Copyright's Asymmetric Uncertainty

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Conventional wisdom holds that the pervasive uncertainty in copyright law is intolerable because it inhibits expression—those who would engage in lawful uses of copyrighted works abstain for fear of crushing liability. The argument is right but for the wrong reasons. It is based on the often-unstated assumption that users who face liability are risk averse. But the leading account of decision making under uncertainty suggests that those facing potential losses are in fact risk seeking, while those facing potential gains are risk averse. In light of this asymmetry in risk preferences, copyright's asymmetric distribution of uncertainty—salient issues for users are opaque while those for copyright holders are clear—promotes access while preserving copyright holder incentives. Users discount the risks of boundary crossing because the doctrines of access make the boundaries unpredictable, and copyright holders overvalue their entitlements because they are reliable, protecting against the most feared uses of their works with predictably potent remedies. In short, the system exploits asymmetric risk preferences through its asymmetric distribution of uncertainty. Good economics does not always make good law, however. The Rule of Law ideal also values clarity in an asymmetric way: the need for notice is at its zenith where the law imposes punishment and its nadir where the law confers benefits. Even if it is true that copyright's asymmetric uncertainty promotes maximal expression, forcing users to shoulder the burdens of uncertainty in the name of social welfare evinces a disrespect for user autonomy that is inconsistent with the Rule of Law.

INTRODUCTION 334
I. COPYRIGHT'S ASYMMETRIC UNCERTAINTY 337
A. The Copyright Holder's Concerns 338
1. Validity 339
2. Liability for literal or close copying 341
3. Compensation and deterrence 342
B. The Potential User's Concerns 343
1. The scope of the copyright 344
2. Fair use and other affirmative defenses 349
3. Damages 353
C. Asymmetric Uncertainty 355
II. ECONOMICS AND THE ASYMMETRY OF RISK 355

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A. The Conventional View: Overdeterrence 356
B. Prospect Theory 360
C. Salient Clarity for Optimal Incentives 362
D. Risk-Averse Copyright Holders and User Access 364
E. User Uncertainty for Optimal Access 366
1. Risk-seeking users 366
2. Anchoring at safe harbors. 367
3. Rule proliferation and the problem of postdiction 370
III. ASYMMETRIC UNCERTAINTY AND THE RULE OF LAW 372
A. The Rule of Law 373
B. Asymmetric Uncertainty and the Rule of Law 375
1. Uncertainty and the Rule of Law. 375
2. The problem of asymmetry. 379
C. Theory Matters 382
CONCLUSION 385

INTRODUCTION

Copyright suffers from deep uncertainty.[1] Mostly to blame are the unpredictable standards governing the lawful use of copyrighted works. One may use a copyrighted work to inspire novel expression so long as the new work is not "substantially similar" to the old one.[2] Or one may use a copyrighted work where doing so qualifies as "fair use," considering the purpose and character of the use, the nature of the copied work, the amount used, and the effect on the potential market for the copied work.[3] These and other standards frustrate attempts to predict whether the use of a copyrighted work would be adjudicated lawful. And users who guess wrong are in trouble, for those found to infringe even a single copyright face up to $150,000 in

1 See David Fagundes, *Crystals in the Public Domain*, 50 BC L Rev 139, 161–74 (2009) (criticizing scholars who prefer "muddy" entitlements and advocating greater certainty through "crystalline" entitlements); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 185 (Penguin 2004) ("The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open."); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L & Contemp Probs 263, 280 (Winter–Spring 2003) ("Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.").

2 *Atari, Inc v North American Philips Consumer Electronics Corp*, 672 F2d 607, 614 (7th Cir 1982). See also Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 UC Davis L Rev 719, 722–23 (1987); Jessica Litman, *The Public Domain*, 39 Emory L J 965, 1005 & n 246 (1990).

3 17 USC § 107 (outlining four factors for determining when unlicensed use of a copyrighted work will be protected from liability).

statutory damages regardless of whether the copyright holder suffers significant harm.[4]

The conventional argument for remedying copyright's uncertainty is that uncertainty deters lawful uses of copyrighted works.[5] Many might build on prior works to produce valuable expression but opt not to do so because they cannot predict their liability. Suppose an artist wants to model a campaign poster for a political candidate on a photograph from a newspaper.[6] He cannot know for sure whether his use of the photograph would be privileged as a fair use. The relevant factors—taken from an opinion Justice Joseph Story wrote in 1841[7]—are unhelpful,[8] and the answer is unclear even to copyright experts.[9] Unable to predict his liability, the artist may not produce the poster in the first place. In such situations, the argument goes, copyright's uncertainty inhibits expression.

This assumed deterrent effect represents a failure of copyright to achieve its goal of promoting expressive works. Congress provides exclusive rights to copyright holders to encourage expression, but uncertainty stifles it.[10] The solution, on the conventional account, is to

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4 17 USC § 504(c)(2). See Pamela Samuelson and Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm & Mary L Rev 439, 458–59 (2009).

5 See, for example, Fagundes, 50 BC L Rev at 143–44, 150–60 (cited in note 1); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 Iowa L Rev 1271, 1283–91 (2008); Gideon Parchomovsky and Kevin A. Goldman, *Fair Use Harbors*, 93 Va L Rev 1483, 1497–1502 (2007); Michael W. Carroll, *Fixing Fair Use*, 85 NC L Rev 1087, 1092–1122 (2007); Lessig, *Free Culture* at 184–99 (cited in note 1). See also Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 Cardozo L Rev 1781, 1791–1806 (2010) (analyzing this assumed effect as a First Amendment problem). Consider also Nimmer, 66 L & Contemp Probs at 265–66 (cited in note 1).

6 This hypothetical is taken from the story of Shepard Fairey, the artist whose "Hope" poster depicting then-candidate Barack Obama has become iconic. See Randy Kennedy, *Artist Sues the A.P. over Obama Image*, NY Times C1 (Feb 10, 2009) (describing the declaratory judgment action Fairey filed against the Associated Press to assert that his poster design was not infringing).

7 *Folsom v Marsh*, 9 F Cas 342, 348 (CCD Mass 1841) (holding that, in order to determine if a copyright has been infringed, one must look to the nature and objects of the selection made, quantity and value of materials used, and how it might diminish the market value of the original).

8 See Tim Wu, *Is There "Hope" for Shepard Fairey?*, Slate *2 (Oct 21, 2009), online at http://www.slate.com/id/2233152 (visited Nov 3, 2011).

9 Besides Tim Wu's ambivalence, see id, consider the disagreement between David Post and Jane Ginsburg. See David Post, *AP, Copyright Infringement, and the Hope Poster*, Volokh Conspiracy (Feb 11, 2009), online at http://volokh.com/archives/archive_2009_02_08-2009_02_14.shtml#1234399793 (visited Nov 3, 2011).

10 See US Const Art I, § 8, cl 8; William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* 37–165 (Harvard 2003) (providing a detailed economic analysis of copyright law); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 35–58 (Yale 2006) (outlining the basic economics of information production). See also William Fisher, *Theories of Intellectual Property*, in Stephen R. Munzer, ed, *New Essays in the Legal and Political Theory of Property* 168,

reduce copyright's uncertainty and thereby increase production. This argument has as its core but unexplored premise a prediction about how users of copyrighted works respond to uncertainty. The premise is that, all else equal—most importantly, holding the substantive *scope* of copyright law constant—a user is less likely to use a copyrighted work if he is unable to predict whether his use would be deemed lawful. Thus stated, the conventional argument's core premise is a behavioral one, a prediction about the choices users make under conditions of uncertainty.

This Article argues that the conventional wisdom is right for the wrong reasons. The behavioral premise on which it relies is probably false—because users are risk seekers in the face of liability, they engage in more (not less) expression under an uncertain regime than under a clear one. Copyright holders by contrast are risk averse, valuing clear entitlements more than equivalent murky ones. Fortunately, the questions salient to copyright holders have ready answers. Copyright is asymmetrically uncertain, and its asymmetry promotes rather than inhibits expression in light of asymmetric risk sensitivity. But copyright's distribution of uncertainty is exactly backwards according to principles of fairness that inform standard accounts of the Rule of Law. That ideal requires notice above all where the law imposes penalties for transgression, whereas murkiness is more tolerable for the provision of benefits. So the law should provide clarity for users who face liability even if it fails to do so for copyright holders. Our system does the opposite, and in that respect fails to realize the Rule of Law ideal. This competing diagnosis of the cause for copyright's disease, I argue, counsels in favor of a different cure.

