators of user-generated content find themselves on the receiving end of a damages claim. This largely tracks the norms and practices of such communities, but it should be understood as the balance struck between competing property rights and not the byproduct of copyright holder beneficence or sluggishness in assertion of their rights.

*b. Everyday Certainty*

Implied authorization also provides legal grounding for everyday non-authorial activities taking place on the Internet, many of which we take for granted as legal. We forward e-mail and view publicly accessible websites without a thought to copyright ramifications. As noted above, traditional conceptions of implied license go a long way toward providing legal comfort to such uses to the extent such comfort is necessary.<sup>297</sup>

Implied authorization may also mitigate the risk of “copytraps.”<sup>298</sup> Suppose a consumer innocently comes across a website offering free music downloads that turn out to be illicit. Should she be subject to suit? An affirmative answer could chill a range of legitimate commerce, as many copyright holders wish to use such websites to promote their work. The fear of running afoul of copyright laws, moreover, could lead risk-averse users to restrict their browsing or downloading activities to websites with official affiliation to major content owners like the broadcast networks or movie studios, creating a barrier to entry for lesser known, but equally legitimate, alternatives.

One response would be to amend the Copyright Act to relieve the burden of its strict liability provisions.<sup>299</sup> But a similar effect could be accomplished if courts take user property rights seriously. As argued above,<sup>300</sup> if a website is public, and subject to the notice-and-takedown regime of 17 U.S.C. § 512, then Internet users should be permitted to rely on the publicly accessible nature of a site. In other words, downloading from an anonymous peer-to-peer network is not the same thing as doing so from a public website. Some boundary issues may arise with respect to sites based outside the United States, but the implied authorization framework offers a mechanism for providing assurance that innocent conduct will not be a basis for liability.<sup>301</sup>

The need to provide consumers with certainty that their conduct will not produce liability for money damages extends beyond actual litigation danger, which is low in many if not most contemporary “copytrap” settings.

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297. *See supra* notes 110–11 and accompanying text.

298. *See generally* Ned Snow, *Copytraps*, 84 *IND. L.J.* 285 (2009).

299. *See id.* at 323.

300. *See supra* Part III.B.4.g.

301. *Cf. Lee, supra* note 295, at 1496–99 (applying informality test to label photocopying for personal use a legitimate practice while concluding that unauthorized music file sharing is illegitimate).

Danger also lies in the pressure placed on technology manufacturers or providers to limit the capabilities of their products.<sup>302</sup>

*c. The “Fairness” of Opt-Out Requirements*

If it is true that copyright holders should be expected to engage in self-protection to avoid audience intermeddling,<sup>303</sup> then courts should be more receptive to “opt-out” regimes with respect to copyright uses.

Opt out is controversial, as demonstrated by the fallout from Google’s attempt to use an opt-out model in digitizing books into a searchable database. But an implied authorization defense of opt out is not a far way off from the approach taken by *Field v. Google Inc.*<sup>304</sup> *Field* involved a challenge to the search engine model itself.<sup>305</sup> Google indexes the Internet on an opt-out system. That is, its indexing programs will respect the wishes of site owners who do not want to be indexed by Google if they include a machine-readable metatag (invisible to viewers of the page) to that effect. This method emerged as the industry norm, likely because most websites want to be found.<sup>306</sup> The plaintiff nonetheless “decided to manufacture a claim for copyright infringement . . . in the hopes of making money from Google’s standard practice” by placing material online, allowing Google’s robots to index it, and bringing suit.<sup>307</sup>

The district court rejected the attempt for a variety of reasons, including fair use and estoppel, but of note here was its invocation and approval of Google’s implied license defense. Though *Field* has been criticized for straying from the doctrine’s traditional bounds,<sup>308</sup> it fits well into the framework advocated by this Article. The plaintiff ignored norms—industry standards in the court’s telling—regarding acceptable use of his copyrighted material, and refrained from taking a simple step to prevent Google’s use of his work.<sup>309</sup> The court viewed this conduct as conveying permission to Google to use the author’s work,<sup>310</sup> but it can as easily be interpreted as a failure to adequately assert rights against Google’s reasonable expectation—based on prevailing norms—of a right to use its own property to interact with material placed on the Internet.

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302. See *supra* notes 63–67 and accompanying text.

