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Copyright Policy as Catalyst and Barrier to Innovation and Free Speech

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I. COPYRIGHT POLICY 37
II. COPYRIGHT POLICY & INNOVATION 49
III. COPYRIGHT POLICY & FREE EXPRESSION 58
IV. RECALIBRATING COPYRIGHT POLICY 68
A. Recalibrating Statutory Damages 68
B. Recalibrating Secondary Liability 73
C. Recalibrating Fair Use 79
V. CONCLUSION 83

Copyright is an innovation policy, a competition policy, and a free expression policy. Copyright's purpose to catalyze creative expression and innovation is canonical; creativity and innovation are synergetic. Copyright has a long history of regulating innovation and competing disseminators of creative works. It seeks to balance incentivizing a public good with providing a private interest.

Copyright's incentive/access paradigm must balance the incentives necessary for an initial creator with the needs of subsequent creators and the public.[1] This creates an inevitable tension between a copyright holder's right to exclude and a downstream creator's freedom of expression.[2] Creative works are cumulative

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1. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (noting the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"); *see also* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 281 (1970) (arguing that British historian Lord Thomas Macaulay's "statement that copyright was 'a tax on readers for the purpose of giving a bounty to writers' reveals the conflict of interest between the reader and the book producer that underlies much of the discussion about copyright law" (quoting THOMAS MACAULAY, SPEECHES ON COPYRIGHT 25 (C. Gaston ed. 1914))).

2. *See, e.g.*, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 16 (2004) ("[T]he conflict between intellectual property and freedom of speech is obvious."); Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 3 (2013) ("Intellectual property rights and the First Amendment pull in opposite directions."); Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 833 (2010) ("The apparent conflict is obvious.").

creations that rely on prior works as building blocks.[3] Creative works are often the output of a first creator and are also an input of a second creator; the second creator's input, therefore, was an earlier creator's output.[4] Tension arises when content creators want to maintain control over their works so they can monetize and commodify them. Content users often resist this control because they want the freedom to remix, mashup, and use someone else's speech to participate in democratic culture-making.[5] This gives rise to a policy dilemma: over-protection threatens user-generated creativity and free expression, yet rampant piracy threatens creative industries.[6]

There is also an inevitable tension between new and incumbent disseminators of copyrighted works.[7] From the early days of the printing press, copyright policy has been inextricably intertwined with technology.[8] New technology can open new avenues to enjoy and distribute copyrighted works, and it can open new ways to infringe works. New communication technologies have fundamentally changed the way we create and disseminate speech. New technologies lie at the intersection of free expression and culture in the digital

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3. *See, e.g.*, Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 167 (1992) ("A culture could not exist if all free riding were prohibited within it.").

4. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 66–67 (2003) (noting that "[c]reating a new expressive work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it"); *see, e.g.*, Margaret Chon, *Intergenerational Equity and Intellectual Property: Sticky Knowledge and Copyright*, 2011 WIS. L. REV. 177, 178–79 (2011); Brett Frischmann, *Crossing Boundaries: Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801, 803–05 (2009).

5. Hannibal Travis, *Free Speech Institutions and Fair Use: A New Agenda for Copyright Reform*, 33 CARDOZO ARTS & ENT. L.J. 673, 705 (2015) ("Online video and Internet user mashups of movies and television shows have evolved into the preferred medium of expression for Americans and other residents of developed nations.").

6. *E.g.*, Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 279 (2004); Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 33–35 (1991).

7. *E.g.*, Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 178 (2012) ("The very emergence of the new technology and the firms seeking to offer products or services based on that technology creates the potential for conflict."); Wu, *supra* note 6, at 341 ("[C]onflict between dissemination rivals is probably inevitable as long as technological change creates the opportunity to undercut incumbents.").

8. Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1838 (2009) ("Copyright law has a symbiotic relationship with technology. Generally, new technology enables novel ways to enjoy copyrighted content, which opens new markets for artists to sell their licensed works."); DiCola & Sag, *supra* note 7, at 175–76 ("Each new technology of copying and distribution since the printing press has presented both challenges and opportunities."). *See also* M. Ethan Katsh, *Communications Revolutions and Legal Revolutions: The New Media and the Future of Law*, 8 NOVA L.J. 631, 633–34 (1984) ("[C]opyright law developed after the invention of printing, wiretapping laws followed shortly after the invention of the telephone, and laws of privacy were enacted as a result of the growth of newspapers.").

age and the commodification of information and knowledge.[9] Modern telecommunications allow for new speech opportunities by "the democratization of authorship."[10] Protecting healthy breathing space for new communication technology is an important First Amendment safeguard that enables more expression and more distribution. Promoting the development of speech technologies, which enable greater speech activities, serves "'double duty' . . . by serving the freedoms of both the speech and the press."[11]

Copyright policy matters today because we are "becoming a nation of makers and sharers, not just consumers of other people's copyrighted material."[12] Modern copyright policy affects everyday users of modern technology. The effects of copyright are felt by more than just publishers and professional authors.[13] Copyright now regulates end users, not just specialized intermediaries.[14] No longer cabined and restricted to professional spheres of those who publish and distribute content, copyright law has a present effect on modern life.[15] Furthermore, copyright's expansion has made it hard to avoid infringement: "We back up our hard disks; we forward emails to friends. We read aloud to our children using funny voices for different characters; we play CDs on our car stereos with our windows open."[16] Today, it is easy to unintentionally infringe copyright.[17]

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9. Jack M. Balkin, *Free Speech and Press in the Digital Edge: The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 441 (2009).

10. Brad A. Greenberg, *Rethinking Technology Neutrality*, 100 MINN. L. REV. 1495, 1527 (2016) ("[T]he arrival of the Internet—and with it the democratization of authorship, the digitization of everything, and the disappearance of physical copies—complicates the calculus. The Internet, like the combustion engine to the farmer, is a technological discontinuity—a rapid spike on the timeline of innovation that moves the future of technology onto a new plane.").

11. Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 811 (2010). *See also* Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL OF RTS. J. 1037, 1047 (2009) (noting that to the Framers of the U.S. Constitution the freedom of the press meant the "freedom of the printing press").

12. PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 7 (2011).

13. *See* James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 214–15 (2005) (noting a range of online activity that implicates a copyright holder's exclusive rights "from forwarding e-mail, backing up data, and printing a hard copy of an online document to caching frequently accessed files, cataloging Internet sites, and webcasting one's travels."); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–48 (2007) (illustrating every day acts that could be found to infringe copyrights, resulting in daily liability exposure of $12.45 million per day or $4.54 billion annually).

14. Wu, *supra* note 6, at 356–57; *see also* Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1176 (2010).

15. Margaret Chon, *Copyright's Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364, 365 (2016) ("The Internet challenges us to understand copyright law as taking a more capacious role in overall knowledge governance.").

16. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1919–20 (2007).

17. John Tehranian, *The New ©ensorship*, 101 IOWA L. REV. 245, 265 (2015).

The fair use doctrine has been harnessed to balance competing interests in copyrighted works.[18] The fair use defense "supplements the[] traditional First Amendment safeguards" that protect our free expression interests.[19] Copyright is a means of incenting innovation and free speech; it is "not an end unto itself."[20] Much like freedom of expression and innovation are not ends in themselves, copyright protection is not for its own sake.[21] Free expression is a means of fostering democratic self-governance, truth, and happiness. Innovation is a means of fostering economic growth, prosperity, development, and happiness. Copyright is a means of fostering the progress of science and enriching the public domain from which others can freely draw. Ultimately, the benefit of copyright should be the public interest.[22]

This Article offers a holistic assessment of copyright policy's effects on innovation and free speech before offering some sensible areas for reform. Part I examines modern copyright policy and its justifications. Part II examines the effect of copyright policy on innovation. Part III examines the effect of copyright policy on our free speech culture and core First Amendment interests. I argue modern copyright is out of balance. Expansive, exclusive rights, strict liability, and the threat of hefty statutory damages discourage innovation and free expression. Hydraulic pressure from incumbents has forced copyright out

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> Today, however, almost anyone can engage in such conduct with ease: most of us have, by way of smartphones, scanners, and computers connected to the internet, the tools of massive digital reproduction and distribution at our fingertips. As such, we all come into contact with, and unwittingly violate, copyright law (i.e., by meeting the elements of a prima facie case of infringement) dozens of times a day.

Id. *See also* Yvette Joy Liebesman, *Redefining the Intended Copyright Infringer*, 50 AKRON L. REV. 765, 796 (2016) ("[T]echnological advancements in copying have led to the ability to both more easily infringe and more easily be caught.").

18. 17 U.S.C. § 107 (2012).

19. Eldred v. Ashcroft, 537 U.S. 186, 220 (2003).

20. *E.g.*, Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1491–92 (2007) ("[T]he American model [of copyright] views protecting authors' rights . . . [as] the means to produce a more robust intellectual and artistic culture.").

21. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."); *see also* Jack M. Balkin, *Idea: The First Amendment Is An Information Policy*, 41 HOFSTRA L. REV. 1, 18–19 (2012); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 337–38 (1991).

22. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id.

of kilter. Part IV, therefore, offers some suggestions for recalibrating copyright policy to mitigate the chilling effect on innovation and our free speech culture.

I. COPYRIGHT POLICY

According to conventional consequentialist intellectual property theory, copyright tolerates a limited proprietary right to creative works of authorship in order to encourage creation of works that ultimately redound to the benefit of the public.[23] Serving the public interest is more than an afterthought; it is the animating force behind granting limited proprietary rights to creative works. The Copyright Clause authorizes Congress "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[24] As a product of positive law, the copyright bargain is an instrument that exists for an express purpose: to promote the progress of science, learning, and creativity.[25] Thus the public's interest is the centerpiece of the copyright schema.

U.S. copyright is premised on economic incentives, rather than on natural rights.[26] The copyright bargain is struck because we theorize it will encourage socially optimal production of creative works.[27] Creative works are non-rivalrous and nonexcludable. Such works are non-rivalrous because they cannot be used up when consumed.[28] And such works are nonexcludable because non-

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23. *E.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

24. U.S. CONST. art. I, § 8, cl. 8.

25. Eldred v. Ashcroft, 537 U.S. 186, 214–15 (2003) (discussing the copyright "bargain" established between the public and the author).

26. *See, e.g.*, Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("[C]opyright is the creature of the Federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right, but created a new one."); Am. Tobacco Co. v. Werkmeister, 207 U.S. 284, 291 (1907) ("In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in article I, § 8."); Wheaton v. Peters, 33 U.S. 591, 661 (1834) ("[C]ongress, in passing the act of 1790, did not legislate in reference to existing rights."). *See also* LANDES & POSNER, *supra* note 4, at 12; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

27. *See* Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 HOUS. L. REV. 451, 452 (2017).

28. Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 143 (2004).

> Information cannot be depleted, however; in economic terms, its consumption is nonrivalrous. It simply cannot be 'used up.' Indeed, copying information actually multiplies the available resources, not only by making a new physical copy but by spreading the idea and therefore permitting others to use and enjoy it. The result is that rather than a tragedy, an information commons is a 'comedy' in which everyone benefits.

Id.

paying consumers cannot be prevented from accessing them.[29] These works are essentially a public good; exclusive rights are necessary to prevent the free rider problem, which would defeat an incentive to produce the creative works.[30] Intellectual property rights step in to prevent underproduction of these valuable works.[31] As the Supreme Court explained, "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[32] By design, the system "generate[s] both incentives and spillovers."[33]

Creators are given monopoly power over their works because the costs associated with creation are not shared by copyists. But copyright policy should create sufficient incentives, not maximum incentives.[34] The Constitution both grants and limits Congress's authority to offer exclusive rights; these rights are only for "limited Times," only to "Authors," and only to "Writings."[35] While this constitutional grant has been given liberal construction, the internal limitations nonetheless remain. Copyright is not an absolute right. The limits on the enumerated statutory rights—like fair use, first sale exhaustion, and compulsory licenses—dispel a vision of copyright as an absolute right.[36] Copyrights are intended "to Promote the Progress of Science," and copyright

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29. *See* Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 295 (1970); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988).

30. LANDES & POSNER, *supra* note 4, at 12–13; Landes & Posner, *supra* note 26; Lemley, *supra* note 28, at 29 ("The traditional economic justification for intellectual property is well known. Ideas are public goods: they can be copied freely and used by anyone who is aware of them without depriving others of their use."). *But see* Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 164 (2002) ("But not all 'public goods' are the proper province of copyright."); Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2012) (challenging copyright's assumption that external incentives are necessary).

31. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1611 (1982) ("Because it is difficult or expensive to prevent 'free riders' from using such goods, public goods usually will be under-produced if left to the private market.").

32. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

33. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 284 (2007).

34. *See, e.g.*, Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 125 (1999) ("[T]he goal of intellectual property [law] is only to provide the 'optimal incentive,' not the largest incentive possible. Past a certain point, it would be inefficient to withhold works from the public domain in order to provide ever-decreasing 'incentives' to their creators."); Lawrence Lessig, *Intellectual Property and Code*, 11 ST. JOHN'S J.L. COMM. 635, 638 (1996) ("[W]e protect intellectual property to provide the owner sufficient incentive to produce such property. 'Sufficient incentive,' however, is something less than 'perfect control.'").

35. U.S. CONST., art. I, § 8, cl. 8.

36. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346–47 (1991).

policy should be interpreted in that light.[37] Copyright should promote learning, not inhibit it. Copyright's purpose is not to amass private fortunes, but rather to promote the public welfare. As the Supreme Court has emphasized, "The primary objective of copyright is not to reward the labor of authors, but 'To promote the Progress of Science and useful Arts.'"[38]

To balance competing interests, copyright is a policy-minded compromise.[39] Copyright's exclusive rights—granted to stimulate production and public dissemination of creative works—have costs. The Supreme Court has acknowledged that "[t]he more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff."[40] Thus every right to exclude impairs the liberty and freedom of others.

Copyright imposes significant economic and noneconomic costs on free markets and free expression. Copyright restricts free expression interests of downstream creators and secondary users. Copyright is also a financial instrument that enables supra-competitive market rates.[41] Exclusive rights artificially create scarcity of a public good. The economic distortions caused by the rightsholder's supra-competitive prices can, in turn, create deadweight losses—to the extent there is unmet need at supra-competitive prices.[42] Because of the speech-abridging and market-distorting effects of copyright's monopoly, copyright policy is all about tradeoffs.[43] As explained below, I believe copyright policy is out of balance and in need of recalibration.

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37. *Id.* at 349–50 (quoting U.S. CONST., art. I, § 8, cl. 8).

38. *Id.* at 349 (quoting U.S. CONST., art. I, § 8, cl. 8).

39. The modern Copyright Act is the product of much debate and compromise. The current legal framework was negotiated by industry insiders between the 1950s and 1970s. *See* Barbara Ringer, *Authors' Rights in the Electronic Age: Beyond the Copyright Act of 1976*, 1 LOY. L.A. ENT. L. REV. 1, 4 (1981); Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 477 (1977).

40. MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005) (citations omitted).

41. *Cf.* Frederick M. Abbott, *The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health*, *in* NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES 27, 36 (Pedro Roffe et al. eds., 2006) ("A patent is essentially a financial instrument that entitles its bearer to achieve greater than competitive market rates of return on investment.").

42. *See, e.g.*, Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1206–07 (1996) (discussing deadweight loss that results from monopoly power over distribution of existing works).

43. *See, e.g.*, Frischmann, *supra* note 4, at 804 ("Most economic analyses of intellectual property focus on tradeoffs associated with exclusivity."); Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 STAN. L. REV. 951, 1014 (2012) ("When it comes to the copyright-innovation intersection, courts and commentators to date have agreed that society's main policy goal is to trade off incentivizing authorship and incentivizing innovation.").

Since the first Copyright Act of 1790, copyright's scope, duration, and damages have been ever expanding.[44] Scholars have noted that copyright today is "both wider (in terms of coverage) and deeper (in terms of time)" than ever.[45] Some have described this rights enlargement as a "one-way [copyright] ratchet."[46] The optimistic view sees copyright's expansion "as a series of efficiency-promoting adjustments," whereas the pessimistic view sees the expansion as a classic public choice pathology.[47] Regardless whether you conclude that we have struck a "happier balance" between competing interests,[48] or that it is evidence of legislative capture,[49] it is undeniable that copyright is longer and stronger than ever before.

Today, copyright subsists in all "original works of authorship fixed in any tangible medium[,]" and it grants the copyright owner exclusive rights over reproduction, adaptation, distribution, performance, and display.[50] The duration of copyright terms has been extended eleven times between 1963 and 1998.[51] Copyright initially offered a fourteen year term of protection, which could be renewed once; it now offers protection for the life of the author plus an additional

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44. *Compare* Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831), *with* Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

45. L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249, 264 (1992). *See also* Amanda Reid, *Claiming the Copyright*, 34 YALE L. & POL'Y REV. 425, 444 (2016) ("Today, our formality-optional system has swept within the bounds of copyright far more works for far longer than was initially contemplated. And copyright's bounds are larger than ever. Not only has the subject matter of copyright expanded, but the rights have expanded too.").