The analysis here builds on three asymmetries. First, copyright's uncertainty is asymmetrically distributed, but that distribution is an efficient one in light of asymmetric sensitivity to risk—the second asymmetry. And third, the Rule of Law value of notice is asymmetric, too, implicated more for users facing liability than for the copyright holders who enjoy the benefits of the system. Copyright's asymmetry maps on to leading accounts of risk sensitivity, but it conflicts with the values that underlie the Rule of Law.

These three asymmetries provide the structure for the Article. Part I describes the first, the asymmetric distribution of uncertainty in the copyright system. After explaining who these "users" and "copyright holders" are, I argue that the questions most salient to users are unpredictable while those most salient to copyright holders

168–76 (Cambridge 2001) (describing the competing justificatory theories of copyright law and noting that the economic-utilitarian theory is the most popular one).

are clear. Part II is an economic analysis of copyright's asymmetric uncertainty, and I argue that the distribution of uncertainty is desirable in light of asymmetric sensitivity to risk. In Part III, I provide an argument against copyright's distribution of uncertainty based on the Rule of Law, and in particular on the asymmetric value of notice implicit in that ideal.

Before turning to the argument, one definition and one clarification. First, as I use the term, an *uncertain* directive is one under which relevant parties are unable to predict with confidence how a court would adjudicate their rights, duties, and liabilities. So, for example, copyright's fair use doctrine is uncertain to the extent that users and copyright holders cannot predict whether a use of a copyrighted work would be found privileged or infringing. It is true that fair use is governed by a standard rather than a rule, but that is neither necessary nor sufficient to imply its uncertainty.

Second, the analysis here aims to isolate the effects of copyright's uncertainty, and therefore to hold copyright's scope constant throughout. A property law example may help to clarify what it means to hold scope constant while varying uncertainty. Suppose two neighbors have a dispute over who owns a ten-foot strip of land. Under an uncertain regime, each neighbor might face a 50 percent chance of winning the entire strip, and the expected scope of the property right in the land would therefore be five feet on average. We could eliminate uncertainty while maintaining identical scope by adopting a rule that always divided the contested property in half between the neighbors—each would still expect a five-foot right on average, but now each would be able to predict with confidence the particular outcome. I do not here question whether copyrights are too broad or too narrow. My analysis takes their scope as a given and addresses whether they are too uncertain.

I. COPYRIGHT'S ASYMMETRIC UNCERTAINTY

Two groups of people have a particular interest in knowing the scope of and remedies for the exclusive rights that copyright law creates. The first comprises those who want to take advantage of copyright law's exclusivity, those whose production of expressive works depends on the availability of exclusive rights.[11] For simplicity, I call them "copyright holders," and even though almost anyone who expresses himself in a fixed medium thereby obtains a copyright, the term refers to an ideal type meant to capture only those who actually care about their copyrights. The second comprises those who want to

[11] See Benkler, *The Wealth of Networks* at 41–48 (cited in note 10).

use preexisting works to create novel expression, the "potential users" of copyrighted works. Unlike the copyright holder, the potential user tends not to create with an eye toward exclusive distribution of his work. He, too, is an ideal type, and of course in practice the ideal types often overlap.[12]

The claim that copyright law is often uncertain—that relevant parties can't predict with confidence how a court would adjudicate their rights and liabilities—is uncontroversial enough to be stated rather than defended.[13] But what is remarkable about copyright's uncertainty is its asymmetry. The answers to copyright questions that are most unpredictable are of greatest interest to potential users of copyrighted works, whereas the copyright holder's most pressing questions find ready answers. Copyright secures clear protection against the copyright holder's most feared use of his work—literal or close copying—with strong and effective remedies. But the potential user's access rights are governed by open-ended and amorphous standards, and the costs of guessing wrong on liability can far exceed either the value of the use or any harm to the copyright holder. Recognizing that copyright's uncertainty is asymmetric helps to sharpen the inquiry into its significance. The question is not just whether uncertainty in copyright reduces expression but instead what effect copyright's asymmetric distribution of uncertainty has on the production and use of expression, or, alternately, whether asymmetric uncertainty is objectionable on nonconsequentialist grounds.[14]

A. The Copyright Holder's Concerns

Although there are many who would produce expressive works irrespective of copyright protection,[15] those whose production

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12 I omit here the passive consumer, whose primary interest is in having cheap access to a diversity of expressive works. With a few exceptions, such as questions involving whether and how he may share copyrighted works with others, the passive consumer cares little about the particulars of copyright law.

13 See note 5.

14 See David McGowan, *Copyright Nonconsequentialism*, 69 Mo L Rev 1, 36–38 (2004). See also Steven J. Horowitz, Note, *Competing Lockean Claims to Virtual Property*, 20 Harv J L & Tech 443, 450–57 (2007) (applying Lockean property theory); Fisher, *Theories of Intellectual Property* at 168–76 (cited in note 10) (surveying intellectual property theory). See also generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 Georgetown L J 287 (1988) (same).

15 There are a variety of production strategies for copyright: some rely on exclusion, others are indifferent, and others are even hindered by copyright. See Benkler, *The Wealth of Networks* at 41–48 (cited in note 10); Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 Yale L J 369, 375–81 (2002) (explaining why peer production is

depends on copyright care most about three features of the law. They want (1) a reliable entitlement (2) prohibiting at least literal or close copying of their work, which is (3) protected by remedies sufficient both to deter copying and to compensate for any losses that result from it. These are the core protections that ensure meaningful incentives to produce copyrightable expression, for without them a copyright holder might have to compete against others who sell identical copies of his own work. Such competition against perfect substitutes would drive down the price toward the near-zero marginal cost of the copy, leaving him without the ability to profit from the work or to recoup the costs of its production. Uncertainty in these three salient features of the law would spell trouble for copyright holders, but fortunately the features are predictable in practice.

1. Validity.

Above all, the copyright holder wants a reliably valid entitlement. Uncertainty in the validity of entitlements makes it more difficult to assert or license rights and thus to profit from an expressive work, regardless of the scope or duration of the entitlement. Validity turns on the requirements for obtaining and for maintaining a copyright. In the United States, both sets of requirements are clear and accommodating for copyright holders. Copyright protection is easy to get and reliable once obtained.

Under § 102 of the Copyright Act,[16] copyright protection subsists in "original works of authorship fixed in any tangible medium of expression."[17] Any expressive work that is both original and fixed in a tangible medium of expression enjoys copyright protection immediately upon fixation, without approval from the Copyright Office or any other government agency. There are benefits to registering a copyright,[18] but registration is cheap and involves no substantive examination of the expressive value or originality of the registered work. And both substantive requirements—originality and

efficient for addressing particular kinds of problems in light of the diverse motivations of contributors).

16 Pub L No 94-553, 90 Stat 2541 (1976), codified as amended at 17 USC § 101 et seq.

17 Copyright Act § 102(a), 17 USC § 102(a) (describing the types of material that fall within the ambit of copyright protection).

18 See Roger E. Schechter and John R. Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks* § 5.3 at 89–91 (West 2003). Among the most significant benefits is that registration is a prerequisite for statutory damages or attorney's fees. See 17 USC § 412. See also Shira Perlmutter, *Freeing Copyright from Formalities*, 13 Cardozo Arts & Enter L J 565, 569–87 (1995) (arguing that conditioning benefits on registration is a vestige of pre–Berne Convention Implementation Act law and should be rejected).

fixation in a tangible medium—are easy enough to identify and permissive. Originality requires just a modicum of creativity,[19] which does not depend on uniqueness or artistic merit. Thus do two composers who independently compose identical and equally terrible songs both enjoy copyrights in their work. There are hard cases at the margins, such as phone books and organized legal case reports,[20] but the margins are small. The fixation requirement is satisfied even by drafts and unpublished works, fixed in any tangible medium from paper to Random Access Memory (RAM).[21]

Prior to the enactment of the Copyright Act of 1976 (and, more relevantly, the Berne Convention Implementation Act[22]), those seeking copyright protection had to comply with various formalities to obtain and maintain copyright protection. The law required registration, the provision of copyright notices on each copy of a work, and renewal early in the copyright term.[23] But today, registration provides prima facie evidence of the validity of a copyright,[24] and it allows a copyright holder to seek statutory damages,[25] but copyrights are valid even in the absence of

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19 See *Feist Publications, Inc v Rural Telephone Service Co*, 499 US 340, 346 (1991) (requiring "a modicum of creativity"). See also id at 345–46:

> To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. . . . [T]wo poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.