303. See *supra* Part III.B.4.

304. 412 F. Supp. 2d 1106 (D. Nev. 2006).

305. Though it is not the only one. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

306. *Field*, 412 F. Supp. 2d at 1112.

307. *Id.* at 1113.

308. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) (“[T]hough not seemingly acknowledged by the district court in *Field*, the Ninth Circuit has explained that the implied license doctrine in copyright cases is to be very narrowly construed.”).

309. *Field*, 412 F. Supp. 2d at 1116.

310. *Id.* (“[Plaintiff’s] conduct is reasonably interpreted as a grant of a license to Google for that use.”).

To be sure, in examples like Google Books courts might consider the difference between works set free on the Internet instead of into the world of hard-bound copies in determining precisely where to draw the line between opt-in or opt-out mechanisms.<sup>311</sup> But if copyright disputes are more than simple trespass situations, then opt-out requirements for copyright owners are reasonable for ameliorating the conflict between competing property interests.<sup>312</sup>

*d. Fair Use*

Basing implied authorization on user property rights and gaps in the Copyright Act addresses the problem of establishing a non-fair-use-reliant basis for asserting strong user rights in the face of copyright claims. It avoids the body of doctrine that has grown around fair use and the prospect that fair use precedents may be insufficiently flexible to protect personal use rights.

That is not to say that the preceding is irrelevant to fair use. As a doctrinal matter, the implied authorization framework could be implemented through the fair use defense. Indeed, fair use is the simplest route by which the property rights of users could be imported into an infringement analysis. Even though implied authorization draws from a body of law independent of fair use, section 107 of the Copyright Act may still be the best vehicle for presenting it in a doctrinally cognizable manner.

Focusing on competing property interests could also help broaden current conceptions of fair use, with user property rights giving courts a basis for expanding the considerations at play in fair use analysis. Rather than a way to circumvent fair use's rigidity, implied authorization may be a means for breathing new life into section 107.<sup>313</sup> At the same time, focusing on mediating competing property claims in light of existing norms would provide guideposts for judges worried that fair use may become a blank check for widespread infringement.

*e. Taking Context Seriously*

Using implied authorization within the fair use framework also takes seriously the Supreme Court's command that evaluating copyright fair use claims is a contextual endeavor. This dictate frustrates personal copyright uses because of the inability to secure *ex ante* certainty that a particular use

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311. *See supra* Part III.B.4.c.

312. *Cf.* RESTATEMENT (SECOND) OF TORTS § 827 (1979) (stating that in a nuisance case, "the burden on the person harmed of avoiding the harm" is an "important" factor in evaluating the gravity of the harm).

313. For example, whether a user is exercising personal property rights has ready applicability to the first fair use factor: the purpose and character of the challenged use. Courts could treat as relevant whether the defendant had a reasonable property-backed expectation that her use was authorized. A court could similarly evaluate the conduct of the copyright holder in determining the reasonableness of the defendant's conduct.

is legal. But if our right to use our property to interact with the world is contextual, depending in part on our understanding that a particular use is both illegal under the Copyright Act as well as unauthorized, might that mean that ambiguity with respect to a use's legality may excuse a use later found to be infringing?

The objective reasonableness of a user's belief that she had the right to interact with copyrighted material helps determine whether that use is implicitly authorized. To the extent that copyright law (and the conduct of the copyright holder) makes clear that such use is unauthorized, then the user's claim to a reasonable property-backed expectation is questionable. Conversely, if the legal status of an act is untested or ambiguous, the claim to reasonableness is stronger.<sup>314</sup>

In the current copyright context, rights holders may be pleased to have so much up in the air. After all, uncertainty about a use's legality may rebound to their benefit when cease-and-desist letters are mailed. Since many copyright users lack the resources to pursue litigation (or are ill-equipped to face the prospect of an adverse judgment), the assertion of claims has an obvious *in terrorem* effect. Given those effects, copyright holders have an incentive to avoid declaratory judgment actions that might preemptively establish the legality of particular uses and undermine the deterrent value of uncertainty.<sup>315</sup>

But what if this uncertainty could benefit users as well as copyright owners? What if doctrinal muddiness could offer a basis for excusing a defendant's conduct? If the defendant's objective reasonableness is a factor to consider in determining whether her use of copyrighted matter was authorized, then the state of the law is an appropriate factor to consider.