46. *E.g.*, Dennis S. Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 CORNELL J.L. & PUB. POL'Y 161, 163 (1999) ("Congress has a ratchet for copyright protection that sends it in only one direction—more for owners of existing copyrights and less for current and future authors and for the public generally."); Jessica Litman, *Convergence of Paradigms and Cultures: War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002) ("Recently, copyright legislation has seemed to be a one-way ratchet, increasing the subject matter, scope, and duration of copyright with every amendment."); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 282 (2004) ("Many copyright scholars object to the way Congress deals with their subject. With good reason, they feel Congress wields a copyright ratchet: terms get longer, and the scope of rights gets wider, but never the reverse."); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 543 (2004) ("Legally, then, copyright has been a one-way ratchet covering more works and granting more rights for a longer time.").

47. Wu, *supra* note 6, at 291; *see also* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 757 (2001).

48. Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 64 (2002).

49. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) (recounting how incumbents have proposed and drafted various amendments to the Copyright Act).

50. 17 U.S.C. §§ 102(a), 106 (2012).

51. 17 U.S.C. § 302 (2012). *See also* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1042 n.38 (2005).

seventy years after the author's death.[52] Not only have the type of works protected by copyright broadened, but the rights that attach to these works have also been enlarged.[53] Copyright is no longer limited to protecting maps, charts, and books; it now protects a range of works, including photographs, choreography, architectural drawings, sound recordings, and computer software.[54] Copyright is no longer limited to protecting against verbatim and near-verbatim copying; it now protects a range of activities including derivative creations, public performances, and public displays.[55] Formalities, like affixing a copyright notice and registering a work, are no longer required.[56] The Digital Millennium Copyright Act makes circumvention of digital rights management illegal.[57] And statutory damages for copyright infringement can run as high as $150,000 per work for willful infringement.[58]

As technology has changed our relationship with copyrighted works, incumbent rightsholders have pushed for the scope of copyright to change.[59] New technology has made copying and distributing easier. To combat threats of piracy from new technology, copyright holders regularly push for greater protections. For example, over the past century, incumbents have urged Congress to revise the copyright laws to extend exclusive rights to new technologies like phonographs, film, cable transmission, and internet radio.[60]

Historically copyright has had trouble keeping pace with new, unforeseen technologies.[61] Application of copyright to breakthrough technologies is often

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52. *Compare* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831), *with* 17 U.S.C. § 302.

53. *See* 17 U.S.C. § 106. *See also* Reid, *supra* note 45, at 444.

54. 17 U.S.C. § 102(a).

55. 17 U.S.C. § 106.

56. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §§ 7–9, 102 Stat. 2853, 2857-59 (1988). *See also* Reid, *supra* note 45, at 425 (arguing that one way to re-balance the interests of copyright holders and users is by reintroducing formalities that incentivize copyright holders to claim their works).

57. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 1201, 1203, 1204, 112 Stat. 2860, 2863-76 (1998) (codified in various sections of 17 U.S.C.).

58. 17 U.S.C. § 504 (2012).

59. Dan L. Burk, *Inventing Around Copyright*, 109 NW. U. L. REV. 64, 69 (2014).

60. *See, e.g.*, *id.* ("As increasingly effective copying technology was developed and disseminated—such as offset lithography, xerography, and digitization—legal exclusivity was called upon to fill a greater and greater gap between the initial cost of creation and the cost of subsequent dissemination."); Greenberg, *supra* note 10, at 1495–96 ("With the 1976 Copyright Act, a Congress weary of recurring demands to revise copyright law in light of new technologies—e.g., phonographs, film, radio, cable transmission, etc.—thought it had guarded the statute against ossification and obsolescence via technology-neutral defaults.").

61. S. REP. NO. 105-190, at 2 (1998) ("Copyright laws have struggled through the years to keep pace with emerging technology."). *See also* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 24, 25 (rev. ed., Stanford Univ. Press 2003); JESSICA LITMAN, DIGITAL COPYRIGHT 57 (2d ed. 2006); Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1613 (2001).

uncertain.[62] To avoid the problems of continual adjustments and the risk of obsolescence, policymakers aimed for modern copyright to be technology-neutral.[63] The goal of technology neutrality is to "future-proof" copyright such that it is adaptable to new, currently unknown technologies.[64] But, in fact, copyright has not been made future-proof.[65]

Copyright's application to new technology remains uncertain.[66] Over the years, the Supreme Court has been called upon to resolve whether to apply copyright to new technology, including internet retransmissions of broadcast television programs, file sharing over peer-to-peer networks, home video recording devices (VCRs), player pianos, and photographs.[67] So despite the goal

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62. Depoorter, *supra* note 8, at 1835–36 ("In copyright law, breakthrough technologies make it more difficult to apply existing rules by analogy. Even when courts seek to apply the relatively bright-line rules of copyright doctrine, the exact entitlement of rights may be surprisingly uncertain when applied to a novel technology.").

63. *See* Greenberg, *supra* note 10, at 1511–15.

64. Jake Linford, *Improving Technology Neutrality Through Compulsory Licensing*, 100 MINN. L. REV. HEADNOTES 126, 128 (2016) ("Advocates of technology neutrality in copyright law emphasize that a technology neutral statute should be somewhat future proof—adaptable to new technologies even if the enacting Congress couldn't hazard a guess at what those technologies might be."). *See also* Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 270–76 (2007) (noting future-proofing and equivalence); Greenberg, *supra* note 10, at 1518.

> That all new copyright-using technologies are subject to copyright law gave the 1976 Act the appearance of flexibility in the face of increasingly rapid technological change. Only authors or users unhappy with the law's application would feel the need to lobby Congress for technology-specific treatment. Neutrality was a blunt tool, but it appeared to guard copyright law against obsolescence, even if over time it became apparent that the law was often too general to be adequately tailored to new technologies. Indeed, four decades later, technology neutrality continues to be touted as value-maximizing in copyright law.

Greenberg, *supra* note 10, at 1518 (citations omitted).

65. Greenberg, *supra* note 10, at 1497 ("Technology-neutral provisions have failed to future-proof copyright law, leading to numerous quickly outmoded revisions. Neutral provisions also have magnified copyright's complexity by driving judicial inconsistency and increasing the role of uncertain ex post exceptions.").

66. Depoorter, *supra* note 8, at 1841 (noting "the dynamic and unpredictable nature of technological innovation makes it difficult for lawmakers to predict or anticipate forthcoming inventions" because "past innovations are not always reliable indicators of what is to come") (citation omitted).

67. *See generally* American Broadcasting Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (internet retransmission); MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (peer-to-peer file sharing); N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001) (electronic reproductions); Lotus Dev. Corp. v. Borland Int'l, Inc., 516 U.S. 233 (1996) (software); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (home video recorders); Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975) (photocopying); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974) (cable retransmission); Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968) (same); Mazer v. Stein, 347 U.S. 201 (1954) (applied art); Buck v. Jewell-La Salle Realty Co., 283 U.S. 191 (1931) (radio); Kalem Co. v. Harper Bros., 222 U.S. 55 (1911) (motion picture version of novel Ben Hur); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908)

of future-proofing, modern copyright has required judicial interpretations and legislative amendments to address technological advances.[68] Each new technological advance has forced an adjustment of the scope of copyright.[69]

Notwithstanding future-proof aspirations, copyright's expansion is ill-fit for current use and potential future technology. It has proven hard to anticipate and keep up with future technology.[70] Mark Twain could hardly have envisioned e-books, and our Congress is at a similar disadvantage.[71] Anticipating the future value of innovations is notoriously difficult.[72] Technological innovation injects "unknown unknowns" into the calculus.[73] One of the shortcomings of attempting to future-proof is, as Brad Greenberg noted, that "we cannot predict whether applying a law to a new technology will promote—or undermine—the law's policy goals."[74]

Another shortcoming of attempting to future-proof is that modern copyright is built around existing technologies and implicitly discriminates against new technologies.[75] By allowing incumbents to dictate copyright policy, Congress has entrenched a preference for extant technologies. This bias for current

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(player piano rolls); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photographs). *See also* Greenberg, *supra* note 10, at 1496 n.7.

68. Burk, *supra* note 59, at 69 ("Radio, broadcast television, xerography, cable, digital transmission, and other communication technologies have all left their mark on the statute as Congress has responded to the demands of copyright holders, resulting in the cumulative, technologically defined amendment of the statute over time."); Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 278–79 (1989) (tracing legislative amendments to the 1909 and 1976 Copyright Acts in response to advances in communication technologies).

69. Depoorter, *supra* note 8, at 1835 ("Whenever technological advances create new means of making copies or communicating copyrighted works, difficult questions arise as to how boundaries should be drawn around new uses of content created by the new technology.").

70. Greenberg, *supra* note 10, at 1527.

> [W]hen Congress attempts to draft laws with an eye toward an unknown future, it does so from the vantage point of contemporary technological limitations, crafting technology-neutral laws with extant technology in mind. Like the nineteenth-century farmer who imagines a sharper plow but is unable to foresee the combustion engine, Congress imagines linear advances from extant technology.

Id. (citations omitted).

71. *See id.* at 1519 ("At the urging of frustrated copyright owners and even the Register of Copyrights, the statute has been amended thirty-one times to add or revise technology-specific provisions. Revisions have added complexity to the 1976 Act, and on occasion without clear benefit to copyright owners or users.").

72. *Id.* at 1524–26 (recounting examples of "miscalculations" that "look abjectly shortsighted").

73. *Id.* at 1526 ("Technology neutrality is based on the premise that technology-neutral laws can adequately anticipate known unknowns. The trouble is: technological spikes inject unknown unknowns.").

74. *Id.*

75. *Id.* at 1497 (2016) ("[T]he 1976 Act's technology-neutral defaults were drafted with existing technologies (and business models) in mind, resulting in inefficient and unjustified discrimination against new technologies.").

technologies is reflected in copyright's technology-specific exemptions, like compulsory licenses for cable retransmissions,[76] jukeboxes,[77] mechanical reproductions of musical works,[78] and qualifying webcasters.[79] Far from being neutral, bias is baked into our technology, as well as our copyright policy.[80]

Our copyright policy has enabled technology entrenchment, which ensures incumbent distributors maintain dominance.[81] This bias is manifest and forced into relief after the emergence of a paradigm-shifting innovation.[82] But the emergence of a paradigm-shifting innovation can be thwarted by the threat of a copyright lawsuit. Litigation risks entrench incumbents by hampering new innovations and legitimate uses of copyrighted works.[83] New technology

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76. 17 U.S.C. § 111 (2012).

77. 17 U.S.C. § 116 (2012).

78. 17 U.S.C. § 115 (2012).

79. 17 U.S.C. § 114 (2012). *See also* Amanda Reid, *The Power of Music: Applying First Amendment Scrutiny to Copyright Regulation of Internet Radio*, 20 TEX. INTELL. PROP. L.J. 233 (2012) (arguing the copyright regulations that limit the number and arrangement of songs a webcaster may transmit within a three-hour period infringe First Amendment interests); Amanda S. Reid, *Play It Again, Sam: Webcasters' Sound Recording Complement as an Unconstitutional Restraint on Free Speech*, 26 HASTINGS COMM. & ENT L.J. 317 (2004) (analyzing whether copyright regulations on webcaster transmissions would pass First Amendment scrutiny).

80. *E.g.*, CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 3 (2016) (arguing the "math-powered applications powering the data economy" are created by "fallible human beings" and "many of these models encoded human prejudice, misunderstanding, and bias into the software systems that increasingly manage[] our lives"); SARA WACHTER-BOETTCHER, TECHNICALLY WRONG: SEXIST APPS, BIASED ALGORITHMS, AND OTHER THREATS OF TOXIC TECH 6 (2017) ("The more I started paying attention to how tech products are designed, the more I started noticing how often they're full of blind spots, biases, and outright ethical blunders—and how often those oversights can exacerbate unfairness and leave vulnerable people out.").

81. Raymond Shih Ray Ku, *Grokking Grokste*r, 2005 WIS. L. REV. 1217, 1262–63 (2005) (suggesting that technology neutrality may have been about technology entrenchment, to ensure the incumbent distributors could remain powerful even when new, more efficient vehicles arose for disseminating content); Wendy Seltzer, *The Imperfect is the Enemy of Good: Anticircumvention versus Open User Innovation*, 25 BERKELEY TECH. L.J. 909, 960 (2010).

> If the incumbent can [block new, disruptive technology] using intellectual property, it can preserve its own position for a bit longer at the expense of a public denied the opportunities of technological improvement. It takes less foresight to seek stability by blocking others from innovating than to innovate for oneself.

Seltzer, *supra* note 81, at 960.

82. Michael Birnhack, *Reverse Engineering Informational Privacy Law*, 15 YALE J.L. & TECH. 24, 28 (2012).

> Time and again we realize that a law that seemed to be technology-neutral at one point (usually the time of its legislation), is in fact based on a particular technology, albeit in a general manner. We often realize the technological mindset that is embedded in the law only once a new technological paradigm replaces the previous one.

Id.

83. A recent study, citing conversations with hundreds of startups, explained that "[a]s the curation and distribution of creative content becomes an increasingly ripe source of innovation, old-fashioned notions of what it means to make a copy—and how infringement of copyright is

challenges conventional understandings of what it means to reproduce or distribute a work. But uncertain application of copyright law has deterred socially beneficial innovations.[84]

Copyright lawsuits are powerful deterrents, in part, because of the risk and uncertainty of statutory damages. Current copyright law entitles a rightsholder to recover both actual damages and any additional profits of the infringer.[85] Or, in lieu of actual damages and profits, a copyright owner may elect to recover statutory damages.[86] A plaintiff may elect statutory damages in lieu of actual damages at any time before the final judgment is delivered.[87] Thus, at trial, a plaintiff has the option to prove actual damages or to skirt this burden and seek an amount within a statutory range.[88]

While the statute offers some general guidelines, a court ultimately "has wide discretion in setting the amount of statutory damages," as the Ninth Circuit noted.[89] The statute provides that a court may award an amount between $750 and $30,000 for each work infringed "as the court considers just."[90] If the court concludes the infringement was "committed willfully," the court may increase the award to $150,000.[91] Or, if the court concludes the infringement was innocent—because the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright"—the court may decrease the award to "not less than $200."[92] The statute thus sets out three brackets of damages: innocent ($200–$30,000), non-innocent-and-non-willful ($750–$30,000), and willful ($750–$150,000).

Statutory damages are commonly understood to have a two-fold purpose: (1) assure adequate compensation to the copyright owner for her injury, and (2) deter infringement.[93] As the Copyright Office indicated in a 1961 report: "[T]he

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enforced—lead to many potentially great business models being blocked." Edward Lee, *Copyright-Exempt Nonprofits: A Simple Proposal to Spur Innovation*, 45 ARIZ. ST. L.J. 1433, 1441 (2013).

84. Depoorter, *supra* note 8, at 1841.

85. 17 U.S.C. § 504(b) (2012) ("The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.").

86. 17 U.S.C. § 504(c).

87. *Id.*

88. *See, e.g.*, Curet-Velazquez v. ACEMLA de Puerto Rico, Inc., 656 F.3d 47, 57–58 (1st Cir. 2011) (allowing plaintiff to request relief in the alternative, either actual damages or statutory damages, and ultimately elect statutory damages in plaintiff's proposed findings of fact and conclusions of law).

89. Nintendo of Am., Inc. v. Dragon Pac. Int'l, 40 F.3d 1007, 1010 (9th Cir. 1994).

90. 17 U.S.C. § 504(c)(1).

91. 17 U.S.C. § 504(c)(2).

92. *Id.*

93. H. Comm. on the Judiciary, 87th Cong., 1st Sess., Report of the Registrar of Copyrights on the General Revision of the U.S. Copyright Law 102-103 (Comm. Print 1961). *Accord* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) (statutory damages "may serve purposes traditionally associated with legal relief, such as compensation and punishment"). Note

value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove."[94] Additionally, deterrence is presumed necessary, otherwise users may adopt a take-now-and-pay-only-if-caught mentality.[95]

Notwithstanding the laudable goals of statutory damages, there is growing criticism of the current array.[96] Similar cases have resulted in wildly disparate damage awards.[97] Uncertain application of statutory damages can over-deter uses of copyrighted works. Scholars note that statutory damage "awards have too often been arbitrary and inconsistent, and sometimes grossly excessive."[98] Several notable cases "received considerable publicity."[99] In July 2009, a jury awarded statutory damages of $675,000 against a college student found liable for downloading and sharing thirty songs online.[100] A month prior, in June 2009, a jury awarded statutory damages of $1.92 million against a single mother found liable for downloading and sharing twenty-four songs online.[101] And in 2004, a jury awarded statutory damages of $19.7 million, even though the defendant argued "the actual harm" from the infringements was only $59,000.[102] The risk of sizable statutory damages undeniably chills even legitimate uses of

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that statutory damages are available only if the copyright owner registered her work prior to the infringement. 17 U.S.C. § 412 (2012).