20 See id at 361–64 (denying copyright protection for a telephone book); *Matthew Bender & Company v West Publishing Co*, 158 F3d 674, 683–89 (2d Cir 1998) (holding that West was unable to assert a copyright in its case reports because the reports lacked a "modicum of creativity," despite alleged originality in the arrangement of information and the selection and presentation of citations).

21 See 17 USC § 102 ("Copyright protection subsists, in accordance with this title, in original works of authorship *fixed in any tangible medium of expression*.") (emphasis added). See also *MAI Systems Corp v Peak Computer*, 991 F2d 511, 518 (9th Cir 1993) (holding that loading copyrighted software into RAM constitutes a copyright violation because a copy in RAM is "fixed" in the sense that it is sufficiently permanent to be perceived or reproduced); Aaron Perzanowski, *Fixing RAM Copies*, 104 Nw U L Rev 1067, 1070–80 (2010) (recognizing that most courts adopt the view that RAM copies are fixed for purposes of the Copyright Act, and discussing criticisms of this view).

22 Pub L No 100-568, 102 Stat 2853 (1988), codified in various sections of Title 17.

23 Some commentators, however, advocate for a return to increased formalities in copyright law. See James Gibson, *Once and Future Copyright*, 81 Notre Dame L Rev 167, 212–42 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 Stan L Rev 485, 545–68 (2004). But see Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 Colum J L & Arts 311, 342–48 (2010) (arguing that reintroducing formalities would burden only uninformed copyright holders).

24 17 USC § 410(c).

25 17 USC § 412.

registration. Renewal is no longer part of the law,[26] and rights endure much longer than they did three decades ago.[27] Copyrights remain valid for seventy years after an author's death even if she never published the work, registered or renewed her copyright, or provided any notice of its existence.[28] Producers of expressive works can thus predict with near certainty that they will enjoy valid copyrights for their entire lives and beyond.

2. Liability for literal or close copying.

With a predictably valid copyright in hand, a copyright holder's most pressing concern is eliminating literal or close copies of the copyrighted work.[29] The novelist, for example, most wants to earn a living writing novels, and to do that she must sell (or license the sale of) her manuscripts above the marginal cost of producing copies. Otherwise she will neither cover the fixed costs of her time writing the manuscript nor make enough to forgo other employment. But in order to sell copies above marginal cost, she needs to avoid competition in the sale of her work. If others could freely copy and sell her novels, the price would be driven down toward the near-zero price of the copy.[30] If her copyright affords nothing else, it must

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26 And too bad it isn't, argue William Landes and Judge Richard Posner, for renewal requirements would enlarge the public domain even if copyright protection were indefinitely renewable. See generally William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U Chi L Rev 471 (2003) (distinguishing between perpetual and indefinite copyrights and arguing that the latter, by requiring copyright holders to renew their copyright at certain intervals, will allow many protected expressions to enter the public domain earlier than the present system).

27 See Sonny Bono Copyright Term Extension Act of 1998 (CTEA), Pub L No 105-298, 112 Stat 2827, codified in various sections of Title 17.

28 17 USC § 302(a). Congress extended copyright term from life-plus-fifty to life-plus-seventy in the CTEA, which was upheld against constitutional challenge in *Eldred v Ashcroft*, 537 US 186, 199–222 (2003).

29 C. Scott Hemphill and Jeannie Suk's proposal to extend intellectual property protection to fashion focuses on the evils of literal and close copies, and they explain that close copies are meant to substitute for the original work. See C. Scott Hemphill and Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan L Rev 1147, 1170–95 (2009). But see Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va L Rev 1687, 1717–34 (2006) (arguing that such protection is unnecessary).

30 See Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U Chi L Rev 129, 131 (2004) ("We grant creators exclusive rights in their works—permitting them to charge a supracompetitive price—to encourage them to make such works in the first place."); William F. Patry and Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 Cal L Rev 1639, 1645 (2004) ("[C]opyright law enables the copyright owner to prevent anyone from competing against him by selling identical copies of the copyrighted work, and so if the work is popular he will be able to obtain a supracompetitive return.").

protect against the unlicensed production of literal or close copies.[31] Uncertainty in whether copyrights protect against such copies would be troubling indeed.

Here, too, copyright holders enjoy predictable rights. In clear terms the Copyright Act provides authors the exclusive right to reproduce their works in copies.[32] Of course, the copyright holder worries not only about exact copies but close ones as well, for close copies, such as a novel with one word changed on each page, are almost perfect substitutes for the original work and therefore drive down the price almost as easily as literal copies would. Fortunately, the law forbids close copies under the substantial similarity test.[33] The test for substantial similarity is vague and sometimes unpredictable,[34] but copyright holders can be confident that close copies—those most likely to substitute for the original work in the market—will be deemed infringing. The test considers whether the lay observer would recognize that the copy was taken from the original work,[35] and the observer would so recognize in the case of a close copy.

3. Compensation and deterrence.

The conclusion that the most feared uses of copyrighted works constitute infringement is of little solace to copyright holders unless the system reliably provides remedies sufficient to compensate for losses from infringement and to deter such infringement. Worries about remedies may be compounded by difficulties of proof: How much of a competitor's success in selling the copyrighted work is due to the competitor's marketing or business acumen, and how much to the work itself? And how many more copies of the work would the copyright holder have sold in the absence of infringement? These are tough questions, and if the copyright system were to burden the copyright holder with each of them, he might not decide to spend time producing expressive works in the first place.

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31 Derivative works can be lucrative—the Harry Potter brand was estimated to be worth more than $15 billion in 2007, only $9 billion of which was from book sales. See Beth Snyder Bulik, *Harry Potter, the $15 Billion Man*, Advertising Age (July 16, 2007), online at http://adage.com/article/news/harry-potter-15-billion-man/119212 (visited Nov 5, 2011). But the vast majority of novels make money, if at all, through sales as novels.

32 17 USC § 106(1) (providing the exclusive right "to reproduce the copyrighted work in copies or phonorecords").

33 See, for example, *Reyher v Children's Television Workshop*, 533 F2d 87, 90 (2d Cir 1976); *Universal Athletic Sales Co v Salkeld*, 511 F2d 904, 907 (3d Cir 1975).

34 For a useful description of the test and its vagueness, see *Peter Pan Fabrics v Martin Weiner Corp*, 274 F2d 487, 489 (2d Cir 1960). See also sources cited in note 2; Fagundes, 50 BC L Rev at 158–60 (cited in note 1).

35 See, for example, *Arnstein v Broadcast Music, Inc*, 137 F2d 410, 412 (2d Cir 1943).

Fortunately, copyright remedies are predictably potent. The copyright holder can elect to recover actual damages and the infringer's profits, and to do the latter he need only establish the infringer's gross revenue.[36] The infringer then has the burden of proving deductible expenses and the portion of profits not attributable to infringement.[37] If actual damages are uncertain, the copyright owner can elect to recover statutory damages of up to $30,000 per infringed work, $150,000 if the infringement is willful.[38] Furthermore, the Copyright Act permits courts to award attorney's fees to prevailing copyright holders,[39] which are awarded as a matter of course despite being nominally discretionary.[40] Beyond damages and fees, available remedies include injunctions and the impoundment and destruction of infringing articles.[41] A copyright holder can find his compensation among these varied and powerful remedies, which are in turn strong enough to deter most potential infringers (at least those with money to lose[42]).

B. The Potential User's Concerns

Most affected by copyright's uncertainty are the potential users of copyrighted works, those who want to use a work in ways not intended or expected by the copyright holder.[43] For example, users

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36 17 USC § 504(a)(1), (b).