The creation of what might be called a "qualified immunity" for copyright users offers a number of benefits. Qualified immunity is a doctrine in civil rights law. Federal law provides a cause of action against those who act under color of state law to cause "the deprivation of any rights, privileges, or immunities secured by the Constitution" and certain federal laws.<sup>316</sup> Qualified immunity excuses such violations where the government official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>317</sup> The Supreme Court views the doctrine as balancing the need to deter civil rights violations with the need to provide government officials with breathing space to act in settings in which legal uncertainty could deter potentially beneficial conduct.<sup>318</sup> Copyright law also tries to strike a

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314. *Cf. supra* note 295 and accompanying text (discussing Professor Lee's proposed framework).

315. *See supra* note 61.

316. 42 U.S.C. § 1983 (2006).

317. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

318. *See, e.g., Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

balance: it seeks to protect the rights of creators in their expressions while ensuring a sufficient public domain for everyone else. But uncertainty about the line separating infringement from lawful use may deter socially beneficial copyright uses, leaving society as a whole worse off. If users could expect that reasonable uses would at least be excused from money damages, then more of these deterred works might come into existence. Nor is this necessarily a bad deal for copyright holders. If prospective plaintiffs also had something to lose from unsettled copyright law, perhaps more would be clarified.<sup>319</sup>

#### CONCLUSION

Copyright has been around long enough for us to forget just how extraordinary it is. Copyright holders may invoke the coercive apparatus of the state to regulate the private exercise of property rights. They may do so regardless of whether the regulated property owners are engaged in commercial activity that might threaten the copyright holder's commercial monopoly on the sale of works that embody the copyright. Normalizing this state of affairs by calling it part and parcel of the "property" owned by the copyright holder obscures copyright's parallel status as an interference with property rights.

Keeping this interference in mind makes copyright's aspiration to property status less impressive. A variety of doctrines mediate competing claims where both sides have property rights. So it is with copyright law, where copyright's negative easement competes with, and often yields to, the property rights of users, e.g., with the first-sale doctrine. Similar collisions occur when copyright holders seek control over the tools copyright users use to interact with copyrighted material. Calling copyright "property" tells us nothing about how to resolve these disputes. Somebody's property rights will be curtailed.

To know who loses, we must look not to property rhetoric but to the law. When we do, we see that property rights matter, but they do not always favor copyright holders. User property rights are rooted in the common

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319. The proper lessons of civil rights law as applied to the copyright context could be an article unto itself. To the extent we want to keep the analogy a close one, it is worth noting that the Supreme Court recently diluted qualified immunity doctrine's ability to "clearly establish" law by abandoning the requirement that a court determine whether the alleged facts make out a constitutional violation before determining whether the right in question was clearly established. *Saucier v. Katz*, 533 U.S. 194 (2001), once required courts to engage in a two-step inquiry. First, the court had to determine whether the plaintiff alleged a violation of a constitutional right. If so, the court had to consider whether said right was "clearly established" at the time of the challenged act. *Id.* at 201. The Court modified the rule in 2009 to permit judges to exercise discretion in deciding whether to address both prongs of the *Saucier* inquiry, meaning courts can simply conclude that the right is not clearly established and do nothing to aid in that endeavor. *Pearson*, 129 S. Ct. at 818 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."). That said, even after *Pearson*, courts retain the ability to use qualified immunity doctrine to clarify the state of the law and an analogous doctrine could play a similar part in copyright law.



law, not statute. Where a statute alters the common law baseline it must do so clearly. This principle has been used to expand copyright's scope into third party liability, but it also could provide a basis for limiting copyright's reach. To the extent the 1976 Copyright Act fails to clearly redefine longstanding user expectations of rights to interact with protected content, those common law expectations may effectively curtail copyright. In particular, the statute's open text surrounding a copyright holder's ability to "authorize" certain acts with respect to her work invites courts to consider whether the copyright holder has exercised sufficient control over her property to undermine the property-backed expectations of users, which may also be rooted in widely held social norms.

The alternative is to assume that Congress sweepingly—and without express comment—curtailed the property interests of millions of citizens with only limited room for courts to protect private property against overreaching copyright claims. There may be reasons to believe that proposition, but a dedication to the sanctity of property is not one of them.