94. H. Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 102 (Comm. Print 1961).

95. *See, e.g.*, Dream Dealers Music v. Parker, 924 F. Supp. 1146, 1153 (S.D. Ala. 1996) ("Foremost, the court must award an amount that will put the defendant on notice that it costs more to violate the copyright law than to obey it.").

96. *See, e.g.*, J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 526 (2004) (arguing "the punitive effect of even the minimum statutory damage award, when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment"); Jeffrey Stavroff, *Damages in Dissonance: The "Shocking" Penalty for Illegal Music File-Sharing*, 39 CAP. U.L. REV. 659, 662 (2011) (arguing "recent statutory damages awards are unfair, arbitrary, and contrary to the Framers' intention that copyright provide incentives to stimulate artistic creativity for the general public good").

97. Pamela Samuelson et al., *Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?*, 60 J. COPYRIGHT SOC'Y 529, 553 n.101 (2013) (comparing cases).

98. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 510 (2009).

99. Dep't of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, And Innovation In The Digital Economy* 70–71 (Jan. 28, 2016), http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf.

100. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 489–91, 493 (1st Cir. 2011) (reinstating jury's award of $675,000 in statutory damages, reversing a decision by the district court to reduce it to $67,500).

101. Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 901–02 (8th Cir. 2012) (reinstituting the first jury's damages verdict of $220,000, after the second jury awarded statutory damages of $1,920,000 and the third jury awarded statutory damages of $1,500,000).

102. Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 458 (D. Md. 2004).

copyrighted works.[103] Capitalizing on this uncertainty, copyright "trolls" have, as the U.S. Department of Commerce's Internet Policy Task Force noted, used the "the threat of statutory damages to turn litigation threats into a profit center."[104]

Litigation threats have also been used to enjoin robust discussions on matters of public importance.[105] Copyright has be used to stifle free speech.[106] As the Supreme Court has acknowledged, "some restriction on expression is the inherent and intended effect of every grant of copyright."[107] But, as the Court explained, "copyright's limited monopolies are compatible with free speech

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103. Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 32 (2010) ("[A]s long as the wild card of punitive damages remains in a copyright owner's deck of remedies, the risk of moving forward will often seem too great."). *See also* Dep't of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* 52 (July 2013), http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf.

> Much public attention has focused on the size of the awards in the two infringement cases against individual file sharers that have gone to trial. In both cases, after large awards by juries within the statutory range had been reduced by the district courts, they were eventually reinstated by the Courts of Appeals.

Id.

104. *See* Dep't of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, And Innovation In The Digital Economy* 75–76 (Jan. 28, 2016), http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf.

105. *See, e.g.*, Tehranian, *supra* note 17, at 250–51; Travis, *supra* note 5, at 725 ("Public figures such as political candidates, public officials, and celebrities have increasingly looked to copyright law to prevent criticism or parody of their actions or works.").

> Whether it is a creationist group using the Digital Millennium Copyright Act ("DMCA") to force the takedown of critical materials put online by evolutionists; abortion-rights activists bringing infringement litigation to enjoin speech by pro-life forces; military personnel using copyright claims to suppress photographs documenting human-rights abuses; or a political commentator suing to vindicate the exclusive rights to recordings of his shows as a means of suppressing criticism of his hate-filled rant, examples of this disingenuous use of copyright law abound.

Tehranian, *supra* note 17, at 250–51 (citations omitted).

106. Tushnet, *supra* note 46, at 399.

> Ordinary theories of copyright have been used to suppress political speech ranging from a successful suit against an unauthorized translation of Hitler's *Mein Kampf* designed to awaken Americans to the threat posed by Nazi ideology to less weighty, but still notably successful, lawsuits against political uses of music inconsistent with composers' beliefs.

Id.

107. Golan v. Holder, 565 U.S. 302, 327–28 (2012); *accord* Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism In Free Speech Theory*, 107 NW. U.L. REV. 647, 653 (2013).

> Copyright is a source of income for authors, so it creates an incentive for them to produce speech. But it does so by stifling other speech. When the law suppresses pirated editions, it keeps the work out of the hands of some people who would otherwise consume it. We are trading some speech for other speech.

Koppelman, *supra* note 107, at 653.

principles" because "copyright law contains built-in First Amendment accommodations," like fair use and the idea/expression dichotomy.[108]

Fair use is a bulwark of free speech values; our free speech culture cannot survive without it. This relationship has been described by Judge M. Margaret McKeown as the "ying and yang of copyright and the First Amendment."[109] Fair use allows use of copyrighted works without permission from the copyright holder.[110] Congress has codified four non-exclusive fair use factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality used; and (4) the effect of the use on markets for the copyrighted work.[111] To keep pace with copyright's expansion, I argue that fair use must also expand in order to maintain the copyright balance. In Part IV, I offer a suggestion for recalibrating fair use.

Promoting free expression is intertwined with promoting innovation.[112] Copyright can be both the engine of free speech and a tool of censorship. Copyright can also be used to foster or thwart innovations. Copyright policymaking demands a clear and honest appraisal of the current balance. As such, we must ask if copyright policy is appropriately calibrated to account for these tradeoffs. Because of the costs to innovation and free expression, I argue it is not.

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108. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

109. Hon. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 16 (2015).

110. *See* H.R. Rep. No. 94-1476, p. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659; Stewart v. Abend, 495 U.S. 207, 236 (1990); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 447–48 (1984). Fair use has since been codified in Section 107 of the 1976 Copyright Act. Copyright Act of 1976 § 107, 90 Stat. at 2546 (codified as amended at 17 U.S.C. § 107). *See also* Depoorter, *supra* note 8, at 1838–39 ("One of the most prominent legal issues in copyright law pertains to fair use: does the new use fall within the legal category of free use, or is it within the exclusive right of copyright owners and therefore in need of a license?").

111. 17 U.S.C. § 107 (2012).

112. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438 (2009). *See also* Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562 (2000) ("Technology now makes possible the attainment of decentralization and democratization by enabling small groups of constituents and individuals to become users—participants in the production of their information environment—rather than by lightly regulating concentrated commercial mass media to make them better serve individuals conceived as passive consumers.").

> [W]e cannot easily separate values of free expression from the goals of promoting widespread and decentralized innovation and new forms of information production and information services. To put it another way, we best serve free speech values by decentralizing and promoting innovation, by letting lots of different people experiment with a wide variety of new ways of communicating, sharing information, associating, and building things together.

Balkin, *supra* note 112, at 438.

II. COPYRIGHT POLICY & INNOVATION

Conventional economic theory suggests that the creative destruction cycle is the engine of long-term economic growth.[113] Economist Joseph Schumpeter described capitalism as a "perennial gale of creative destruction."[114] The Schumpeterian cycle of innovation and growth typically involves a dominant, incumbent firm that is overwhelmed by a new, disruptive innovation, which then upends the balance of power.[115] In the process of creative destruction the "capitalist engine," according to Schumpeter, keeps moving by "incessantly revolutioniz[ing] the economic structure . . . [by] incessantly destroying the old one, incessantly creating a new one."[116] In turn, the new firm may become dominant, and subject to a subsequent cycle of creative destruction by another new innovation.

But after the creative destruction cycle, the newly established interest often seeks to protect its now dominant status through legal and regulatory protections.[117] This "transition from entrepreneur" to incumbent can be "breathtakingly fast."[118] For example, in the electrical lighting industry, it took less than a decade for Thomas Edison to transition from a "maverick" promoting the feasibility of incandescent lighting to an outspoken critic of the "dangerous" alternating current innovation.[119]

History teaches that newly dominant forces have often pushed for greater copyright protections to maintain their advantage. Legal scholars have observed this pattern:

> At the turn of the last century, the music publishers selling sheet music came into conflict with the manufacturers of a new technological device, the piano roll. In the 1920s, 1930s, and early 1940s, the music publishers clashed with radio companies. In the 1970s and 1980s, the movie studios fought with the makers of videocassette recorders (VCRs). In the early 2000s, the record labels resisted digital distribution of music and sought to squelch or otherwise control the software companies that offered file sharing software.[120]

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113. *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (1942).

114. *Id.* at 84.

115. CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL 79–81, 132–34 (1997); Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV. (1995); Spencer Weber Waller & Matthew Sag, *Promoting Innovation*, 100 IOWA L. REV. 2223, 2226 (2015).

116. SCHUMPETER, *supra* note 113, at 83.

117. *E.g.*, DEBORA L. SPAR, RULING THE WAVES: CYCLES OF DISCOVERY, CHAOS, AND WEALTH FROM THE COMPASS TO THE INTERNET 16–18 (2001).

118. Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 872 n.141 (1990).

119. *Id.*

120. DiCola & Sag, *supra* note 7, at 175 (citations omitted).

The now incumbent forces have the opportunity and the cost advantage needed to erect barriers to independent entry.[121] Whether it was television broadcasters trying to block cable television or existing radio companies trying to block "low-power" FM stations, incumbents have a long history of leveraging copyright to block competing technologies.[122]

Copyright barriers can prevent creative destruction and hamper the cycle of progress. Incumbents have a strong, selfish instinct to bury disruptive innovations.[123] But to further economic growth, the creative destruction cycle must continue. Economic growth's pains and gains are inextricable.

Innovation is the process that drives competition and economic growth.[124] Some innovations involve dramatic improvements whereas others are merely incremental.[125] Innovation often occurs in fits and starts. Innovation, like evolution, can be messy and nonlinear.[126] The current digital media successes, for example, have resulted from several rounds of iterative innovations, not just a single innovative advance.[127]

Newcomers are often responsible for cutting-edge, economic advances.[128] Entrepreneurs and start-ups are key players in the creative destruction process that fosters innovation.[129] In fact, scholars note that "[f]rom 1980 [to] 2005,

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121. *See, e.g.*, Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 33 (2010) ("Market leaders in the entertainment and information businesses have learned to use copyright legislation as an opportunity to erect market barriers to block their nascent competition.").

122. Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 139 (2006).

123. *Id.* at 140 ("Since few firms plan for their own death, even if their death is in the public interest, the temptation to bury a disruptive innovation may be strong indeed.").

124. Waller & Sag, *supra* note 115, at 2246 ("Innovation is a process that does not end. In the long run innovation, is the most important driver of both competition and economic growth.").

125. Greenberg, *supra* note 10, at 1525 ("Some innovations are subtle and frequent, like improvements to the typewriter; others are dramatic and paradigm shifting, like the computer processor.").

126. Mike Masnick, *When You Let Incumbents Veto Innovation, You Get Less Innovation*, 2013 WIS. L. REV. 27, 28 (2013) ("The process of innovation is messy and unpredictable.").

127. Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 667 (2014) ("The success of Silicon Valley enterprises has often been a result not just of a single initial inspiration, but of successive rounds of serial innovation within a single firm.").

128. Mirit Eyal-Cohen, *Through the Lens of Innovation*, 43 FLA. ST. U. L. REV. 951, 964–65 (2016). In the Schumpeterian model:

> Entrepreneurs are special because they create 'new combinations,' namely by introducing new products, developing new methods of production, devising new business models, and creating new markets—creations that confront and eventually defeat previously existing economic orders. By implementing innovations, entrepreneurs destroy the basis for the old economy while paving the way to a new economic order of prosperity and welfare.

Id.

129. WILLIAM J. BAUMOL, THE FREE MARKET INNOVATION MACHINE: ANALYZING THE GROWTH MIRACLE OF CAPITALISM 31 (2002); *accord* William J. Baumol, *Entrepreneurship in Economic Theory*, 58 AM. ECON. REV. 64, 64 (1968).

firms less than five years old accounted for nearly all net job growth in the country, and in 2007 alone, these same young firms accounted for nearly two-thirds of job creation."[130] And these newcomers are more likely to produce disruptive technologies.[131] Such technological progress has been the centerpiece of domestic economic growth.[132] According to the Obama White House, "from 1948 [to] 2012 over half of the total increase in U.S. productivity growth, a key driver of economic growth, came from innovation and technological change."[133]

The innovation process involves creative destruction. When online travel sites (*e.g.*, Expedia) supersede travel agencies and when online entertainment streaming services (*e.g.*, Netflix) replace movie rental stores (*e.g.*, Blockbuster), we have creative destruction:[134] superior products and services replace and destroy the old ones.[135] These new technologies—which arguably produce better products—are good for both society and the economy.[136]

But disruptive technology can face serious limitations when confronted with copyright law. Copyright policy is inextricably intertwined with new

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130. Eyal-Cohen, *supra* note 128, at 963–64.

131. ARNOLD KLING & NICK SCHULZ, FROM POVERTY TO PROSPERITY: INTANGIBLE ASSETS, HIDDEN LIABILITIES AND THE LASTING TRIUMPH OVER SCARCITY 8 (2009) ("Often, innovation is the result of the unplanned trial-and-error learning that takes place among new enterprises, rather than the organized research and development efforts of large organizations."). *See also* DiCola & Sag, *supra* note 7, at 179 ("[D]ue to its potential to disrupt the status quo, new copyright technology is almost never developed by the dominant content owners of the day. New technologies for the dissemination of copyrighted works, by their very nature, tend to come from outsiders.").

132. *See, e.g.*, NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE (Joseph E. Stiglitz & G. Frank Mathewson eds., 1986).

133. *Fact Sheet: The White House Releases New Strategy for American Innovation, Announces Areas of Opportunity from Self-Driving Cars to Smart Cities*, WHITE HOUSE OFFICE OF THE PRESS SEC'Y (Oct. 21, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/10/21/fact-sheet-white-house-releases-new-strategy-american-innovation.

134. Waller & Sag, *supra* note 115, at 2223–24 (detailing examples of modern creative destruction: "email has upended the economics of the postal service, Craigslist has devastated newspaper classified ads, online shopping has imperiled bricks-and-mortar retail, and the smartphone has relegated former mobile handset market leaders, such as Nokia and Blackberry, to obscurity").

135. Rather than creating a new market, there is a risk that some new technology may simply free ride and cannibalize old technology without offering a superior substitute. *See* Barak Y. Orbach, *Indirect Free Riding on the Wheels of Commerce: Dual-Use Technologies and Copyright Liability*, 57 EMORY L.J. 409, 455 (2008).

136. Seltzer, *supra* note 81, at 963.

> While disruption is painful to those whose businesses are leapfrogged, it generally benefits end-users. Through competition, they get access to a wider range of products, better tailored to their needs in feature selection or price. Customers who cannot attract the attention of a major producer, on whose scale they would be just a speck, may be able to find a supplier elsewhere who sees them as opportunities to break in to a new market. Some would-be disruptors fail, of course, but the larger number of innovators who can try when barriers to entry are lower gives more opportunities for unexpected successes.

Id.

communications technologies.[137] Copyright can deter innovation because the application of the law to breakthrough technologies is often uncertain.[138] Copyright policy, therefore, creates winners and losers in the marketplace.[139] Copyright allows incumbents to lock out competition.[140] As an exclusive right (*i.e.*, the right to exclude), the copyright holder can deny a competitor access to "an essential input," namely the copyrighted work.[141] As a financial instrument, copyright enables supra-competitive market rates.[142] Exclusive rights artificially create scarcity of a public good. And the economic distortions caused by the rightsholder's supra-competitive prices can, in turn, create deadweight losses—to the extent there is unmet need at supra-competitive prices.[143]

Copyright not only blocks price competition, but it also blocks project development and innovation.[144] Copyright has historically lagged behind technological innovations.[145] It isn't always clear *ex ante* the extent to which copyright law will apply—or if it will apply at all.[146] While the law offers some accommodations for new technology, such as safe harbors and fair use, their application is uncertain.[147] The contours of copyright's statutory language

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137. Burk, *supra* note 59, at 69 ("[C]opyright has evolved to place exclusive rights at the level of activities such as reproduction and distribution of copies, or transmission of performances, which are largely technological activities.").

138. Depoorter, *supra* note 8, at 1836 ("In copyright law, breakthrough technologies make it more difficult to apply existing rules by analogy. Even when courts seek to apply the relatively bright-line rules of copyright doctrine, the exact entitlement of rights may be surprisingly uncertain when applied to a novel technology.").

139. Lee, *supra* note 11, at 808 ("In the successful fair use cases above, all of the technologies continued. In the unsuccessful cases, all of the specific technologies ceased to exist."); Randal C. Picker, *Copyright and Technology: Déjà Vu All Over Again*, 2013 WIS. L. REV. ONLINE 41, 41 (2013) (noting "[c]opyright can kill technology").

140. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 249 (2005).

141. Wu, *supra* note 6, at 295.

142. *Cf.* Abbott, *supra* note 41, at 36 ("A patent is essentially a financial instrument that entitles its bearer to achieve greater than competitive market rates of return on investment.").

143. *E.g.*, Sterk, *supra* note 42, at 1206 (discussing deadweight loss that results from monopoly power over distribution of existing works).