37 17 USC § 504(b).

38 17 USC § 504(c)(1)–(2). On the disconnect between actual harm and statutory damages in copyright, see Samuelson and Wheatland, 51 Wm & Mary L Rev at 461–63 (cited in note 4); J. Cam Barker, Note, *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, 545–56 (2004).

39 Courts may "award a reasonable attorney's fee to the prevailing party." 17 USC § 505. See also *Fogerty v Fantasy, Inc*, 510 US 517, 533–34 (1994) (holding that prevailing plaintiffs and defendants must be treated alike in awarding fees under the Act).

40 See Jeffrey Edward Barnes, Comment, *Attorney's Fee Awards in Federal Copyright Litigation after* Fogerty v. Fantasy*: Defendants Are Winning Fees More Often, but the New Standard Still Favors Prevailing Plaintiffs*, 47 UCLA L Rev 1381, 1390 (2000) (finding that prevailing plaintiffs were awarded attorney's fees in 89 percent of cases).

41 17 USC § 502 (injunctions); 17 USC § 503 (impounding and destruction).

42 Joel Tenenbaum, for example, was a graduate student at Boston University when a jury awarded $675,000 in statutory damages against him. According to Tenenbaum, Judge Nancy Gertner's decision to reduce the award to $67,500 made no difference, since even that smaller award would force him into bankruptcy. See Jonathan Saltzman, *Student Appeals Award of $67,500*, Boston Globe B1 (Aug 26, 2010). Judge Gertner's order reducing the damages was subsequently reversed by the First Circuit. See *Sony BMG Music Entertainment v Tenenbaum*, 2011 WL 4133920, *18 (1st Cir).

43 See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 51–83 (Penguin 2008); William W. Fisher III, *The Implications for Law of User Innovation*, 94 Minn L Rev 1417, 1418–30 (2010); Anupam Chander and Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 Cal L

may mix pieces of prior works together[44] or write new stories using characters from old ones.[45] The intent of the user is not to produce or sell verbatim copies of a preexisting work but to put some portion of a work to a new purpose.[46] The potential user is most concerned with whether his expressive activity will constitute infringement and, if so, whether the remedies for infringement will be proportional to the harm caused—in other words, whether his liability has a reasonable ceiling. Copyright makes answering both of these questions difficult. A potential user cannot predict with confidence whether a contemplated use will be deemed infringing or whether the damages will be manageable or devastating. As a result, the system is asymmetrically uncertain: the issues most salient to the user are unpredictable while those salient to copyright holders are clear.

1. The scope of the copyright.

A potential user's principal concern is whether his use infringes a copyright. The existence (though not always the owner[47]) of a copyright is easy to determine for the reasons above, namely, that copyright attaches to almost all fixed expression by default and for a very long time. But not every use of a copyrighted work is infringing, even before considering affirmative defenses such as fair use. For

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Rev 597, 598–601 (2007). See also Edward Lee, *Warming Up to User-Generated Content*, 2008 U Ill L Rev 1459, 1543–47.

44 See, for example, Lee, 2008 U Ill L Rev at 1509–13 (cited in note 43). A well-known example is the visual artist Jeff Koons, who incorporates popular media and advertising into his work, which has been described as "appropriation art." Contrast *Blanch v Koons*, 467 F3d 244, 246–48, 250–59 (2d Cir 2006) (determining that Koons's use of a copyrighted photograph in collage painting was fair use), with *Rogers v Koons*, 960 F2d 301, 308–12 (2d Cir 1992) (finding that Koons's "String of Puppies" sculpture infringed copyright in "Puppies" photograph).

45 See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U Pa L Rev 1869, 1869–74 (2009); Chander and Sunder, 95 Cal L Rev at 611–17 (cited in note 43).

46 A recent example involved Fredrik Colting's *60 Years Later: Coming through the Rye*, the story of a seventy-six-year-old Holden Caulfield from J.D. Salinger's *The Catcher in the Rye*. See *Salinger v Colting*, 607 F3d 68, 71–72 (2d Cir 2010). The entire hip-hop genre is another example. See Neil Weinstock Netanel, *Copyright's Paradox* 19–23 (Oxford 2008).

47 Works whose owners cannot be identified or located are called "orphan works." See Jerry Brito and Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, 12 Mich Telecomm & Tech L Rev 75, 77–86 (2005). The problem of orphan works has been exacerbated by copyright term extension—sixty-five years after the death of the author, it becomes much harder in most cases to identify the copyright holder. In the wake of *Eldred*, Congress sought advice from the Copyright Office on the orphan works problem, and the office concluded that legislative action was necessary. US Copyright Office, *Report on Orphan Works* 92–93 (Jan 2006), online at http://www.copyright.gov/orphan/orphan-report-full.pdf (visited Nov 5, 2011). Orphan works have received renewed attention in light of the Google Book Search settlement. See, for example, Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J Competition L & Econ 383, 391–94 (2009).

example, one may freely copy the idea embodied in a work but not expressive elements that embody it, or one may be inspired by a work in producing novel expression, so long as the novel expression isn't "substantially similar" to the original work. Although this framework guarantees a certain amount of freedom to use copyrighted works, the access provided is uncertain because users cannot reasonably predict the lines a court will draw.

Consider first the murky distinction between ideas and expression. The Supreme Court has explained that "protection is given only to the expression of the idea—not the idea itself."[48] According to the Court, this "idea/expression dichotomy" helps strike "a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."[49] So, for example, the author of a book on bookkeeping can claim no exclusive right to the methods described therein.[50] While one can state the general rule without much trouble (using ideas is fine but using expression is not), the line between the two is famously elusive. At least for non-Platonists, there isn't a set of transcendent ideas that predate their expression,[51] and realizing this, courts may construe an author's expression broadly. On the other hand, courts may be predisposed to see in the particulars of the world some deeper truth, and so in each expression focus more on the idea to construe the user's right of access broadly. As a result, though the distinction between idea and expression may be an important source of user rights, it nonetheless introduces uncertainty. As Judge Learned Hand explained, "Nobody has ever been able to fix that boundary, and nobody ever can."[52]

Related to the idea-expression dichotomy is the principle that copyright extends only to the original contributions of an author. Shakespeare's *Hamlet* may be on the expression side of the line (and in the public domain), but Tom Stoppard enjoys no exclusive right to

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48 *Mazer v Stein*, 347 US 201, 217–18 (1954). See also 17 USC § 102(b).

49 *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539, 556 (1985), quoting decision below, *Harper & Row Publishers v Nation Enterprises*, 723 F2d 195, 203 (2d Cir 1983). For a discussion of this definitional balance, see generally Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 Stan Tech L Rev 2, online at http://stlr.stanford.edu/pdf/horowitz-free-speech-theory.pdf (visited Nov 5, 2011).

50 *Baker v Selden*, 101 US 99, 101–07 (1879). Today, the idea-expression dichotomy is codified in 17 USC § 102(b).

51 I refer to Plato's theory of forms, which describes nonmaterial ideal forms that represent the highest form of reality, to be contrasted with the particulars of the sensible world. See Plato, *The Republic* 233–39 (M. Walter Dunne 1901) (Henry Davis, trans) (O. Leigh, ed). See also Richard Kraut, *Introduction to the Study of Plato*, in Richard Kraut, ed, *The Cambridge Companion to Plato* 1, 10–12 (Cambridge 1992).

52 *Nichols v Universal Pictures Corp*, 45 F2d 119, 121 (2d Cir 1930).

elements original to *Hamlet* itself despite using them in *Rosencrantz and Guildenstern Are Dead*[53]—he has a copyright only in what is originally his. This is a difficult question in the campaign poster example from the Introduction, which is the story of Shepard Fairey's "Hope" poster riff on an AP photograph of then-candidate Barack Obama.[54] How much of the photograph represents the AP photographer's original contribution, in which he or the AP has an exclusive right, and how much represents the event photographed itself, in which there is no such right?[55] The photographer surely doesn't own Obama's facial expression, for example, but perhaps he has a claim to capturing it from a certain angle and allowing for a certain amount of light.[56] It is difficult even for a copyright expert to locate where the photograph's originality begins; the typical user is hopeless.

In some ways, the boundaries of copyright are set by clearer rules, but the multiplicity of these rules only adds to the typical user's uncertainty concerning his rights. Copyright differs from both real property and patent in its use of finer-grained rules, enumerating the specific activities to which various parties may have a right—in Henry Smith's terminology, copyright employs less of a rough-and-ready exclusion strategy for delineating rights and more of a governance strategy.[57] The advantage of a governance regime in theory is that it can in its precision delineate a more efficient assignment of entitlements, though the particular assignments in copyright reflect political compromise more than social welfare.[58] The disadvantage is that information costs increase as we move from a simple exclusion rule—Henry can exclude all others from his property, and all others know that they may not enter the property without needing to know that Henry owns it—to finer-grained

53 Tom Stoppard, *Rosencrantz and Guildenstern Are Dead* (Grove 1967).

54 See notes 6–9.

55 On this, see Post, *AP, Copyright Infringement, and the Hope Poster* (cited in note 9); Randy Picker, *Fairey v Associated Press: Yes He Can*, The University of Chicago Law School Faculty Blog (Feb 10, 2009), online at http://uchicagolaw.typepad.com/faculty/2009/02/fairey-v-associated-press-yes-he-can.html (visited Nov 5, 2011).

56 See, for example, *Burrow-Giles Lithographic Co v Sarony*, 111 US 53, 60 (1884) (holding that a photographer's picture of Oscar Wilde was copyrightable due to the "harmonious, characteristic, and graceful" quality that was created by posing Wilde in a manner that was the photographer's "own original mental conception").

57 See Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 Yale L J 1742, 1799–1806 (2007). See also Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J Legal Stud S453, S455–56 (2002).

58 See Smith, 116 Yale L J at 1785 (cited in note 57).

assignments of particular rights.[59] It becomes more difficult, and thus more expensive, to figure out what one is permitted to do.

In practice, as a governance strategy increases the information costs of understanding the assignment of rights, even where such rights would be clear to an expert for example, users become unable to predict whether the law would permit their uses of copyrighted works because it is too costly to figure it out. Users are unlikely to know, for example, that they may record (without the permission of the copyright holder) their own versions of previously released musical compositions for a small, fixed rate per copy,[60] but only if the composition is "nondramatic"[61] and only if they provide proper notice before distributing their version.[62] Nor are they likely to know when their performance of a song crosses the line from private (permitted) to public (prohibited),[63] nor that they are free to publicly perform sound recordings so long as the underlying musical composition is in the public domain but not otherwise.[64] And the use-based assignment of rights can be remarkably specific: under § 110(5)(B), if an establishment "other than a food service or drinking establishment" publicly performs a copyrighted "nondramatic musical work" by retransmitting a broadcast by a radio station "licensed as such by the Federal Communications Commission," that establishment does not infringe the copyright holder's exclusive right to publicly perform his work, provided, however, that the establishment is under two-thousand gross feet of space, excluding parking, or the work is performed on no more than six loudspeakers or four audiovisual devices.[65] With such incredible granularity in the assignment of entitlements, it becomes expensive for the typical user

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59 See id at 1784.

60 The Copyright Royalty Board has set the rate at the greater of 9.1 cents per copy or 1.75 cents per minute of playing time. 37 CFR § 385.3(a).

61 17 USC § 115(a)(1). For a discussion of the distinction between dramatic and nondramatic works, see Howard B. Abrams, 1 *The Law of Copyright* § 2:39 at 2-128 (West 2010).

62 17 USC § 115(b).

63 17 USC § 106(4). For a recent analysis of the public performance right, see Gary Myers and George Howard, *The Future of Music: Reconfiguring Public Performance Rights*, 17 J Intel Prop L 207, 218–24 (2010).

64 There is no general public performance right in sound recordings. 17 USC § 106(4). To complicate things further, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995, Pub L No 104-39, 109 Stat 336, codified as amended in various sections of Title 17, which among other things provides the exclusive right "to perform [copyrighted sound recordings] publicly by means of a digital audio transmission." 17 USC § 106(6). See also Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 Harv J L & Tech 233, 236 (2007).

65 17 USC § 110(5)(B). This exception even limits the *size* of televisions. See 17 USC § 110(5)(B)(i)(II).

to determine his rights, and it thus becomes difficult to predict at reasonable cost whether he would face liability for infringement. And thus far, I have avoided the most notorious aspect of copyright's governance strategy—the fair use doctrine—which often leaves even well-counseled users in the dark.

Delineation by governance increases uncertainty in other ways that have little to do with information costs. For example, the proliferation of use-based entitlements in a governance regime can lead to interpretive ambiguity and conflict. Suppose that Tom owns a plot of land called Tom's Park. In an exclusion regime, no one but Tom may do anything in Tom's Park without Tom's permission, and thus whether Tom's right is violated is a simple question.[66] The exclusion strategy requires for the interpretation of claims to legal entitlement only an understanding of the property and whether its boundaries were crossed. To borrow a classic example,[67] suppose instead that the relevant park is open to all, with the one use-based exception that no vehicles may be used in the park. Even with just one use-based rule to structure entitlement, interpretation becomes more challenging, since it is not necessarily clear what counts as a vehicle for the purposes of the rule.[68] Consider the interpretive ambiguity of "nondramatic" above.

Interpretive ambiguity is just the beginning. With each additional use-based entitlement, the possibility for conflict among claims to entitlement increases,[69] and it takes a Hercules to sort it all out.[70] One example of such conflict arises as a result of the competing entitlements under the fair use doctrine and the Visual Artists Rights Act of 1990[71] (VARA). Under VARA, a visual artist has the right to prevent any intentional mutilation of his work that would be prejudicial to his honor or reputation, but the fair use doctrine gives users the right to parody a copyrighted work—and one way to

66 Even traditional property law has exceptions. For example, the general right to exclude is relaxed in situations of necessity. See *Ploof v Putnam*, 71 A 188 (Vt 1908).

67 With apologies to H.L.A. Hart, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593, 607 (1958).

68 Lon Fuller explains that there is no context-independent meaning of the words we use to structure legal entitlements. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv L Rev 630, 662 (1958) (explaining that words "have a penumbra of meaning which, unlike the core, will vary from context to context").

69 This point is the legal realists'. See generally, for example, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand L Rev 395 (1950).

70 Hercules is Ronald Dworkin's ideal judge who constructs theories to fit and justify the law in order to arrive at the right answer in hard cases. He is "a lawyer of superhuman skill, learning, patience and acumen." See Ronald Dworkin, *Hard Cases*, 88 Harv L Rev 1057, 1083 (1975).

71 Pub L 101-650, 104 Stat 5128 (1990), codified in various sections of Title 17.

parody a work is to mutilate the original. How would a court adjudicate these competing claims?[72] The conflict is hardly resolved by the fact that VARA makes the artist's right "subject to section 107 [fair use],"[73] for the question remains how broadly to construe fair use. The House Judiciary Committee that reviewed VARA did "not want to preclude fair use" but thought it

> unlikely that such claims will be appropriate given the limited number of works covered by the Act, and given that the modification of a single copy or limited edition of a work of visual art has different implications for the fair use doctrine than does an act involving a work reproduced in potentially unlimited copies.[74]

Legislative history doesn't control the resolution of this conflict[75]—and good luck to users seeking to understand their rights if it did[76]—but it does neatly outline the competing interests in play. In short, where use-based entitlements conflict, it is very hard to predict how a court would adjudicate a dispute and thus what a potential user is permitted to do.

Before he even considers the possibility of affirmative defenses such as fair use, the potential user faces uncertainty in the scope of copyright's protection and therefore in whether a planned use would infringe. Of course this uncertainty affects the copyright holder as well, but the most salient of a copyright holder's concerns—namely, whether he has a strong copyright to protect against market substitution—is clear enough, whereas the potential user's most salient concerns—what he can use and how—are opaque.

2. Fair use and other affirmative defenses.

A planned use that would otherwise infringe may be privileged under the fair use doctrine or some other affirmative defense. Fair

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72 This conflict is recognized in William F. Patry, 5 *Patry on Copyright* § 16:35 at 16-70 to 16-71 (West 2011). See also Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 Cardozo Arts & Enter L J 79, 99–103 (1996).