144. Wu, *supra* note 122, at 137.

145. Depoorter, *supra* note 8, at 1840 ("Because innovation is rapid and unpredictable, the adaptation of copyright law lags far behind the introduction of new technological advancements."); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 566 (1998) ("[T]hat technological developments outpace the rate of legal change poses another particular problem for intellectual property rights; the law always lags behind the technology.").

146. See Chander, *supra* note 127, at 658 ("Consider the graveyard of dot-com enterprises, felled not by flawed monetization plans, but by copyright law: MP3.com, ICraveTV.com, Aimster, Grokster, and, most famously, Napster.").

147. Lee, *supra* note 83, at 1444 ("U.S. copyright law has three primary mechanisms designed to allow some ways for technology developers to develop new uses of copyrighted content: (1) the DMCA safe harbors, (2) fair use, and (3) the *Sony* safe harbor."). *See also* Amanda Reid, *Considering Fair Use: DMCA's Take Down & Repeat Infringers Policies*, 24 COMM. L. & POL'Y

continue to be interpreted and interpolated by judicial opinions.[148] This lag between new technology and judicial interpretation creates a period of legal uncertainty.[149] In turn, this uncertainty makes litigation more expensive and risky.[150]

Entrepreneurs and start-ups are more likely to face a lawsuit for their disruptive communication technology than established businesses.[151] New businesses have attempted to navigate the copyright maze trying to create non-infringing products, only to have the courts find their technology infringing.[152] For example, Aereo, which sought to offer over-the-air television to internet-connected devices, designed its technology to conform to the requirements of existing case law.[153] Nonetheless, the Supreme Court found the technology infringing.[154] Grokster, which sought to offer a non-infringing peer-to-peer system, tried to learn from the *Napster* case.[155] Nonetheless, the Supreme Court found the technology infringing.[156] Experiences like these have discouraged innovations in the digital sphere.[157]

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1 (2019) (proposing reforms to the DMCA's safe harbor regime to better safeguard fair use interests).

148. *See* Litman, *supra* note 49, at 858.

149. Depoorter, *supra* note 8, at 1846 (noting "the introduction of a new technology is always followed by a period of legal uncertainty in copyright law"); Wu, *supra* note 122, at 141 ("With the arrival of every new industry—automobiles, airplanes, software, computers, internet auctions—there is always some question as to whether or when intellectual property rights of some form should attach.").

150. John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1829 (2013).

151. *E.g.*, Lee, *supra* note 83, at 1442. *See also* Seltzer, *supra* note 81, at 961 ("The entertainment companies' response to both VCR and MP3 as they became popular was similar to their reaction to newer technologies under the DMCA: attempt to sue them anyway.").

> If a new Internet platform utilizes copyrighted content, as is often the case, the probability is very high that a copyright lawsuit could be brought to challenge the new platform, especially if it is making a new kind of use of the content. Even if the new use turns out not to infringe, litigation could take a decade or more to decide the issue.

Lee, *supra* note 83, at 1442.

152. Greenberg, *supra* note 10, at 1540 ("Napster, Aimster, and Grokster—three early peer-to-peer file-sharing services—varied technologically but offered the same general service: enabling a user to share a file in his possession with other users who wanted a copy . . . . [D]espite effectively similar technology, Napster, Aimster, and Grokster each lost on a different basis.") (citations omitted).

153. *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008); *see also* Olivier Sylvain, *Disruption and Deference*, 74 MD. L. REV. 715, 721–22 (2015) (providing a background on Aereo's technology).

154. Am. Broad. Co. v. Aereo, Inc., 134 S. Ct. 2498, 2503 (2014).

155. Burk, *supra* note 59, at 66 ("Grokster and KaZaa intentionally attempted to design around the contours of technological liability as mapped out by the Ninth Circuit in the *Napster* decision.").

156. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 939–40 (2005).

157. Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 916 (2012) ("Venture capital funding in the area of digital music fell significantly after the Napster

But even when a new technology does not infringe, the risk of litigation is a powerful disincentive for innovators.[158] A copyright lawsuit is often an existential threat to the survival of the firm. Not only are company trade secrets put at risk of disclosure during the litigation process, but the costs—in time and money—are enormous.[159] Rarely can a defendant escape litigation before the discovery phase and before accumulating sizable litigation costs.[160] Indeed, litigation can last for years and the legal fees can reach into the millions.[161] For example, YouTube's successful defense against Viacom's copyright lawsuit is estimated to have generated over $100 million in legal costs.[162] Only the best capitalized firms are able to absorb such costs. Start-ups have comparatively fewer resources than established industry groups and are less able to bear the cost of litigating—even a meritorious case.[163] Without a wealthy backer, like Google, YouTube would not have survived the litigation process.[164]

The threat of litigation and the uncertainty of litigation costs are substantial barriers to innovation.[165] Even when a defendant prevails, the costs can be ruinous for a start-up company. The cost and time to defend can be "backbreaking" even with "the most ironclad fair-use defenses."[166] The

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decision. One VC explained that 'it became a wasteland' with 'no music deals getting done.'") (citation omitted).

158. Matthew Le Merle et al., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment* A Quantitative Study, BOOZ&CO. 1, 6 (2011), https://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf. ("A large majority of angels and venture capitalists support increased clarity in copyright law, especially if it would decrease the level of ambiguity surrounding the probability of facing a lawsuit in cases of copyright infringement, as well as the size of damages in the event of liability. Fully 80 percent report being uncomfortable investing in business models in which the regulatory framework is ambiguous.").

159. Blevins, *supra* note 150, at 1846 ("In pre-trial motions, Viacom filed a motion to compel high volumes of information from YouTube—including 'undisputed trade secret[s].'").

160. *See* Tehranian, *supra* note 17, at 268.

161. *See, e.g.*, Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 864 n.146 (2008) ("defending the lawsuit against the ReplayTV cost more than $1 million per month in legal fees").

162. Blevins, *supra* note 150, at 1832.

163. *Id.* at 1830–31.

164. Lee, *supra* note 83, at 1440.

> Though startups are often the most innovative companies (because they are not saddled with the innovator's dilemma), they are least able to withstand a copyright lawsuit. That plight leaves innovation in this area mainly to incumbents with sufficient financial resources, such as Google (which also might acquire innovative startups as was the case with Google's acquisition of YouTube).

Id.

165. Blevins, *supra* note 150, at 1830 ("For many Internet companies, the litigation itself can be fatal even if they are complying fully with copyright law. For these reasons, content industries can often 'win' simply by filing litigation so long as the litigation is expensive.").

166. Tehranian, *supra* note 17, at 267.

opportunity costs and litigation costs can bankrupt a company.[167] Thus, copyright uncertainty risks "strike suits by content owners who have the financial resources to withstand lengthy and expensive litigation."[168] The lesson is that the mere threat of litigation is often sufficient for market incumbents to wield power over new entrants.[169]

By giving so much power to incumbent forces, copyright is not optimized to foster and spur innovation.[170] Copyright's digital rights management (DRM) policies, for example, have hindered innovation.[171] DRM restrictions have dampened the opportunities to innovate and create complementary markets around copyrighted works.[172] Such policies have slowed innovation and

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167. Blevins, *supra* note 150, at 1823 ("Major record labels ultimately sued Veoh for secondary copyright liability, but Veoh prevailed at both the district court and in the Ninth Circuit. In modern copyright litigation, however, winning isn't everything. By the time the Ninth Circuit released its opinion, Veoh had gone bankrupt, citing excessive litigation costs."); Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED, Feb. 12, 2010, 3:49 PM, https://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/ (noting that after prevailing in a copyright infringement suit filed by Universal Music Group, Veoh entered bankruptcy due to "distraction of the legal battles, and the challenges of the broader macro-economic climate").

168. Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1224 (2011); *see also* Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 4 (1990) (offering "a model that explains strike suits as a result of defendant uncertainty regarding the merit of plaintiffs' claims"). As one scholar noted, "The plaintiffs do not necessarily need to prevail on the merits —in many cases, they merely need to survive dispositive motions that would limit discovery or would halt the litigation altogether." Blevins, *supra* note 150, at 1830.

169. Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 78 n.67 (1993) ("The ability to threaten to impose high litigation costs will improve the bargaining position of the party with superior resources."); Blevins, *supra* note 150, at 1824 ("The lesson is that copyright enforcement against Internet platforms can often succeed merely by increasing the potential costs of enforcement proceedings.").

170. Lee, *supra* note 83, at 1439 ("The paradox is that, of all the areas of law, copyright law most directly bears on what new Internet platforms can be developed legally, yet copyright law is the least developed to spur innovation in new platforms today."). On the other hand, the overall net result of copyright policy on innovation has arguably been good for Silicon Valley. Courts and Congress have facilitated the development of e-commerce. Chander, *supra* note 127, at 668–69 ("[J]ust as nineteenth-century American judges altered the common law in order to subsidize industrial development, judges and legislators at the turn of the Millennium altered the law to subsidize the development of Internet companies.").

171. Randal Picker, *Copyright and the DMCA: Market Locks and Technological Contracts*, *in* ANTITRUST, PATENTS AND COPYRIGHTS: EU AND US PERSPECTIVES 180 (François Lévêque & Howard Shelanski eds., 2005) ("Producers often try to make life tough for their competitors and in many situations incumbents seize upon copyright law to create entry barriers."); Seltzer, *supra* note 81, at 919 (2010) (exploring the impact of digital rights management (DRM) "on user innovation and on the permitted development of media technology[, b]ecause DRM systems, by design and contract, must be hardened against user-modification, they foreclose a whole class of technology and an entire mode of development").

172. *See* Lohmann, *supra* note 161, at 852. *See also* Wu, *supra* note 6, at 331–32; Wu, *supra* note 122, at 141–46.

development around DVDs[173] and e-books.[174] These policies undermine the generative qualities of digital media.[175] Users are disabled from tinkering and innovating. Rather than just a passive recipient, users are an underappreciated source of product innovations.[176] Allowing users to adapt and contribute to innovations helps produce better products.[177] This exchange of information and ideas fosters a democratic environment and an empowered user.[178]

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173. Seltzer, *supra* note 81, at 917–18 (contrasting the development and diversity of music-capable devices against the limits around recorded movies and concluding "DVD's DMCA-backed encryption locks out independent developers and much experimentation").

174. *Id.* at 918.

> [I]n a DRM-encumbered world, a media educator cannot cue movie clips for classroom commentary without special exemption; a literary critic is blocked from extracting e-book pages (or has the e-book deleted out from under her); and a mashup artist is restricted in sampling scope. These restrictions are direct consequences of DRM, problematic for copyright and culture.

Id.

175. *Id.* at 958.

> [A]nticircumvention's restrictions are troublesome because they explicitly bar a particular mode of development—the public mode of free and open source software development—that has been increasingly successful in both commercial and non-commercial production. Anticircumvention forecloses end-user tinkering and innovation and cements a centralized industrial structure, just at the time when technology offers us the means and networked opportunity to do more from the distributed edges of the Internet.

Id.

176. Julian Sanchez, *Infringement and Innovation in Online Platforms*, NOTES FROM THE LOUNGE (Jan. 24, 2012), http://www.juliansanchez.com/2012/01/24/infringement-and-innovation-in-online-platforms ("Online innovation is a collaborative process, and the most interesting uses the users find for your platform won't neecessarily [*sic*] be the ones you intended."); Eric Von Hippel, *Users Rule*, MIT TECH. REV., (Feb. 22, 2011) (noting "users of a technology, whether they're individuals or companies, are usually the initial developers of important innovations that enable them to do new things and create new markets").

177. Seltzer, *supra* note 81, at 967.

> [U]sers—whether in their roles as amateur hobbyists, professional scientists, or programmers—often build or adapt tools for their own use, to serve previously unmet needs . . . . Their innovations may later be followed by and shared with other similarly situated users. Second, end-users can contribute to commercial innovation indirectly, serving as research labs for commercial suppliers. Even when the end-users do not themselves produce in large scale, their innovations may be adopted by established firms.

Id.

178. *See id.* at 968.

> [U]ser innovation produces distributional benefits. The distribution of wealth and access may be fairer in a field open to user innovation than in one closed to it. Access may be more democratic, open to those who are time-rich and money-poor (and offering new fields of entrepreneurship by which people may make time into money). Particularly users with niche needs will be better served by self-innovating. Moreover, the user-innovator is empowered to think of him or herself as more than a mere consumer, and perhaps, like the Jeffersonian yeoman farmer, to become more involved in governance of the information environment.

Id.

Creative destruction theory teaches that incumbents are not optimized to develop new markets or new delivery methods for content.[179] Entrenched in the current market, incumbents focus on current consumers and under-invest in new, immature technologies.[180] Incumbents often do not know how to fully exploit new technology.[181] The full potential of new innovations is not always appreciated at the inception.[182] Copyright holders often "undervalue the social benefits that a new technology offers."[183] As one commentator observed, "On the Internet, you don't know what a new technology is for until you see what people do with it."[184] Outsiders are key to developing disruptive technologies.[185] Copyright should not be an artificial impediment to the cycle of innovation.

Incumbent forces should not be relied upon to craft appropriate copyright policy.[186] Copyright holders aim to maximize their own economic interest; they are not a proxy for the public's interest.[187] Undoubtedly, disruptive technology can destroy existing industries.[188] But copyright is not intended to shield any

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179. Lohmann, *supra* note 161, at 846.

> Ironically, many of the very characteristics that guarantee their success as incumbents create the disabilities that prevent them from recognizing the opportunities presented by disruptive technologies. A variety of both internal and external forces conspire to make established firms either reject investments in disruptive innovations or mis-invest by treating them as sustaining innovations.

Id. See also Burk, *supra* note 59, at 76.

180. *See* Lee, *supra* note 83, at 1438. "Simply stated, the copyright innovator's dilemma is the following: the more innovative or different a speech technology is in terms of utilizing content, the more likely the technology will face a copyright lawsuit or challenge." *Id.* at 1439.

181. *See* CHRISTENSEN, *supra* note 115, at 42 (observing that leading companies have been successful in implementing "sustaining" innovations but have failed to keep pace with disruptive, radical innovations).

182. *Id.* at 131("[N]either manufacturers nor customers know how or why the products will be used, and hence do not know what specific features of the product will and will not ultimately be valued.").

183. Lee, *supra* note 11, at 826.

184. Julian Sanchez, *Infringement and Innovation in Online Platforms*, NOTES FROM THE LOUNGE (Jan. 24, 2012), http://www.juliansanchez.com/2012/01/24/infringement-and-innovation-in-online-platforms.

185. Lohmann, *supra* note 161, at 849 ("An organization cannot disrupt itself. It can only implement technologies in ways that sustain its profit or business model.").

186. *See* Litman, *supra* note 49, at 860–61 (recounting how incumbents have proposed and drafted various amendments to the Copyright Act).

187. Lee, *supra* note 11, at 827.

> But precisely because it is not their [major copyright industries] business, we should be wary of allowing them to dictate or limit the ways in which new speech technologies are developed. The copyright industry is supposed to maximize the profits of their shareholders, not the overall welfare of the public.

Id.

188. *See, e.g.*, Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539, 564 (2003) ("Under certain circumstances, new technologies that facilitate copying and distribution of creative works strike at the foundations of copyright and the industries built upon the economics of the printing press.").

particularly industry or incumbent.[189] Rather, copyright exists to fix the problem of public goods. The purpose of copyright is to incent creation and dissemination of original works.[190] In fact, the use of copyright to insulate an industry player from creative destruction undermines healthy markets. Copyright exists to promote progress, and creative destruction is key to promoting progress and preventing stagnation.

III. COPYRIGHT POLICY & FREE EXPRESSION

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[191] The First Amendment protects several overlapping goals, including a robust marketplace of ideas in the ongoing pursuit for truth,[192] informed participation in our democracy,[193] and the liberty of self-realization and individual autonomy.[194] The First Amendment and copyright policy can work in tandem to promote free expression interests.[195] As

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189. *See id*. at 566.

> File sharing, therefore, is a serious threat, one that strikes at the very foundation of a business model based upon distributing content to the public. However, copyright does not protect against this type of threat. Copyright protects the distribution of creative works in general, not a particular industry or business model.

Id.

190. *Id.* at 572 ("The purpose of copyright is not to maximize the individual wealth of copyright holders, or even to maximize creativity. The purpose of copyright is to remove the obstacles to creation imposed by problems associated with public goods, and to put creation on an even playing field with other endeavors.").

191. U.S. CONST. amend. I.

192. *See* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

193. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 273 (1964); Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 98 (1960) ("To be free does not mean to be well governed. It does not mean to be justly governed. It means to be self-governed."); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011) (defining "speech" as "speech acts and media of communication that are socially regarded as necessary and proper means of participating in the formation of public opinion").

194. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (arguing that "[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual"); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'").

195. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression.").

the Supreme Court noted, "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[196]

In theory, copyright is speech-enhancing because it incentivizes an author to create and, without such incentive, the author, in theory, would not have created.[197] Copyright policy has a noble purpose, but copyright policy that is out of balance threatens our core values. Copyright lawsuits are being used in lieu of legitimate debate. Use of a government-backed monopoly to censor unpopular speech is deeply troubling in a nation that values democratic self-governance. As one scholar noted:

> Instead of engaging in robust free speech to convince the public of the merits of their respective views, organizations at the front lines of leading cultural and political issues have waged a proxy war against each other through the prism of copyright law by raising infringement claims as a means to silence their opponents.[198]

The attractiveness of modern copyright as a weapon to chill speech is due to four interrelated factors: (1) the ease and "ubiquity" of infringement; (2) the simplicity of asserting a prima facie infringement case; (3) the uncertainty of available defenses, like fair use; and (4) the threat of hefty statutory penalties.[199] Censorship by copyright undermines core First Amendment principles.

Copyright out of balance threatens our liberty to learn.[200] Copyright threatens access to the building blocks of learning and culture. For example, a survey of visual artists and visual arts professionals found that one-third have avoided or abandoned work in their field because of copyright concerns.[201] And more than one-half of their editors and publishers have also abandoned projects, such as illustrated books and articles.[202] Copyright concerns have thwarted digital dissemination of cultural and scientific works by museums and libraries,[203]

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196. *Id.*

197. Alfred C. Yen, *The Challenges of Following Good Advice About Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 412, 412–13 (2016).

198. Tehranian, *supra* note 17, at 262.

199. *Id.* at 266.

200. Patterson, *supra* note 45, at 266 (noting the "vital link between learning and liberty" and worrying "the money-makers will take our liberty to learn" because "[t]hat is the beginning of tyranny").

201. Patricia Aufderheide et al., *Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Art Communities*, COLLEGE ART ASSOCIATION 5 (Feb. 2014), http://www.collegeart.org/pdf/FairUseIssuesReport.pdf.

202. *Id.*

203. *See, e.g.*, The Art Institute of Chicago et. al, *Comments on Orphan Works and Mass Digitization* (Feb. 4, 2013), http://copyright.gov/orphan/comments/noi_10222012/Museums.pdf; Sarah E. Thomas, *Response by the Cornell University Library to the Notice of Inquiry Concerning Orphan Works*, (March 23, 2005), http://copyright.gov/orphan/comments/OW0569-Thomas.pdf.

retarded dissemination of works of historically marginalized communities,[204] and undermined preservation of degrading older works.[205] The dissemination of new ideas has been undermined by copyright concerns.

Copyright out of balance also threatens the advancement of the arts. History teaches that borrowing and building upon prior works has been a common practice for centuries.[206] It is reflected in the works of classical artists like Handel and Beethoven and modern artists like Ray Charles and Public Enemy.[207] A similar culture of borrowing and building upon also exists in the literary world.[208] Authorship invariably borrows from existing material.[209] While cultural cross-fertilization has brought us new art, modern copyright threatens this practice. Legal scholars query whether, under modern copyright, "jazz, soul or rock and roll [would] be legal if they were reinvented today?"[210] They distressingly conclude: "We are not sure."[211]

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204. Steven Seidenberg, *Orphaned Treasures: A Trove of Historic Jazz Recordings Has Found a Home in Harlem, But You Can't Hear Them*, A.B.A. J., May 2011, at 47, 48 (noting that copyright concerns held up unreleased jazz recordings from the 1930s and 1940s); Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275, 288 (2011) ("[T]he orphan works problem disproportionately impacts access to cultural works by minorities, women, and other disadvantaged groups."); Letter from Tim Brooks to Jule L. Sigall, Initial Comment in Response to Notice of Inquiry on Orphan Works 2 (Mar. 23, 2005), *available at* http://www.copyright.gov/orphan/comments/OW0579-Brooks.pdf (noting reissue of early sound recordings by African-Americans, which was planned to accompany the release of the book, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890–1919*, "had to be aborted because of the time and cost involved in locating and dealing with rights holders," according to the book's author).

205. In a letter from the American Film Heritage Association to Senator Strom Thurmond, Chairman Larry Urbanski stated "that as much as 75% of motion pictures from the 1920s are no longer clearly owned by anyone, and film preservationists as such cannot obtain the necessary permissions to preserve them." Orphan Works, 70 Fed. Reg. 3739, 3740 n.3 (Jan. 26, 2005).

206. Julie E. Cohen, *Intellectual Property and Public Values: The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 374 (2005) ("[I]t will perhaps be helpful to remember that copyright is a system of legal regulation overlaid on processes of human learning and creativity that have existed for millennia.").

207. JAMES BOYLE & JENNIFER JENKINS, THEFT! A HISTORY OF MUSIC 52 (2017).

208. For example, Virgil borrowed a minor character from Homer's *Odyssey* in writing his epic poem *Aeneid*. The *Aeneid* is an epic poem that tells the legendary story of Aeneas, a Trojan who travelled to Italy, where he became an ancestor of the Romans. *See* Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 267 (2015) ("Virgil's 'Aeneid' was essentially a piece of 'Iliad' fan fiction, focusing on a secondary character from that story.").

209. Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983) ("The central problem is that all works are to some extent based on works that precede them."); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990) ("But the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.").

210. BOYLE & JENKINS, *supra* note 207.

211. *Id.*

Copyright policy is out of balance not only because of its breadth, but also because of its indiscriminate, automatic application to all original works of authorship. This indiscriminate application of copyright has created the "orphan works" problem.[212] Automatic protection coupled with elimination of formalities has created an explosion of works for whom ownership is unknown.[213] And unclear ownership holds up productive use of these creative works.[214] The transaction costs to identify and locate rightsholders is often prohibitive.[215] In fact, orphan works have been dubbed "hostage works" by some scholars.[216] By failing to claim her work, a copyright owner creates a work

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212. Former Register of Copyrights Marybeth Peters has described the orphan works problem as "pervasive." *See* Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives, 110th Congress, 2nd Session, (March 13, 2008) http://www.copyright.gov/docs/regstat031308.html.

> Scholars cannot use the important letters, images and manuscripts they search out in archives or private homes, other than in the limited manner permitted by fair use or the first sale doctrine. Publishers cannot recirculate works or publish obscure materials that have been all but lost to the world. Museums are stymied in their creation of exhibitions, books, websites and other educational programs, particularly when the project would include the use of multiple works. Archives cannot make rare footage available to wider audiences. Documentary filmmakers must exclude certain manuscripts, images, sound recordings and other important source material from their films. The Copyright Office finds such loss difficult to justify when the primary rationale behind the prohibition is to protect a copyright owner who is missing. If there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous waste. The outcome does not further the objectives of the copyright system.

Id.

213. After the passage of the 1976 Act—and the removal of all formalities with the enactment of the Berne Convention Implementation Act of 1988, Pub. L. 100-568 (1988)—federal copyright protection no longer depends on compliance with formalities, like affixing a copyright notice or registering the work. Copyright protection attaches at the moment of fixation in a tangible medium of expression.

214. *See, e.g.*, David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 3 (2013) ("Over the last decade, the problem of orphan works—i.e., copyrighted works whose owners cannot be located by a reasonably diligent search—has come sharply into focus as libraries, archives and other large repositories of copyrighted works have sought to digitize and make available their collections online."); Reid, *supra* note 45, at 432–34 (discussing the "orphan works" problem and the deadweight losses caused by the decision to forgo using copyrighted works in ways that would contribute to education, culture, and research).

215. David Fagundes, *Crystals in the Public Domain*, 50 B.C.L. REV. 139, 156 (2009) ("[I]n a culture where the stakes of infringement are enormous, potential users must spend enormous amounts of time and money trying to track down the owners of such works and make sure they have cleared the rights to them."); Reid, *supra* note 45, at 432 (discussing that "notice failure increases the transaction costs to license a work").

216. *See, e.g.*, Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1434 (2012).

that others are wary to use. This chilling effect creates undeniable deadweight loss.[217]

On the other hand, copyright policy in balance can further democratic self-governance.[218] Copyright can increase public discourse by lowering the costs of educating,[219] informing,[220] and keeping the public informed.[221] By design, our copyright system removes government licensing from the publishing business.[222] Rather than relying on royal patronage and crown monopolies like our British forebears, U.S. copyright policy relies on the free market to stimulate and reward the progress of science.[223] Copyright can foster a democratic culture by allowing broad participation in the diffusion of knowledge.[224]

Our First Amendment values require engaged participants.[225] Participants must be free to engage with their peers, their culture, and the important ideas of

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217. "When a copyright owner cannot be identified or is unlocatable, potential users abandon important, productive projects, many of which would be beneficial to our national heritage." Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives, 110th Congress, 2nd Session, (March 13, 2008) http://www.copyright.gov/docs/regstat031308.html.

218. Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283, 339 (1996) ("Copyright serves to support a system of self-reliant authorship, expressive diversity, and the dissemination of information that, given its vital importance for democratic governance, is and should be subsidized, at least to some extent, at the expense of nonexpressive production.").

219. Chander, *supra* note 127, at 690 (noting internet-based "firms improve the productivity of workers and disseminate knowledge across the world. Individuals increasingly learn through tutorials posted on YouTube.").

220. Balkin, *supra* note 21, at 11.

> [S]ocial media lower the costs of informing and organizing people quickly. Collective action requires trust—especially collective action that might be punished. I will not protest unless I know that other people will, too. Social media allow political entrepreneurs to convey the message that many people feel upset at the government, and this helps create the belief that if ordinary citizens act, others will, too.

Id.

221. *Id.*

> [S]ocial media allow individuals to report quickly and easily if government overreacts to protests or otherwise misbehaves. This provides additional sources of grievance and additional motivation. Protests of previous government actions—often at funerals and memorials—can become important drivers of continuing protest. Conversely, reports that the government has been unable to stop protests have a snowball effect; they bolster trust and courage and the belief that joining in is worth the effort and the risk.

Id.

222. *See* Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 316, 338 (2008).

223. *See, e.g.*, JOSEPH LOEWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 14 (2002); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 151 (1968).

224. Netanel, *supra* note 218, at 289.

225. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2368 (2000); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2505 (2003).

the day. Participants are both recipients and re-makers of copyrighted works.[226] It is a basic human instinct to observe others, compare, and imitate. Thus, participants need access to copyrighted works and the freedom to consume, rework, and communicate about those same works.[227]

Democratic participation is key to creating a democratic culture.[228] As Jack Balkin noted, "The idea of a democratic culture captures the inherent duality of freedom of speech: Although freedom of speech is deeply individual, it is at the same time deeply collective because it is deeply cultural."[229] A free democratic culture needs the freedom to culture-make.[230]

Culture-making, in turn, is the freedom to incorporate existing materials, memes, and resources.[231] Culture-making needs the freedom to replicate and derivate. Culture-making is appropriative[232] and iterative.[233] Culture-making results from the full range of uses and remixes of creative works.[234] Freedom of expression is key to the cycle of exchange that builds common themes and narratives, which form the basis of shared culture.[235] In our social interactions

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226. Cohen, *supra* note 206, at 348 ("[U]sers play two important roles within the copyright system: Users receive copyrighted works, and (some) users become authors.").

227. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C.L. REV. 397, 422 (2003) ("Some degree of freedom and autonomy when interacting with a copyright work is necessary to obtain full meaning from that work. The law must allow for freedom to communicate about that work, and even freedom to manipulate the work.").

228. Balkin, *supra* note 2, at 35 ("A democratic culture is the culture of a democratized society; a democratic culture is a participatory culture.").

229. *Id.* at 5.

230. *Id.* at 46–47.

> Freedom is participation. Freedom is distribution. Freedom is interaction. Freedom is the ability to influence and be influenced in turn. Freedom is the ability to change others and to be changed as well. Freedom is the ability to glom on and route around. Freedom is appropriation, transformation, promulgation, subversion, the creation of the new out of the old. Freedom is mixing, fusing, separating, conflating, and uniting. Freedom is the discovery of synergies, the reshuffling of associations and connections, the combination of influences and materials. Freedom is bricolage.

Id.

231. Cohen, *supra* note 206, at 372 ("The 'play of culture' describes degrees of freedom within this network; it is the process by which culture bends and folds unpredictably, bringing new groups, artifacts, and practices into unexpected juxtaposition.").

232. Balkin, *supra* note 2, at 4.

> Freedom of speech is appropriative because it draws on existing cultural resources; it builds on cultural materials that lay to hand. Dissenters draw on what they dislike in order to criticize it; artists borrow from previous examples and build on artistic conventions; even casual conversation draws on common topics and expressions.

Id.

233. *Id.* at 34 (free expression on the Internet "is part of an interactive cycle of social exchange, social participation, and self-formation").

234. Cohen, *supra* note 206, at 373 ("Consumption, communication, self-development, and creative play merge and blur into one another, and the play of culture is the result.").

235. Balkin, *supra* note 2, at 6.

we draw from the existing cultural milieu to adopt, criticize, and reference common experiences and information.

First Amendment expressive interests are central to culture-making.[236] Policymakers should not let copyright holders dictate how users consume and interact with cultural artifacts. The First Amendment and copyright lie at the intersection of "struggles over discursive power—the right to create, and control, cultural meanings."[237] Profit-motivated private actors cannot be ceded the responsibility of protecting the public's interest. The public's interests in self-expression, autonomy, and culture-making may not be consonant with copyright holder's interests in commodifying their creative works.

We must ensure a robust architecture that promotes the diffusion of innovation, the progress of science, and a healthy marketplace of ideas. Freedom of expression needs an infrastructure that supports it.[238] And modern speech theory must account for the new opportunities and risks that modern digital communication technologies enable.[239]

We are on the precipice of new opportunities and new risks to free expression with new technology.[240] Technology has enabled a sharing economy, where open collaboration and conversation are the new norm.[241] Sharing, mixing,

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> Freedom of speech is valuable because it protects important aspects of our ability to participate in the system of culture creation. Participation in culture is important because we are made of culture; the right to participate in culture is valuable because it lets us have a say in the forces that shape the world we live in and make us who we are.

Id.

236. Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace,* 14 CARDOZO ARTS & ENT. L.J. 215, 295 (1996) (arguing that copying and use of creative works enable processes of social meaning-making).

237. Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 70 (2000).

238. Balkin, *supra* note 9, at 432 ("A system of free speech depends not only on the mere absence of state censorship, but also on an infrastructure of free expression."); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 451 (2007) ("[P]rotecting free speech interests requires us not to be content with the mere existence of these [free speech] safeguards, but to think seriously about mechanisms for reducing the chilling effect of uncertainty.").

239. *See* Balkin, *supra* note 9, at 440; *see also* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1645 (1967); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986).

240. Balkin, *supra* note 2, at 3 ("The digital revolution offers unprecedented opportunities for creating a vibrant system of free expression. But it also presents new dangers for freedom of speech, dangers that will be realized unless we accommodate ourselves properly to the changes the digital age brings in its wake.").

241. *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 148 (2008).

appropriating, and creating a cultural pastiche is standard in digital media.[242] Yet incumbent forces threaten to create an oligopoly over popular culture.[243]

Modern digital media is fundamentally different from prior disruptive technologies.[244] As the Supreme Court recently noted, "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[245] Social media has proven it has the power to influence cultural and political movements.[246]

Digital media democratizes free expression: everyone with access can do it.[247] New digital technologies magnify the free expression interests at the heart of the

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242. Balkin, *supra* note 2, at 12.

> What I have called glomming on—the creative and opportunistic use of trademarks, cultural icons, and bits of media products to create, innovate, reedit, alter, and form pastiches and collage—is a standard technique of speech in the digital world. Glomming on is cultural bricolage using cultural materials that lay to hand.

Id.

243. Travis, *supra* note 5, at 680 ("Despite modern aspirations for a universal, publicly-funded dissemination of culture and enlightenment, the production of popular culture in modern societies generally remained an oligopolistic and oligarchical affair.").

244. Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1279 (2002) ("While the law has lagged behind technological developments in the past, the Internet seems to present challenges of an entirely different order."); Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN L. 487, 512 (2016); Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2039–40 (2006) (articulating a descriptive and normative theory on what makes the Internet special).

> When massive platforms combine the functions of conduits, content providers, and data brokers, analogies from old free expression cases quickly fall apart . . . . It is time to think beyond the old categories and to develop a new way of balancing dominant platforms' rights and responsibilities . . . . Platforms should also acknowledge their *de facto* role as public forums and quasi-judicial law interpreters, even if they resist taking on all the *de jure* responsibilities such roles imply for state actors.

Pasquale, supra note 245, at 512.

245. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

246. Balkin, *supra* note 21, at 8–11 (discussing infrastructure of free expression and the "Twitter Revolution" in Iran); Anupam Chander, *Jasmine Revolutions*, 97 CORNELL L. REV. 1505, 1520–21 (2012) (highlighting the role of the Internet in the Arab revolutions). *But see* Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 273 (2014).

> As the Occupy Wall Street protests caught fire, attracting support, enthusiasm, outrage, controversy, and intense media scrutiny, the #occupywallstreet hash-tag nonetheless failed to achieve the status of a Twitter Trend. The Twitter algorithm, with its emphasis on new news, discovery, disruption, and cross-cluster penetration was presumably unconcerned with the expressive implications that granting or withholding #occupywallstreet the special status of a trend entailed.