73 VARA § 603, 17 USC § 106A(a).

74 Visual Artists Rights Act of 1990, HR Rep No 101-514, 101st Cong, 2d Sess 22 (1990), reprinted in 1990 USCCAN 6915, 6932.

75 See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 684–89 (1997).

76 Adrian Vermeule explains why even judges are incompetent to deduce rules from legislative history. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 Stan L Rev 1833, 1879 (1998).

use is among the most studied areas of copyright,[77] and also the most unpredictable. Lawrence Lessig famously says that "fair use in America simply means the right to hire a lawyer to defend your right to create."[78] The doctrine is not only inconsistently applied,[79] it lacks a coherent justificatory theory to guide its application.[80]

The potential user who consults the Copyright Act on the question will learn that "the fair use of a copyrighted work . . . is not an infringement of copyright,"[81] and the Act provides a list of relevant factors for the determination of whether a particular use should be deemed fair. These factors include "the purpose and character of the use," "the nature of the copyrighted work," "the amount and substantiality of the portion used," and "the effect of the use upon the potential market for or value of the copyrighted work."[82] Though these "fuzzball factors of fair use"[83] are meant to clarify the meaning of fairness in this context, if anything they do the opposite, for at least three reasons.

First, the factors are ambiguous. Take the last factor, which often is said to be the most important of the four:[84] the effect of the use on the potential market for the copyrighted work. This factor does not suggest a simple analysis of how the copyright holder has

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77 See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U Pa L Rev 549, 565 n 64 (2008) (noting that between 2000 and 2005 there were 3.3 law review articles with "fair use" *in their titles* for every judicial opinion on the subject).

78 Lessig, *Free Culture* at 187 (cited in note 1). See also R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 Fordham L Rev 423, 427 (2005) (describing the "'zone of uncertainty' between 'fair' and 'unfair' uses in the copyright context").

79 See Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv L Rev 1105, 1105 (1990) ("[T]hroughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values.").

80 See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv L Rev 1659, 1686–92 (1988). Not everyone thinks fair use is so hopeless. See, for example, Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L Rev 2537, 2541–43 (2009) (arguing that it is possible to predict fair use outcomes by organizing cases into "policy-relevant clusters"); Beebe, 156 U Pa L Rev at 622 (cited in note 77) ("Nevertheless, as a whole, the mass of nonleading cases has shown itself to be altogether worthy of being followed."). Even if Pamela Samuelson and Barton Beebe alone among experts have cracked fair use, there isn't much hope for users.

81 17 USC § 107.

82 17 USC § 107(1)–(4). It isn't clear whether the factors guide the analysis or whether judges reach a conclusion on fairness and then explain it in terms of the factors. See Nimmer, 66 L & Contemp Probs at 281 (cited in note 1).

83 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U Chi Legal F 207, 208 (1996).

84 See, for example, *Harper & Row*, 471 US at 566; *Robinson v Random House, Inc*, 877 F Supp 830, 842 & n 4, 843 (SDNY 1995). But see William F. Patry, *Patry on Fair Use* § 6.5 at 442–49 (West 2010) (arguing that the fourth factor is no more important than any of the others).

been harmed in his current commercial activities. The factor is both narrower in that the harms to a work's market caused by a scathing parody are not counted[85] and broader in that it concerns not only the markets a copyright holder has exploited but also those that he might.[86] But defining potential markets is dangerously circular if taken to its extreme; as Judge Pierre Leval explains, "[E]very fair use involves some loss of royalty revenue because the secondary user has not paid royalties."[87] Lying somewhere between the markets a copyright holder has exploited and all the possible markets that he might, the definition of the potential market is a tough question for courts and an impossible one for the potential user.

Second, the factors are incommensurable, as is typical of multifactored tests.[88] Because one can't just add a "purpose of the use" score to an "effect on the market" score, courts are left to weigh the importance of each factor separately. But the statute provides no guidance on the relative weight of each factor, and courts and scholars disagree as to whether the factors are to be given equal weight.[89] The Supreme Court's guidance is no more helpful than the statute. Having once suggested that the fourth factor "is undoubtedly the single most important element of fair use,"[90] the Court backpedaled nine years later to adopt a less determinate approach to balancing:

> The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in

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85 See, for example, *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 591–92 (1994) (giving the example of a "scathing theater review" as something that doesn't "produce a harm cognizable under the Copyright Act").

86 "The mere absence of measurable pecuniary damage does not require a finding of fair use." *Marcus v Rowley*, 695 F2d 1171, 1177 (9th Cir 1983) (finding that copying pages from a recipe book for a classroom project did not qualify as a fair use even though it had no effect on the market for the book).

87 Leval, 103 Harv L Rev at 1124 (cited in note 79) (explaining that the importance of the market effect test has been overstated because every fair use adversely affects what otherwise would have the market for licenses or derivative uses).

88 Consider *Menard, Inc v Commissioner of Internal Revenue*, 560 F3d 620, 622–23 (7th Cir 2009) (Posner) ("Multifactor tests with no weight assigned to any factor are bad enough from the standpoint of providing an objective basis for a judicial decision; multifactor tests when none of the factors is concrete are worse.") (citations omitted).

89 See sources cited in note 84. See also Beebe, 156 U Pa L Rev at 621 (cited in note 77):

> In practice, judges appear to apply section 107 in the form of a cognitively more familiar two-sided balancing test in which they weigh the strength of the defendant's justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff.

90 *Harper & Row*, 471 US at 566.

> isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.[91]

One might think that if all four factors pointed in the same direction, at least *then* a conclusion of fair use would be assured,[92] but even that is dubious because an unenumerated fifth (or sixth) factor may trump them all.[93]

Which leads to the third reason the factors fail to clarify the meaning of fair use: they are not exhaustive. Other factors have been suggested by commentators or employed by courts, such as whether the user gives the copyright holder credit or whether the use is in "good faith."[94] While it is true that the four statutory factors predominate in fair use decisions,[95] the ever-present possibility that a court will rely primarily on a factor not even mentioned in the statute makes it harder for users to predict whether their uses will be deemed fair.

Fair use is not the only defense on which users might rely to avoid liability—the most salient issue for users—but the others are hardly predictable in their application either. Both laches[96] and copyright misuse[97] allow the user to avoid liability based on the copyright holder's conduct—the former when the copyright holder has unreasonably delayed in asserting his rights, the latter when he has exaggerated his copyright to appropriate more than the law promises him. Laches turns on reasonableness, misuse on the violation of public policy, and on neither of these can the judgments of courts reliably be predicted. Thus, like fair use, they expand the scope of the potential user's rights but do so in an unpredictable way, injecting greater uncertainty into the most salient of the user's concerns.

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91 *Campbell*, 510 US at 577–78. This tension between *Harper* and *Campbell* suggests that even the Court is confused about fair use.

92 See *Arica Institute, Inc v Palmer*, 970 F2d 1067, 1079 (2d Cir 1992).

93 See *Peter Letterese & Associates, Inc v World Institute of Scientology Enterprises*, 533 F3d 1287, 1308 n 22 (11th Cir 2008) (noting "the possibility that specific factual circumstances may compel a conclusion that cuts against the grain of all four factors"); *Ty, Inc v Publications International Ltd*, 292 F3d 512, 522 (7th Cir 2002) (Posner).

94 See *Marcus*, 695 F2d at 1175–76 (attribution); *Time Incorporated v Bernard Geis Associates*, 293 F Supp 130, 146 (SDNY 1968) ("Fair use presupposes 'good faith and fair dealing.'"). See also Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 BU L Rev 41, 84 (2007) (attribution); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv L Rev 1137, 1138 (1990) (fairness).

95 Beebe, 156 U Pa L Rev at 607–08 (cited in note 77).

96 Laches has been endorsed in some circuits but not others. Compare *Lyons Partnership, LP v Morris Costumes, Inc*, 243 F3d 789, 798 (4th Cir 2001) (rejecting the defense), with *Danjaq LLC v Sony Corp*, 263 F3d 942, 955–56, 963 (9th Cir 2001) (endorsing it).