Id.

247. Balkin, *supra* note 2, at 9 ("[L]owering the costs of transmission, distribution, appropriation, and alteration of information democratizes speech.").

First Amendment.[248] The potential of a bi-directional, mass-participatory digital medium is hard to overstate. Today more of our lives are mediated online.[249] We inform and express ourselves online.[250] The pervasiveness of digital media is illustrated by the popularity of the internet meme that adds "Wi-Fi" and "Battery Life" to psychologist Abraham Maslow's classic hierarchy of needs.[251]

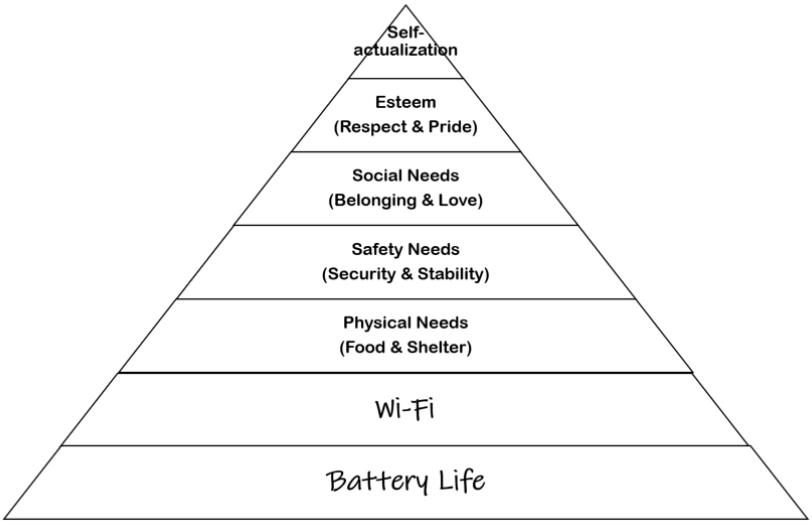

Figure 1. At the bottom of Maslow's classic hierarchy of needs "Wi-Fi" and "Battery Life" are added.

248. Balkin, *supra* note 9, at 436–37 ("What makes the Internet so vibrant and so special is precisely that many different people get to communicate—not just people who own or work for large, mass media organizations. That is also what makes the Internet so full of content and discussions on every possible topic.").

249. Tutt, *supra* note 246, at 257 ("As more of social, political, and economic life pours onto the Internet and onto these centralized platforms, it becomes more essential to join and participate in them. The Internet is not a complement to the ordinary incidents of democratic life so much as a substitute for them."). *See also id.* at 254 ("Life in all its particulars is increasingly integrated with the Internet and increasingly lensed through powerful platforms.").

250. Travis, *supra* note 5, at 728 ("Today, the public informs itself of the world by consulting blogs, mashups, e-books, and other forms of expression mediated by online free speech institutions.").

251. A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REV. 370, 375 (1943).

The internet has been touted as the ultimate free speech institution.[252] As one scholar observed, "[T]he Internet has effectively harnessed the world's interests, creativity, and intelligence to produce an enormous archive of, well, everything."[253] This explosion of accessible information in digital media has increased the value of curated information. The abundance of information can turn into noise on the internet. In classic information theory, noise is defined as an external input that distorts the quality of the signal between the sender and the received.[254] Curation is one answer to this noise problem.[255] But sites that allow users to upload, store, and share their files have faced lawsuits.[256] Pinterest, for example, is a popular curation site, but its copyright legality is unclear.[257] To achieve the full, democratizing potential of an interconnected, digital world we need a vibrant exchange of ideas and innovations.[258] And to achieve such a vibrant exchange we should minimize copyright policies that hamper these ends.

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252. Travis, *supra* note 5, at 679 ("As both the Supreme Court and the Federal Communications Commission have observed, the Internet is the ultimate free speech institution, one that enables uninhibited expression that grows exponentially.").

253. Balkin, *supra* note 9, at 437.

254. *See generally* C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYSTEM TECHNICAL J. 379, 379 (1948); CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION 63 (1949).

255. Balkin, *supra* note 2, at 7.

> Because so many people are producing content and sending it everywhere, audiences are pummeled with vast amounts of information which they must collate, sort, filter, and block. Hence, the digital revolution brings to the forefront the importance of organizing, sorting, filtering, and limiting access to information, as well as the cultural power of those who organize, sort, filter, and limit access.

Id.

256. *See, e.g.*, Viacom Int'l, Inc., v. YouTube, Inc., 676 F.3d 19, 28 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1026 (9th Cir. 2011) (Veoh), *opinion withdrawn and superseded*, Nos. 09-55902, 09-56777, 10-55732, 2013 WL 1092793 (9th Cir. Mar. 14, 2013); Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724, 729–30 (S.D.N.Y. 2012).

257. *Compare* Lee, *supra* note 83, at 1450 ("Pinterest is the most successful website (in terms of users) to provide a platform for people to "curate" content from the Internet. Despite its apparent social value to millions of people, Pinterest has a major problem: its legality under copyright law is unclear."), *with* Chander, *supra* note 127, at 694.

> The Japanese firm Rakuten led a $100 million investment into Pinterest, a website that allows an individual to copy any image across the web to post on one's own scrapbook page. Were it not for safe harbors in the law, Rakuten would likely have been loath to invest in a company whose business model relied on its users' engaging in rampant copyright infringement. Even more important, without such safe harbors, people everywhere would have been denied a simple way to express themselves and to share what they love with the world.

Chander, *supra* note 127, at 694.

258. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 428–29 (2006).

Our information policies affect our democratic, free speech values; we need policies that encourage innovation and discourage incumbent forces from blocking new ideas, new products, and new applications.[259] Access to building blocks of learning and culture are threatened by commodification of information.[260] We need a full-throated support of new opportunities for creation and expression. Yet current copyright liability threatens valuable speech[261] and chills the flow of capital and energies toward new technologies.[262] The threats to speech and innovation illustrate how copyright policy is out of balance; the next part of this Article, therefore, discusses several sensible solutions.

IV. RECALIBRATING COPYRIGHT POLICY

Capacious copyright, ease of infringement, and the risk of supra-compensatory statutory damages are a recipe to chill innovation and free speech. Copyright today risks harming the progress of science. We need a release valve for the hydraulic pressure from expanding copyright. I thus lay out below three sensible, and interrelated, proposals for reform. First, Congress should eliminate statutory damages for innocent infringers and good faith fair users.[263] Second, courts should reinvigorate the bright-line *Sony* rule for dual-use technologies. And third, I propose a two-stage adjustment to protect First Amendment interests: (1) I propose robust fair use protection for uses that do not undermine the incentive to create, and (2) for socially valuable uses that do risk undermining the incentive to create, I propose shifting to a liability rule approach, rather than a property rule approach. These proposals protect important expression and innovation interests by decreasing the chill of uncertainty.

A. Recalibrating Statutory Damages

Today copyright operates as a strict liability tort without proof of intent to infringe and affords statutory damages without proof of actual damages. The availability of statutory damages against innocent infringers and good faith fair users, without evidence of actual damage, is a recipe to chill. Courts have noted that statutory damages are intended to "provide reparation for injury" as well as

259. Balkin, *supra* note 9, at 442.

260. Patterson, *supra* note 45, at 266 (arguing that "access to learning[is] endangered by the efforts of copyright owners to make a commodity of all the knowledge in the land for the purpose of obtaining private fortunes").

261. *See, e.g.*, Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA 233, 233 (2003); McKeown, *supra* note 109, at 2; L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33, 34 (2002); Tehranian, *supra* note 17, at 247.

262. Lee, *supra* note 83, at 1447.

263. *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, 719 F.3d 67, 70 (1st Cir. 2013).

"to discourage wrongful conduct."[264] An award of damages presumes that compensation (or punishment) is warranted. Yet this is far from a foregone conclusion with innocent infringers and good faith fair users.[265] Without evidence of actual damages, the need for compensation becomes hazy. And without compensatory damages, the justification for punitive damages becomes shaky.[266]

Aligning copyright's statutory damages with copyright's policy objectives is critical.[267] From a consequentialist perspective, hefty statutory damages coupled with the ease of inadvertent infringement undermine the utilitarian aims of copyright.[268] To minimize the risk of liability, downstream creators will steer clear of using others' works, and thereby create fewer works from which the public can draw.[269] From a deontological perspective, copyright's current policy overwhelmingly favors copyright holders' rights over users' rights.[270] It favors extant works at the expense of future works. It favors current creators over future creators.

Today, the law provides only thin protection for innocent infringers and certain good faith fair users. I propose to expand these protections. Currently, statutory damages are available against innocent infringer in "a sum of not less than $200," at the court's "discretion."[271] For innocent infringers, the court in

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264. *See, e.g.*, *id.* at 71 (quoting F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952)).

265. *Cf.* Reid, *supra* note 147, at 27 ("The ease of casual infringement means that not all acts of infringement are equally reprehensible.").

266. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 434 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–76 (1996).

267. Orit Fischman Afori, *Flexible Remedies As A Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 3–4 (2011) ("Remedies, in other words, need to be taken seriously. They should not be viewed simply as a legal by-product of the legal system's determination that an infringement has taken place, but rather as a complimentary means for implementing policy.").

268. *See* Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 767, 799 (2011) ("Imposing strict liability on innocent downloaders may also negatively impact market competition for online distribution of works.").

269. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 209 (1996) ("[T]he fair-use criteria are so ambulatory that no one can give a general answer."); R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS. 133, 183 (2007) ("Because copyright law seeks to encourage such noninfringing copying, the possibility of holding innocent infringers liable should be worrisome if it deters potential users from using copyrighted material in ways that might ultimately be found noninfringing."); Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 963–64 (2014) ("Users (even those with legal counsel) often find themselves unable to predict with confidence whether a use would be deemed fair . . . . [and] risk aversion will lead some to abandon projects rather than come close to the boundary line between fair use and infringement.").

270. *Cf.* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 171–203 (1995) (discussing a lack of intent necessary to probe strict liability, which, when applied in copyright law, would find more infringers liable, therefore discouraging people from committing infringement).

271. 17 U.S.C. § 504(c)(2) (2012).

"its discretion may reduce the award of statutory damages," but it may not completely eliminate statutory damages.[272] Statutory damages may be reduced from $750 to $200 per work if the court finds the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."[273] However, an innocent infringement defense is unavailable if a copyright notice appears on a hard copy of the work.[274] In other words, the innocent infringer defense is rarely invoked because it is unavailable if a copyright notice is affixed to the work.[275] I propose that statutory damages should be eliminated altogether against one whom the court determines "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."[276] Rather than simply reducing the statutory damage award, the court should be empowered to, in its discretion, deny statutory damages altogether for an innocent infringer. Moreover, the presence of a copyright notice on a work should not be an absolute barrier to mounting a successful innocent infringer defense.

I also propose expanding protections for good faith fair users. The current good faith fair user defense is rarely, if ever, invoked because of its unduly narrow scope.[277] Statutory damages are remitted against an infringer who "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use," *and* the infringer was working on behalf of a nonprofit educational institution, library, or archives, *and* the infringement was of the exclusive right to reproduce the work—as opposed to the other exclusive

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272. *Id.*

273. *Id.* § 504(c)(1)–(2).

274. *Id.* § 504(c)(2). *See id.* § 401 (as provided in section 401, however, when a copy or phonorecord bears a properly affixed notice, "no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages"); *see also* BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005) (denying "innocent infringer" reduction of statutory damages because copyright owner had placed copyright notices on its published versions of recordings and downloader had access to such versions).

275. Samuelson & Wheatland, *supra* note 98, at 474–75 n.175 (finding only two cases applying the "innocent infringer" minimum) (citing D.C. Comics, Inc. v. Mini Gift Shop, 912 F.2d 29, 35–36 (2d Cir. 1990); Warner Bros., Inc. v. Dae Rim Trading, Inc., 677 F. Supp. 740, 769–70 (S.D.N.Y. 1988), *aff'd in part* Warner Bros., Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1122 (2d Cir. 1989)).

276. 17 U.S.C. § 504(c)(2). The Department of Commerce also recommended increased protections for innocent infringement. *See* Dep't of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, And Innovation In The Digital Economy* 97 (Jan. 28, 2016), http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf.

> We therefore recommend amending the notice provisions in the Copyright Act so that the innocent infringement defense remains available in cases where there is a copyright notice . . . . [And] if a defendant mistakenly believed that he was engaging in a fair use, the notice would not undermine that defense.

Id.

277. Samuelson & Wheatland, *supra* note 98, at 474–75.

rights in copyrighted works.[278] This defense is remarkably cramped. The good faith fair user defense applies only to certain nonprofit and educational institutions.[279] It also applies only to the reproduction right and not any of the other exclusive rights of a copyright holder, like the right to prepare derivative works or the right to distribute copies of the work.[280] This slender defense is of marginal utility in the digital age because it does not apply to many online uses, which often implicate other exclusive rights.[281] For good faith fair users, I propose that statutory damages should be unavailable against any infringer who the court finds "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107."[282] Period. The additional limitations on this defense should be removed.

Innocent infringers and good faith fair users may have a lot in common, but I recommend keeping two separate shields to statutory damages. Innocent infringers may have a basis beyond fair use for being unaware that his or her acts constituted an infringement.[283] And a broad defense to statutory damages for good faith fair users elevates fair use into prominence. Even if a fair use defense is ultimately unsuccessful, a good faith fair user should be shielded from statutory damages. Protecting a good faith fair user gives breathing space and prevents a copyright holder from occupying copyright's gray areas. To prevent rights accretion, good faith fair users should be insulated from statutory damages. Fairly debatable fair users do not warrant the deterrence and punitive treatment of statutory damages. Courts and commentators have bemoaned the lack of *ex ante* guidance on what qualifies as fair use.[284] Because of the

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278. 17 U.S.C. § 504(c)(2).

> The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Id.

279. *Id.*

280. *See id.*

281. Dep't of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, And Innovation In The Digital Economy* 84 (Jan. 28, 2016), http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf.

282. 17 U.S.C. § 504(c)(2).

283. For example, under the 1909 Act, an innocent infringer was someone misled by the lack of a copyright notice into believing the work was unprotected and dedicated to the public domain. *See* Act of Mar. 4, 1909, ch. 320, § 20, 35 Stat. 1075, 1080 ("an innocent infringer who has been misled by the omission of the notice").

284. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) (noting the fair use

flexibility and unpredictability of fair use, plausible fair users should not be penalized.

The expanded thrust of copyright's scope should be parried by greater protections for innocent infringers and good faith fair users. While I propose that statutory damages should be remitted against these users, the availability of actual damages should remain intact. Unlike most other statutory damage regimes, copyright's statutory damages are a remedy for a private wrong, rather than a remedy for a public wrong.[285] Actual damages are the common remedy for a private wrong.[286] Statutory damages were intended to foster new technology by discouraging direct infringers.[287] The original purpose of statutory damages was to provide an assured minimum recovery for a copyright holder, even if actual damages were elusive.[288] But copyright damages are not uniquely difficult to determine.[289] The initial rationale for statutory damages is no longer applicable.[290] Statutory damages no longer seek to assure a minimum recovery, but rather they now serve as a bounty for those who register a

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defense is little more than "the right to hire a lawyer"); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008) (colorfully describing the fair use defense's uncertainty as "billowing white goo").

285. Samuelson & Wheatland, *supra* note 98, at 495 ("Copyright statutory damages aim, moreover, to rectify a private wrong by compensating copyright owners for economic harms done from infringement and not to remedy the sorts of public wrongs at which most statutory damage rules are aimed.").

286. *See* H. Comm. on the Judiciary, 87th Cong., 1st Sess., Report of the Registrar of Copyrights on the General Revision of the U.S. Copyright Law 101 (Comm. Print 1961) (noting that "[l]iability of a wrongdoer for the actual damages suffered by the injured person is a traditional remedy for civil wrongs generally").

287. Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 303 (2009).

> Unfortunately, advocates of the increase in statutory damages failed to see that it might have the opposite of its intended effect: high statutory damages can actually deter innovation, because these damages are awarded not only against direct infringers, but also against technology companies held liable for secondary copyright infringement for uses made of their innovative technologies.

Id.

288. *Id.* at 274 ("The original purpose of statutory damages was to provide a minimum award to copyright owners because of the difficulty of measuring actual damages.").

289. Samuelson & Wheatland, *supra* note 98, at 497 ("Damages in copyright are no harder to compute than 'injury to reputation in a defamation case, pain and suffering in a personal injury case, or emotional distress in an insurance bad faith case, yet punitive damages in those situations all require [due process] excessiveness review.'") (brackets in original).