97 See, for example, *Lasercomb America, Inc v Reynolds*, 911 F2d 970, 976–77 (4th Cir 1990).

3. Damages.

From the copyright holder's perspective, damages for infringement have to be substantial *enough*, and reliably so, to compensate for losses and to deter the infringing conduct. The potential user by contrast cares more about the absolute value of a damages award. To know whether a given use is worth the risk of liability, the user wants to know how much liability he faces. The user's ideal system would employ flat fees per infringement, or at least damages tethered to something concrete, such as the user's profits or the actual harm to the copyright holder.

Copyright's remedial structure is not tethered to profits or harms; damages are wildly unpredictable and can vastly exceed any reasonable assessment of harm.[98] A successful plaintiff is entitled to his choice between (1) the sum of actual damages suffered and the disgorgement of the defendant's profits[99] or (2) statutory damages between $750 and $30,000 (up to $150,000 for willful infringement) per infringed work.[100] The Act provides no guidance as to how courts or juries[101] should choose an appropriate statutory damages award beyond a general appeal to "justice."[102] As one might expect, statutory damages do not follow a consistent pattern.

File-sharing litigation provides a useful example of how unpredictable copyright damages can be.[103] In the wake of Napster, the recording industry pursued a litigation campaign against individuals who shared music files on peer-to-peer networks.[104] Most

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98 See Melville B. Nimmer and David Nimmer, 4 *Nimmer on Copyright* § 14.04[E][1][a] at 14-95 to 14-96.8 (Matthew Bender 2011).

99 17 USC § 504(b). See also *McRoberts Software, Inc v Media 100, Inc*, 329 F3d 557, 573 (7th Cir 2003) (awarding actual damages and lost profits).

100 17 USC § 504(c).

101 See *Feltner v Columbia Pictures Television, Inc*, 523 US 340, 353 (1998) ("The [Seventh Amendment] right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner.") (emphasis omitted).

102 17 USC § 504(c)(1) (permitting the award of damages within the statutory range "as the court considers just"). The plaintiff can also defer his election between actual and statutory damages to any time before judgment, id, and so may ask the finder of fact to calculate both figures and choose the bigger one. See, for example, *Branch v Ogilvy & Mather, Inc*, 772 F Supp 1359, 1364 (SDNY 1991).

103 See Pamela Samuelson and Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U Pa L Rev PENNumbra 53, 54 (2009), online at http://www.pennumbra.com/debates/pdfs/CopyrightDamages.pdf (visited Nov 7, 2011).

104 See Electronic Frontier Foundation, *RIAA v. The People: Five Years Later* 1 (Sept 2008), online at https://www.eff.org/files/eff-riaa-whitepaper.pdf (visited Oct 27, 2011) (reporting that "the recording industry has filed, settled, or threatened legal actions against at least 30,000 individuals"); Recording Industry Association of America, Press Release, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online* (Sept 8, 2003), online at http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1 (visited Nov 7, 2011).

of these cases settled for relatively little,[105] and in the small number that did not, most courts awarded the minimum of $750 in statutory damages per song.[106] But there were at least two outliers. One was the trial against Jammie Thomas-Rasset, in which a Minnesota jury awarded over $1.5 million in statutory damages for infringing twenty-four songs.[107] The second (notable for the unorthodox defense tactics of Charles Nesson[108]) was a $675,000 award against Joel Tenenbaum for 30 songs.[109] File sharers are perhaps unsympathetic defendants, and they are not "potential users" for my purposes, but their example is nonetheless instructive: the outliers in damages awards were no different from the run-of-the-mill defendants in their conduct, and yet they were punished (in Thomas-Rasset's case) eighty times more severely per song, to say nothing of the relationship between these astronomical awards and the actual harm caused.[110] And file sharers are not alone in facing unpredictable damages awards. In a well-known example, a jury on remand from the Supreme Court's decision in *Feltner v Columbia Pictures*

105 See Samuelson and Sheffner, 158 U Pa L Rev PENNumbra at 54 (cited in note 103).

106 Id.

107 See id at 56. This was the third jury award. The first award of $222,000 was thrown out because of bad jury instructions. See *Capitol Records Inc v Thomas*, 579 F Supp 2d 1210, 1226–27 (D Minn 2008). The district judge remitted the second, $1.9 million award to $54,000 because the jury's award was "simply shocking." *Capitol Records Inc v Thomas-Rasset*, 680 F Supp 2d 1045, 1054 (D Minn 2010). But the defendant refused to accept the remittitur, leading to a third trial and the $1.5 million award, which the district court recently reduced as inconsistent with due process. See *Capitol Records, Inc v Thomas-Rasset*, 799 F Supp 2d 999, *34 (D Minn 2011).

108 The tactics included blogging about the (negative) opinions he had received from experts regarding the trial, recording phone conferences with the judge, and playing with a pile of tiny pieces of foam in front of the jury in his opening statements to demonstrate the shift from a world of concrete intellectual products (compact discs, for example) to a world of bits. See John Schwartz, *Tilting at Internet Barriers, A Stalwart Is Upended*, NY Times A11 (Aug 11, 2009). I was in the courtroom to see the opening statement, and it was surreal.

109 See Samuelson and Sheffner, 158 U Pa L Rev PENNumbra at 53 (cited in note 103); Joseph P. Khan, *Why Last Month's $675,000 Judgment against a BU Student Won't Stop People from Downloading Songs Illegally*, Boston Globe G10 (Aug 25, 2009). The damages award in Tenenbaum's case, too, was reduced by the district court. See *Sony BMG Music Entertainment v Tenenbaum*, 721 F Supp 2d 85, 121 (D Mass 2010). But the district court's order was reduced by the First Circuit on the ground that the district court improperly addressed the constitutionality of the award before considering common law remittitur. See *Sony BMG Music Entertainment v Tenenbaum*, 660 F3d 487, 507–08 (1st Cir 2011).

110 Litigants and scholars have argued that massive statutory damages awards violate due process. See, for example, Samuelson and Wheatland, 51 Wm & Mary L Rev at 480–91 (cited in note 4). But see Colin Morrissey, Note, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 Fordham L Rev 3059, 3094–99 (2010). When first introduced, these arguments did not gain much traction in the courts. See, for example, *Zomba Enterprises, Inc v Panorama Records, Inc*, 491 F3d 574, 586–87 (6th Cir 2007). But they have seen some recent successes, including in Thomas-Rasset's own case. See, for example, *Capitol Records*, 799 F Supp 2d at *2–3; *Sony BMG Music Entertainment*, 721 F Supp 2d at 121, revd *Sony BMG Music Entertainment*, 660 F3d at 508.

Television, Inc[111] subjected the owner of a television broadcasting company to $31.68 million in damages, almost quadrupling the district judge's original award.[112]

The Nimmer treatise explains that "absent any nexus between damage to plaintiff and benefit to defendant at any magnitude even roughly comparable to that awarded, the result is to introduce randomness or worse into the litigation calculus."[113] A potential user deciding whether to create something that relies on a copyrighted work must consider the random and potentially crushing statutory damages to which he may be subject. The randomness of damages awards renders uncertain a core concern for the potential user, namely, how much infringement is likely to cost him.

C. Asymmetric Uncertainty

For all the most salient questions facing a copyright holder, the answers are reasonably certain. Most of the time, he can be sure that he has a secure copyright, that it protects against the most troubling uses of his work, and that copyright's remedial framework will provide sufficient protection to deter unlawful activities and compensate him for his losses. But the potential user, who wishes to use preexisting materials in the production of new creative work, faces great uncertainty. He cannot hope to compare in any serious way the value of creating the work with unpredictable damages discounted by the unpredictable likelihood of liability. This dynamic is one of asymmetric uncertainty—potential users disproportionately bear the burden of copyright's uncertainty.

II. ECONOMICS AND THE ASYMMETRY OF RISK

Critics decry copyright's uncertainty, arguing that it leads users to forgo socially valuable expression.[114] Sometimes the criticism confounds certainty with scope—disagreements with copyright's extension into a particular domain are cloaked in complaints about clarity—but attending to that distinction is crucial. In this Part, I argue that, holding scope constant, copyright's asymmetric uncertainty may in fact promote rather than inhibit creative production. The primary reason is that this asymmetry closely tracks the asymmetric risk preferences of the relevant players, as described

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111 523 US 340 (1998).