290. *Id.* at 496.

copyright.[291] Individual authors are less likely to benefit from the statutory damages regime than commercial copyright holders.[292]

At a time when copyright was cabined largely to professional spheres, infringement deterrence made sense. But now that copyright has expanded in scope and duration and digital media has enabled revolutionary communication outlets that are embedded in our daily lives, hefty deterrence no longer makes sense as a default proposition. It should be reserved for willful infringers and commercial pirates. Today, statutory damages indeed serve as a deterrent—deterring entrepreneurs away from innovation and downstream creators from creative expression.[293] Statutory damages for copyright liability risks deterring socially valuable innovation, which can harm consumers, the national economy, and copyright holders themselves by cutting off new markets and opportunities.[294] This proposed recalibration of copyright damages for innocent infringers and good faith fair users furthers the goals of copyright by promoting the progress of learning and protects important free speech interests.

B. Recalibrating Secondary Liability

My second proposal is to reinvigorate the bright-line protection for dual use innovations. Dual, or mixed, use technologies are those capable of both infringing and non-infringing uses, like photocopiers, video recording devices, and file-sharing networks.[295] Copyright holders often perceive these dual use technologies as a threat to their economic interests.[296]

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291. Berg, *supra* note 287, at 302 ("Statutory damages were no longer about ensuring adequate compensation to copyright owners when actual damages and profits were difficult to prove but rather about providing extra damages to certain copyright owners.").

292. 17 U.S.C. § 412 (2012) (requiring registration within three months of publication to qualify for awards of statutory damages and attorney fees). *See also* Samuelson & Wheatland, *supra* note 98, at 454.

293. *Id.* at 309.

294. *Id.* at 272–73.

295. MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL AND ANTITRUST LAW 106 (2010) ("Many of the innovations that consumers have enjoyed throughout the past century fall into [the dual-use] category: the telephone, camera, jukebox, radio, television, photocopier, VCR, computer, Internet, iPod, and P2P file-sharing software.").

296. *See, e.g.*, Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3–4 (2010) ("Copyright law's confrontation with evolving technology has been a near-constant theme since Congress enacted its first copyright law in 1790."); Picker, *supra* note 139, at 42.

> A new distribution entrant wants access to the full body of copyrighted works and the new technology will frequently make possible activities that incumbents will see as infringing. That was certainly how sheet music publishers saw piano rolls, how record companies saw radio, and how television broadcasters saw cable TV.

Picker, *supra* note 139, at 42. *See also* Ginsburg, *supra* note 48, at 66. *But see* DiCola & Sag, *supra* note 7, at 179 ("The emergence of a new technology does not necessarily create conflicts. No significant upheaval arises in those rare instances when content owners are also the inventors of a new copyright technology [like DVD encryption technology].").

In a landmark case, Universal City Studios sued Sony Corporation for contributory copyright infringement for selling a video recording technology that had the potential to facilitate unauthorized copying of copyrighted works.[297] The Supreme Court ruled that time-shifting copyrighted television programs to watch at a later time was a fair use.[298] Sony was thus not liable for contributory infringement because the technology had a "substantial non-infringing use."[299] The Court's language offered a clear-bright line for new technologies: if a product was capable of substantial non-infringing uses, then the producer would not be liable for copyright infringement.[300] The *Sony* rule sought to balance copyright owners' rights to their works with "the rights of others freely to engage in substantially unrelated areas of commerce."[301] This balance was achieved by withholding copyright holders' control over nascent technology.[302] A dual use technology is shielded from contributory liability if it is capable of substantial non-infringing uses. The *Sony* rule has been described as a "permissive, protechnology test."[303]

Over the years, however, subsequent cases have eroded the clarity of the *Sony* safe harbor.[304] In *Grokster*, the Supreme Court held that where there is evidence of inducement to infringe, the *Sony* safe harbor does not apply: "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

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297. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984).

298. *Id.* at 456.

299. *Id.*

300. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1356 (2004) ("[T]he Sony decision was intended to provide assurance that the technology developer will not be held liable for those infringements that consumers commit using the new technology.").

301. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

302. Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 401 (2003) ("The driving concern in *Sony* was a fear that indirect liability would have given copyright holders control over what was then a new and still-developing technology. This the Court was unwilling to do.").

303. Oliar, *supra* note 43, at 1019.

304. Lemley & Reese, *supra* note 300, at 1356 ("In the context of p2p networks, however, lower court decisions have cut back the protection that the *Sony* doctrine offers developers of dual-use technologies, though the courts' opinions leave some uncertainty about how far the cutback goes."). For example, in the *Napster* case, the Ninth Circuit interpreted the *Sony* rule narrowly. A defendant could be secondarily liable if a copyright owner could establish that the defendant knew of the users' infringements, and materially contributed to them. Napster, according to the court, had "*actual* knowledge that *specific* infringing material [was] available using its system," and could have blocked infringers' access, but failed to do so. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001), *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002), and *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002) (emphasis in original). In other words, the court held that the *Sony* rule is merely a presumption against imputing knowledge simply based on the manufacture of a dual use device; it is not a complete defense.

infringement, is liable for the resulting acts of infringement by third parties."[305] But it is unclear what happens if a non-inducing company's technology is used primarily to infringe; the Justices split evenly on the answer. Justice Breyer authored a three-Justice concurrence suggesting such a company would not face secondary liability.[306] But Justice Ginsburg authored a three-Justice concurrence suggesting a company would.[307]

In a post-*Grokster* world, innovators must not only show that their technology is capable of substantial non-infringing uses, but also that none of the touted uses are infringing.[308] But if an innovator touts a use, believing it to be a fair use, and turns out to be wrong, then she could be liable for secondary infringement.[309] Scholars bemoan the uncertainty of the erstwhile certain rule.[310]

I urge that courts and policymakers should err on the side of embracing, rather than curtailing, technology that is capable of substantial non-infringing use. The examination of whether an innovation is capable of substantial non-infringing uses should consider not just the current uses, but also the potential future

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305. MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005).

306. *Grokster*, 545 U.S. at 952 (Breyer, J., concurring).

> [A] strong demonstrated need for modifying *Sony* (or for interpreting *Sony's* standard more strictly) has not yet been shown. That fact, along with the added risks that modification (or strict interpretation) would impose upon technological innovation, leads me to the conclusion that we should maintain *Sony*, reading its standard as I have read it.

Id. at 965–66 (Breyer, J., concurring).

307. *Grokster*, 545 U.S. at 942–49 (Ginsburg, J., concurring).

> [T]here was evidence that Grokster's and StreamCast's products were, and had been for some time, overwhelmingly used to infringe, and that this infringement was the overwhelming source of revenue from the products. Fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time.

Id. at 948 (internal citations omitted).

308. Lohmann, *supra* note 161, at 863 ("[I]nnovators must not only prove the existence of a substantial non-infringing use for their technology, but now must also prove that none of the uses that they actively encourage, through advertising for example, are infringing.").

309. *Id.*

> In many private copying contexts, however, disruptive innovators will proudly and actively advertise uses that they believe to be fair. Should subsequent litigation prove these beliefs to have been mistaken, innovators could face ruinous liability as inducers. The prospect of massive statutory damages for miscalculation of the outcome of a fair use determination could chill a wide range of innovations that enable private copying.

Id.

310. Blevins, *supra* note 150, at 1850.

> The original decision contemplated a bright-line rule that defeated all secondary liability claims. In some circuits, however, *Sony* arguably applies only to contributory liability, and not to vicarious and inducement liability claims. For these reasons, the *Sony* defense provides little remedy against extended discovery. Thus, even if *Sony* helps platforms ultimately win, its uncertainty ensures that the win will come at a high cost.

Id.; Oliar, *supra* note 43, at 961 ("Doctrinally, the contours of Sony's safe harbor remain vague.").

uses.[311] The possibility of future non-infringing uses should not be ignored.[312] Dual use technologies should be given the breathing space the *Sony* rule intended. Otherwise courts risk improperly depriving products and services from the marketplace.[313] New markets often take time to develop; quashing innovation prematurely prevents complementary uses from developing.[314]

Dual use technology should fall outside the scope of a copyright holder's right to exclude unless and until there is ample evidence of harm to the copyright holder.[315] If a court gets it wrong and allows a new technology that truly endangers a rightsholder, Congress can overrule the court and amend the law. In other words, if the courts improperly err on the side of new technologies, Congress is well-equipped to fix that.[316] Congress has the institutional competence to balance the stakeholders' competing interests.[317] But, on the other hand, if a court erroneously cuts off a new technology, Congress is not positioned to remedy that.

The lack of doctrinal certainty for dual use technology favors incumbent copyright holders.[318] This uncertainty functionally expands the scope of copyright. An easy prima facie case of infringement coupled with hefty statutory damages nudge the gray areas of copyright toward the rightsholder. The costs of being wrong about the gray areas are ruinous. Rational actors steer

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311. *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 953–54 (2005) (Breyer, J., concurring) ("Importantly, *Sony* also used the word 'capable,' asking whether the product is '*capable of*' substantial noninfringing uses . . . . And its language also indicates the appropriateness of looking to potential future uses of the product to determine its 'capability.'") (emphasis in original).

312. *See id.* at 955 ("There may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in *Sony*) developed for the VCR.").

313. *See, e.g.*, Brief of the National Venture Capital Ass'n as Amicus Curiae in Support of Respondents at 4, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 497759 ("Because markets take time to develop, and because the future uses to which a product may one day be put (both legitimate and illegitimate) are not necessarily evident in its early phases, *Sony* allows an innovation to incubate without fear that third-party infringement (present or future) will invite litigation.").

314. Lohmann, *supra* note 161, at 854–55. *See also id.* at 840 (describing the "the happy lesson of the complementary relationship that can arise between private copying technology and copyrighted works").

315. Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 1023 (2002).

316. *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430–31 (1984) ("Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.").

317. Lohmann, *supra* note 161, at 856 ("Congress, while perhaps not an ideal democratic decision-maker in all copyright contexts, is better positioned to undertake the relevant sort of fact-finding and has far more discretion in fashioning a nuanced approach.").

318. Blevins, *supra* note 150, at 1824–25.

clear of the gray areas, which functionally expands the zone of copyright.[319] A bright-line rule for dual use technologies would mitigate the chilling effect of uncertainty.[320]

Deference toward dual use technology is an appropriate recalibration because the copyright holder is not being denied an expected return. Disruptive innovations, almost by definition, are not anticipated by the marketplace. It is unlikely an author anticipated capitalizing on disruptive technology; therefore, it is not a foreseeable incentive, but rather simply a windfall.[321] There has been enough uncertainty about the applicability of copyright to new technology, from piano rolls to cable retransmissions, that exploiting new technology cannot plausibly be a meaningful incentive for an author. And to the extent disruptive technology upends the balance of power and replaces an incumbent technology, it is merely the result of the creative destruction cycle. Copyright was never intended to hamper the engine of progress.

Exploiting dual use technology is certainly a *reward* to a copyright holder, but it should not be considered a meaningful *incentive*. If new uses for a copyrighted work are not part of the incentive to create, then failure to benefit from these new uses does not undermine the goal of copyright. Copyright is about calibrating incentives for initial creators, secondary users, and downstream creators. Interference with secondary users and downstream creators is inappropriate if the initial creator's incentives are unaffected.

Rightsholders' *expectations* are not an appropriate benchmark for establishing proper incentives. Expanded copyrights have expanded the rightsholders' expectations. There is a feedback loop on incentives: the more control a rightsholder has over her work, the more she expects to control and demand rents.[322] To have a meaningful assessment of appropriate incentives we need a

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319. Brief of Intel Corp. as Amicus Curiae Supporting Affirmance at 7, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 U.S. S.Ct. Briefs LEXIS 257.

> Faced with impossible predictions about how as yet undeveloped technologies might be used, ambiguous [legal] tests that would be unpredictable in their application, and nearly limitless statutory damages for guessing wrong about the unknowable, innovators, such as Intel, would grow timid. It would be irrational to bring new products to market in the face of massive uncertainty; innovators, such as Intel, would have no choice but to withhold from the market socially and economically useful products.

Id.

320. Blevins, *supra* note 150, at 1825 ("Given the spillovers associated with Internet platforms, adopting bright-line rules that narrow and clarify secondary liability is a justifiable subsidy that outweighs the associated costs of infringement.").

321. *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1590 (2009) ("[C]opyright windfalls allow creators to engage in monopolistic pricing in new markets that are unlikely to have formed a crucial part of their incentives in creating the work.").

322. Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 435 (2007).

> Over time, the increase of rights under copyright law creates expectations among creators, including expectations of increasingly broad rights in the future. Creators form

baseline.[323] But it cannot be predicated on the subjective expectations of rightsholders.[324] A copyright holder's needs are limited, but her wants are unlimited.[325] Allowing rightsholders to articulate appropriate incentives leads to the one-way ratchet of ever expanding copyrights.[326]

The copyright bargain's quid pro quo can help inform the normative vision of what a copyright holder should expect.[327] Policymakers should balance control over works with the collateral costs to innovation and free speech, rather than simply allowing rightsholders to demand incentives. Only foreseeable exploitation of a copyrighted work should be within a copyright holder's zone of control.[328] Unincentivized rewards should redound to the benefit of the public, not the copyright holder.

Exploiting dual use technology should be left to the free market. Free market forces should be allowed to determine the highest and best use of new innovations. The capitalist forces of creative destruction should be allowed to uncover socially optimal uses. The entertainment industry, for example, has a well-documented history of leveraging copyright to try to squelch new

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> incentives based on those expectations. When rights under copyright law fail to satisfy expectations, creators ask lawmakers to provide them with broader rights in the name of 'incentive.' When lawmakers comply, the result creates higher expectations among creators, and so on.

Id.

323. *Id.* at 438–39 ("[L]awmakers must decide which behaviors to encourage and which ones to discourage. Making this decision requires lawmakers to ask not what rights people actually expect from copyright law, but what rights they should be entitled to expect."). *See also* Balganesh, *supra* note 321, at 1571 (proposing "a test of 'foreseeable copying' to limit copyright's grant of exclusivity to situations where a copier's use was reasonably foreseeable at the time of creation—the point when the incentive is meant to operate").

324. Stadler, *supra* note 322, at 435 ("In defining the rights of creators by asking about their incentives to create, copyright law is creating and satisfying increasing expectations in a cycle that leads inexorably to the creation of more rights.").

325. *See* Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundation of Copyright Law*, 42 SAN DIEGO L. REV. 1, 19 (2005) ("Individuals with a modicum of self-interest will claim all that the law allows them to achieve through unilateral action.").

326. *See, e.g.*, Litman, *supra* note 46, at 344 ("Recently, copyright legislation has seemed to be a one-way ratchet, increasing the subject matter, scope, and duration of copyright with every amendment."); Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* 6 NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed., 2007) (critiquing copyright's expansion and arguing that content industries have successfully lobbied Congress for copyright protection not necessarily in the public's interest).

327. Stadler, *supra* note 322, at 474.

328. Balganesh, *supra* note 321, at 1574–75.

> In determining liability for infringement, applying a test of foreseeability would require a court to ask whether the use complained of is one that the copyright owner (that is, the plaintiff) could have reasonably foreseen at the time that the work was created (that is, the point when the entitlement commences).

Id.

technologies, from phonographs to MP3 players.[329] Allowing incumbents to foreclose competition in the U.S. risks shifting the epicenter of technology and entertainment industries to foreign countries.[330] Copyright's purpose is to promote progress. Without the breathing space for free expression and innovation, entrenched copyright holders have been given the keys to keep out competition—to the detriment of the public interest.

C. Recalibrating Fair Use

As copyright's scope has widened and deepened, fair use should concomitantly widen and deepen to preserve the public interest. Fair use should be sensitive to technology and uses that foster self-governance, self-expression, and culture-making. To protect core First Amendment interests, I propose more robust fair use protection for uses that do not undermine the incentives to create. And for socially valuable uses that do risk undermining the incentives to create, I propose shifting to a liability rule approach, rather than a property rule approach.[331]

Copyright has expanded in length and breadth, and I urge that fair use must step up and parry in order to maintain the copyright balance. To do that, fair use must return to copyright's core principles. The cognizable harm under the fourth factor of the fair use analysis—"undoubtedly the single most important element of fair use"[332]—should be harm to the incentive to create. I argue that if a use does not undermine reasonable and foreseeable creative incentives, then the fourth factor should not tilt in favor of the copyright holder. As such, the law should protect against copyright harms.[333] Copyright harms should focus on harms to incentivizing creation, not harms to maximizing profits.[334] Much like

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329. *See, e.g.*, Brief of the National Venture Capital Ass'n as Amicus Curiae in Support of Respondents at 3, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 497759.

> For more than a century, when it first claimed that the player piano spelled the death of American music, the [entertainment] industry has attacked in turn each new development that facilitates copying and distribution, from phonographs to mimeographs, from audiotape players to VCRs, from compact disks to mp3 players. As each new technology has developed, the industry has sought to destroy or control it.

Id.

330. And free expression, much like innovation, may go abroad to find more protection. Travis, *supra* note 5, at 723 ("Free trade, in this way, may protect free speech institutions from censorship, even if the First Amendment and antitrust principles fail.").

331. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

332. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574 (1994) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

333. *Cf.* Tushnet, *supra* note 106, at 405 ("If not all harm caused by unauthorized uses of copyrighted works is *copyright* harm, then copyright must have a distinguishing function.") (emphasis in original).

334. *Id.* at 404–05 ("Copyright's goal is not simply to maximize utility. That would be a tall order for any law. Instead, copyright tries to maximize something else, but what exactly that is—

how antitrust cases turn on whether a challenged practice is likely to decrease competition,[335] copyright cases should inquire whether the challenged use is likely to decrease incentives to create.[336]

The fair use analysis should not default in favor of licensing. Just because a user could have licensed a use, it should not resolve whether a user must have licensed the use. Rather than ask if the use could have been licensed,[337] the inquiry should be whether the use would kill an incentive to create. As the Eleventh Circuit has concluded, "the ability to license does not demand a finding against fair use."[338]

Fair use should shield users who do not create copyright harms. Modern fair use analysis focuses heavily on the first factor of the fair use and inquires if the defendant's use is transformative. Narrowing the fair use analysis to transformative uses overlooks other important uses.[339] Transformative uses, as well as verbatim copying, are necessary for cultural progress.[340] Verbatim copying can be an exercise of free speech,[341] and it is an important means of informing citizens.[342] A fair use inquiry that demands transformative creations sets the bar too high and risks omitting other socially valuable uses of copyrighted works.[343]

Fair use should more broadly protect speech interests.[344] Culture-making needs the freedom to interact, rework, and communicate about copyrighted

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authorship, expression, or economically incentivized expression—remains less than perfectly defined.").

335. *See* Christina Bohannan & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C.L. REV. 905, 983 (2010) ("a private antitrust plaintiff to show not just any injury, but *antitrust* injury—that is, injury that results from decreased competition").

336. *Accord* Christina Bohannan, *Copyright Harm and Reform*, 96 IOWA L. REV. BULL. 13, 21 (2010) ("Just as courts in antitrust cases ask directly whether a challenged practice harms competition, courts in copyright cases should ask directly whether a challenged use of a copyrighted work harms the copyright holder's incentives.").

337. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929–30 (2d Cir. 1994).

338. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1276 (11th Cir. 2014).

339. Tushnet, *supra* note 46, at 586 ("The effect of bringing the First Amendment to copyright through the mechanism of transformative fair use is that the property rights of the copyright owner are limited only to make way for a second individual rightsholder, the second-coming creator.").

340. Cohen, *supra* note 206, at 373 ("Scholars and judges confidently speak of inducing creativity and discouraging slavish imitation, as if the two could be neatly separated. But if these practices are understood not only as related but as together comprising the very stuff of 'progress,' it becomes harder to envision the former without the latter.").

341. Tushnet, *supra* note 46, at 537.

342. *Id.* at 565 ("Copying promotes democracy by literally putting information in citizens' hands.").

343. *Id.* at 559 ("If rewriting, redrawing, or reshooting is the ticket to fair use, most people won't be able to afford to ride.").

344. *Id.* at 587 ("A better approach would be to understand fair use as part of an overall system designed to generate speech, which requires varied tactics.").

works.[345] Individuals have an expressive interest in the works they consume.[346] There is a growing trend to recognize some form of users' rights.[347] Within the literature there has been an erosion of the narrow, author-centric view of copyright.[348] A more robust appreciation of a user's role in copyright would, in turn, offer more robust fair use protection to expressive uses of copyrighted works.[349] Recalibrating fair use to focus on copyright harms would give more breathing space to noncommercial and personal uses of copyrighted works.[350] Nevertheless, some expressive uses of copyrighted works may threaten the incentive to create.[351]

Rather than an all-or-nothing approach to fair use, I propose that a liability rule could add gradation between fair uses and unfair uses when First Amendment interests are implicated. If an expressive use threatens the incentive to create, then it is more appropriate to license rather than exclude the use.[352] In a liability rule system a newcomer has to pay a reasonable license fee, whereas in a property rule system an incumbent can lockout competition.[353]

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345. Liu, *supra* note 227, at 422 ("Some degree of freedom and autonomy when interacting with a copyright work is necessary to obtain full meaning from that work. The law must allow for freedom to communicate about that work, and even freedom to manipulate the work.").

346. *See, e.g.*, Cohen, *supra* note 206, at 370–71; Jessica Litman, *Cultural Environmentalism @ 10: Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 178–79 (2007); Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 497–98, 500, 501 (2010).

347. *See, e.g.*, ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 8 (2015) (characterizing authorship as an act of communication and positing a users' rights theory of copyright); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 15, 193, 194 (1991); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1462 (2008) (arguing "users can and do, in fact, heavily influence what may become a relatively accepted informal copyright practice"); Rothman, *supra* note 346, at 463 ("using the lens of substantive due process and liberty to evaluate users' rights").

348. *See, e.g.*, Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2921 (2006); Cohen, *supra* note 206, at 369; Liu, *supra* note 227, at 398.

349. *See* Cohen, *supra* note 206, at 364 ("A fair use doctrine more attentive to the ways in which context shapes creative practice would be more inclined to approve them.").

350. *Id.* at 352 ("The private copying cases have become the copyright system's dirty little secret, a site at which questions of due process are overlooked and the more difficult questions of liability and privacy evaded.").

351. Tushnet, *supra* note 46, at 537 ("[C]opying may sometimes be an instance of free speech even when it is also copyright infringement.").

352. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2568 (2009).

> Even if a free speech/expression use is ultimately deemed infringing, perhaps the defendants should only have to pay actual damages (e.g., a reasonable license fee), rather than being subject to a large award of statutory damages. This option would be more consistent with First Amendment-tailored rules in other bodies of law that regulate speech.

Id.

353. *See* Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 786–87 (2007) (discussing the different costs and methods of enforcement associated with each rule).

Compensation, rather than a right to exclude, could balance the competing interests in copyright policy and foster the public interest.[354]

I caution that we not convert to a "fared use" model or a pay-per-use model for all unauthorized uses.[355] We should not eliminate all free fair use. If we resort to a pay-to-play model, copyright expands.[356] There is a risk that all uses would demand compensation.[357] But those who cannot afford to license still deserve the right to expression.[358] Only for those uses that undermine incentives to create does the copyright holder deserve compensation.

A copyright holder should be limited to a reasonable license, rather than the right to exclude, when others want to make socially valuable uses of a work. I acknowledge the conventional wisdom that, all things being equal, a property rule approach is preferable.[359] However, in copyright, all things are not equal. Authors' speech is favored over users' speech.[360] Dominant, incumbent technology is favored over new, disruptive technology.[361] Rather than a Coasean World without transaction costs, we live in a world with messy transaction costs and institutional designs that favor some actors over others. As outlined above, socially and economically valuable activities are being

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354. Tushnet, *supra* note 46, at 587 ("A less restrictive alternative to current copyright law, for example, would be a form of compulsory licensing that allows anyone to copy anything as long as the copyright owner receives some payment, perhaps managed by a collective licensing group like ASCAP.").

355. Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C.L. REV. 557, 564–67 (1998).

356. Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only* Part *of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 193 (2003) ("The liability-rule approach is so attractive . . . [but] we must be wary of a likely corollary: if injunctions disappear in favor of monetary rewards, the scope of copyright is likely to expand.").

357. Tushnet, *supra* note 46, at 590.

> Everybody pays for everything, including playing a CD privately and quoting from a book, which were never before part of the copyright owner's rights. Indeed, such proposals raise the possibility of potentially infinite demands for compensation. Why stop at quotation? Why not add in payment for discussion, or for inspiration?

Id.

358. *Id.* at 589 ("Yet poor people also have interests in self-expression and persuasion. One might think that freedom of speech is a way to preserve political and social equality in the face of wealth disparities, but if wealth controlled access to foundational elements of speech, that protection would no longer exist.").

359. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960); Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2095–96 (1997).

360. Michael D. Murray, *Reconstructing the Contours of the Copyright Originality and Idea-Expression Doctrines Regarding the Right to Deny Access to Works*, 1 TEX. A&M L. REV. 921, 939 (2014) ("The United States . . . seek[s] protections for authors, creators, and rights-holders seemingly without regard or acknowledgment of the right of the public to access works").

361. Greg Lastowka, *Innovative Copyright*, 109 MICH. L. REV. 1011, 1022 (2011) ("[C]ourts and legislators often weigh copyright's bird in hand more heavily than new technology's hundred in the bush.").

prevented by current copyright policy, and when socially beneficial activities are undermined by property rules, then liability rules are preferred.

In light of the social, economic, and technological changes in the digital age, a transition from a property rule approach to a liability rule approach is timely and appropriate to consider.[362] A strict property rule regime allows copyright owners to lock-out competition, censor speech, and undermine socially valuable activities. Other areas of copyright law have adopted a liability approach for compulsory licenses, like mechanical licenses to reproduce and distribute copyrighted musical compositions,[363] cable licenses to retransmit television broadcasts,[364] and webcaster licenses to publicly transmit sound recordings over the internet.[365] If we are interested in incentives and proper allocation of costs, liability rules would resolve some of the tensions between copyright and the First Amendment.

V. CONCLUSION

Copyright is intended to incentivize authors to create; it is a means to a socially beneficial end. Copyright is not intended to yield maximum profits to a copyright holder. Copyright policy functions as both a catalyst and barrier to innovation and our free speech culture. Start-up companies and venture capitalists have given compelling accounts illustrating how new innovations

362. Oliar, *supra* note 43, at 954 ("The law has alternated over time between protecting copyright owners and innovators by either property rules or liability rules. The copyright-innovation conflict is one of the most important and recurring themes in copyright law's evolution").

363. 17 U.S.C. §115(a)(2) (2012). *See also* Patterson, *supra* note 45, at 259 ("To prevent monopolization of the recording industry, Congress created the compulsory recording license for musical compositions.").

364. 17 U.S.C. § 111 (2012).

365. 17 U.S.C. § 114(d)(2) (2012).

have been stymied by current copyright.[366] Imagination and innovation go hand-in-hand to foster new ideas and new ways of thinking.[367]

A copyright policy that routinely chills new technology is suboptimal because society loses the positive externalities that come from these unfulfilled technologies.[368] The chilling effect is welfare-reducing because it discourages not only illegal uses, but legal uses as well.[369] The Innovator's Dilemma teaches that newcomers are uniquely positioned to create disruptive technology because dominant firms often try to "prevent the next big idea from succeeding."[370]

But the creative destruction cycle is hampered by our copyright policies, which enable technology entrenchment and lock out competition. The bias ensures incumbent distributors will maintain dominance.[371] Dominant firms should not be allowed to abuse their power to the detriment of society.[372] The

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366. Carrier, *supra* note 157, at 959.

> By interviewing 31 CEOs, company founders, and VPs who operated in the digital music scene at the time of Napster and afterwards, it paints the fullest picture to date of the effect of copyright law on innovation. The Article concludes that the Napster decision stifled innovation, discouraged negotiation, pushed p2p underground, and led to a venture capital "wasteland." It also recounts the industry's mistakes and adherence to the Innovator's Dilemma in preserving an existing business model and ignoring or quashing disruptive threats to the model. And it shows how the labels used litigation as a business model, buttressed by vague copyright laws, statutory damages, and personal liability.

Id. Lee, *supra* note 83, at 1441.

> A recent study, citing conversations with hundreds of startups, explained that "[a]s the curation and distribution of creative content becomes an increasingly ripe source of innovation, old-fashioned notions of what it means to make a copy—and how infringement of copyright is enforced—lead to many potentially great business models being blocked.

Id.

367. Steven H. Hobbs, *Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 ENTREPRENEURIAL BUS. L.J. 1, 11 (2009) ("Imagination and innovation work together to generate new ideas and ways of thinking.").

368. Berg, *supra* note 287, at 310 ("[A]warding statutory damages against the intermediary, which effectively shuts down the intermediary's company or technology, is not the socially optimal solution because it also eliminates the positive externalities of those technologies.").

369. *See* Lichtman & Landes, *supra* note 302, at 405.

370. Waller & Sag, *supra* note 115, at 2227.

371. Ku, *supra* note 81, at 1243 (suggesting that technology neutrality may have been about technology entrenchment, basically ensuring that the incumbent distributors could remain powerful even when new, more efficient vehicles arose for disseminating content); Seltzer, *supra* note 81, at 960.

> If the incumbent can [block new, disruptive technology] using intellectual property, it can preserve its own position for a bit longer at the expense of a public denied the opportunities of technological improvement. It takes less foresight to seek stability by blocking others from innovating than to innovate for oneself.

Seltzer, *supra* note 81, at 960.

372. *See* Waller & Sag, *supra* note 115, at 2227.

marketplace should play a bigger role in deciding if some new information technology is socially beneficial.[373]

Innovators need the freedom to experiment and bring new, disruptive technology to the marketplace. But the threat of copyright liability has "crushing implications" for the creators and venture capitalists who support such innovations.[374] The only ones positioned to defend in court are industry leaders with sufficient capital to afford the litigation costs.[375] It is well documented that litigation costs can bankrupt emerging technology companies.[376] If miscalibrated, copyright risks thwarting not just new innovations, but also the diffusion of innovative practices.[377]

The threat of copyright liability also has powerful implications for our free speech culture. Freedom of expression needs more than a lack of government censorship; it needs institutions and architecture that support free expression.[378] The freedom to engage in culture-making is key to fostering a democratic, free-speech culture. Democratic culture-making needs breathing space to flourish.

Fair use should promote breathing space for the public and allow free uses of works that do not undermine an author's incentive to create. To the extent that future technology and future uses allow new exploitation of copyrighted works, that should redound to the benefit of the public and not to the copyright holder. The copyright holder could not have anticipated unforeseen disruptive technological changes; therefore, such uses are not part of the incentive-to-create calculus. Much like market forces risk upending dominant forces through disruptive technology, disruptive uses of copyrighted works also risk upending copyright holders' possible avenues for remuneration and profit centers. Disruptive technology and disruptive uses of copyrighted works should not be

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373. *Cf.* Giles S. Rich, *Principles of Patentability*, 28 GEO. WASH. L. REV. 393, 402 (1960) ("That is one of the beauties of the patent system. The reward is measured automatically by the popularity of the contribution.").

374. Brief of the Nat'l Venture Capital Ass'n as Amicus Curiae in Support of Respondents at 16–17, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 497759 ("The mandatory mechanism of statutory damages-designed to discourage *direct* infringement-has crushing implications for vendors of multi-purpose technologies, where damages from unforeseen users can quickly mount in the millions and even billions of dollars.") (emphasis in original).

375. Greenberg, *supra* note 10, at 1510 ("The current copyright regime, with its broad defaults, appears to have two predominant effects on the development of copyright-using technologies: it either encourages risk-taking by those who can afford the liability, or discourages technological development by those who cannot.").

376. Berg, *supra* note 287, at 268 n.13 (noting "the risk of facing extremely high litigation costs can alone put certain emerging technology companies out of business" and citing examples).

377. Gaia Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257, 2261 (2010).

> [T]he story of digital music technology is, in fact, not a tale of stifling innovation, but of inhibited diffusion. Copyright enforcement played a role in inhibiting the adoption of digital music technology. It frustrated the consumer's digital music experience and created uncertainty that hindered patently legal uses of digital music technology.

Id.

378. Balkin, *supra* note 21, at 7.

unduly hampered. Creative destruction cycles are key to economic prosperity and progress. Incumbent forces should not be allowed to hamper the cycle and demand crippling rents.

Copyright, initially seen as the engine of creativity, now risks controlling free expression and thwarting the next big innovation.[379] The policy choices we make with digital technology can promote innovation and free expression or can stymie it.[380] Thoughtful conversations about policy reforms require that we appreciate the powerful collateral effects that copyright policy has on culture, democratic self-governance, and innovation.[381] We cannot ignore the free speech and economic interests at stake in modern copyright policy. Copyright holders should not be given veto power over freedom of expression and innovation.

Copyright policy imposes costs and such costs are not inherently justified; rather, they are justified so long as the benefits of the system outweigh the costs.[382] Copyright should do more good than harm.[383] At this stage, I posit the harms to the public's interest are not justified and it is time to recalibrate copyright. We needn't be bound by path dependence.[384] Copyright law must be stable, yet it cannot stand still and ignore costs to innovation and free expression.[385]

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379. Balkin, *supra* note 2, at 27 ("Intellectual property, which was originally viewed as a limited government monopoly designed to encourage innovation, has been transformed into a bulwark against innovation, facilitating control over digital content and limiting the speech of others.").

380. *Accord* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 30 (1999) (discussing how computer code in a digital environment can regulate behavior); ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 251 (1983) (suggesting technology "shapes the structure of the battle, but not every outcome").

381. Carrier, *supra* note 157, at 959 ("Any discussion of the appropriate role of copyright law must consider the effects on innovation.").

382. Wu, *supra* note 122, at 142.

383. Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1343–44 (2015).

384. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1172 (2005) ("The rule of law depends on stability and thus willingly suffers the perpetuation of some incorrect rulings in exchange for the benefit of stability and predictability of outcomes.").

385. *See* ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1967) ("Law must be stable and yet it cannot stand still.").