112 See *Columbia Pictures Television v Krypton Broadcasting of Birmingham, Inc*, 259 F3d 1186, 1190 (9th Cir 2001).

113 Nimmer and Nimmer, 4 *Nimmer on Copyright* § 14.04[E][1][a] at 14-95 to 14-96 (cited in note 98).

114 See note 5.

by the leading account of decision making under uncertainty.[115] Would-be copyright holders who hope to profit from their expressive work want as much certainty as possible, so the incentive effect for any level of copyright protection is enhanced by increasing clarity in areas salient to them. But risk-seeking users—the objects of potential liability—are likely to use more copyrighted expression if the doctrines of access are murky.[116] The reasons require elaboration, but first I provide some background on copyright's economics and on the theory of behavior on which my analysis relies.

A. The Conventional View: Overdeterrence

The copyright system grants limited monopolies to creators of original works of expression in order to encourage production.[117] Copyright incentives are thought necessary because expression is a public good: it is both nonrival (the marginal cost of production is zero) and nonexcludable (once revealed, it cannot be contained).[118] Copyrights are limited both because government-sponsored monopolies are restrictions on freedom, including the freedom of speech, and because new expressive works necessarily build on prior ones, so at some point stronger copyright inhibits rather than promotes cultural production. The core problem of copyright law is how best to

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115 "Leading account" is probably controversial, but Daniel Kahneman and Amos Tversky, on whose pathbreaking "prospect theory" I principally rely, wrote the book on judgment under uncertainty. See generally Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under Uncertainty: Heuristics and Biases* (Cambridge 1982); Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 Econometrica 263, 263 (1979). For accounts of the value of prospect theory for legal analysis, see, for example, Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan L Rev 1471, 1535–36 (1998); Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 Nw U L Rev 1115, 1120–55 (2003).

116 Prospect theory holds that outcomes are evaluated according to some baseline reference point. Here, I take copyright holders seeking gains in the form of potential revenue streams and users as facing losses in the form of potential liability. The conventional argument assumes precisely this baseline—that users are overdeterred in light of what they perceive to be crushing losses—and for that reason, I don't explore whether it is correct. I think it likely is, but I am content for present purposes to make the same empirical assumption that others do.

117 Thomas Jefferson's account here is a classic one. See Letter from Thomas Jefferson to Isaac McPherson (Aug 13, 1813), in Andrew A. Lipscomb, ed, 13 *The Writings of Thomas Jefferson* 326, 334 (Jefferson Memorial Association 1903) ("Society may give an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society.").

118 See Note, *Designing the Public Domain*, 122 Harv L Rev 1489, 1492–93 (2009); Benkler, *The Wealth of Networks* at 35–37 (cited in note 10).

balance encouraging production of expressive works with providing access to them.[119]

Typically, debates over copyright's access-incentives balance focus on the optimal scope of entitlements. Should the copyright holder's exclusive rights extend to unforeseeable forms of derivative works;[120] or to private, noncommercial expression;[121] or to copies or derivative works produced (for example) sixty-nine years after an author's death?[122] Answering these important questions requires balancing the additional incentive effect of broader copyright scope against restraints on access to expressive works. Copyright's optimal level and distribution of uncertainty is distinct from its optimal scope, however, and throughout the discussion that follows, I take the current copyright scope as given. The question is, holding scope constant, how much uncertainty ought we to permit and where.

To make this idea of holding scope constant concrete, it helps to think of copyright scope as an expected value.[123] Suppose that fair use doctrine were to adjudicate the permissibility of use based only on the percentage of the copyrighted work used, and suppose that under the current system, half the time courts permit the use of 75 percent of a work and half the time courts permit 25 percent of a work. The outcome in any case is uncertain, but the expected value is clear enough—users can expect on average to have access to 50 percent of a copyrighted work. One intervention to increase certainty but maintain scope would be to craft a flat rule permitting users to use 50 percent of any copyrighted work. The scope would remain constant but the outcome in each case would be certain. Expressed in these terms, the question is whether making judicial decisions more predictable while maintaining the expected value of user entitlements will increase access to copyrighted works.

Conventional wisdom says yes, for copyright's uncertainty inhibits user access. Commentators argue that users who are unsure which uses are lawful are likely to err on the side of overcompliance,

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119 See Landes and Posner, *Economic Structure of Intellectual Property Law* at 22–24 (cited in note 10); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv L Rev 1569, 1578 (2009). But see Christopher A. Cotropia and James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L Rev 921, 925–38 (2010); Glynn S. Lunney Jr, *Reexamining Copyright's Incentives-Access Paradigm*, 49 Vand L Rev 483, 554–71 (1996) (arguing against the access/incentives paradigm).

120 See Balganesh, 122 Harv L Rev at 1572–74 (cited in note 119).

121 Lessig, *Remix* at 266–68 (cited in note 43).

122 *Eldred v Ashcroft*, 537 US 186, 193 (2003).

123 Expected value is the probability-weighted average of possible values for some variable. See Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal L Rev 1051, 1062–64 (2000).

particularly in light of copyright's impressive remedies.[124] What is worse, some argue, is that this effect is iterative; user caution shifts the baseline of permissible uses in copyright holders' favor, and cautious users stay further away from it, and so on.[125] By "overdeterring" the use of copyrighted works, copyright's uncertainty silences those who might produce valuable new works and thwarts the goal of promoting expressive activity.

The literature is rife with proposals to remedy copyright's uncertainty in order to increase access to copyrighted works.[126] Prominent among them is Gideon Parchomovsky and Kevin Goldman's suggested "fair use harbors," safe harbors that would guarantee the fair use privilege for certain classes of users or uses under clearly defined circumstances.[127] The theory is that we can promote efficient access by providing predictable, low-level immunities for a subset of fair uses, even if we are unwilling to jettison the flexibility that current doctrine provides for the hard cases. In its minimalism the theory aims to protect with bright lines only a very restrictive set of uses—such as 300 or fewer words of a literary work[128]—which in most cases would be uncontroversial fair uses even under the current system. The underlying assumption is that users are deterred by copyright's uncertainty even where the outcome of litigation would be most predictable. Other proposed interventions include a greater role for cheap administrative decision making[129] or a reduction of the number of factors considered in the fair use inquiry.[130]

Focused as they are on uncertainty borne by potential users, these proposals rely on a common behavioral premise: potential users are less likely to use copyrighted works when the law governing use is uncertain. This premise does not assume user rationality. "Overdeterrence" means that users avoid using copyrighted works even where the benefits of use outweigh the costs of potential

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124 See sources cited in note 5.

125 See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L J 882, 887 (2007); Wagner, 74 Fordham L Rev at 429–31 (cited in note 78).

126 Not all the proposals focus on the content of copyright law. See, for example, Carroll, 85 NC L Rev at 1123–28 (cited in note 5) (proposing that the Copyright Office issue advisory opinions on fair use).

127 See Parchomovsky and Goldman, 93 Va L Rev at 1510–18 (cited in note 5). See also Fagundes, 50 BC L Rev at 176–77 (cited in note 1) (endorsing fair use harbors).

128 See Parchomovsky and Goldman, 93 Va L Rev at 1511 (cited in note 5).

129 See Carroll, 85 NC L Rev at 1147 (cited in note 5); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 Cardozo Arts & Enter L J 11, 12–15 (2006).

130 See Joseph P. Liu, *Two-Factor Fair Use?*, 31 Colum J L & Arts 571, 572, 578–80 (2008); Wagner, 74 Fordham L Rev at 434 (cited in note 78).

liability.[131] If users were assumed rational, Parchomovsky and Goldman's suggested immunity for largely uncontroversial fair uses would be inconsequential, for rational users would not hesitate to do what is doubtless permissible. Gibson's iterative theory of rights accretion is based on a combination of deterrence and psychological adjustment to a new salient baseline.[132] Sometimes without acknowledging doing so, commentators in this area have already abandoned rational choice in favor of a more nuanced account of behavior.

Why should this abandonment of rationality matter? In economics, rationality is nothing more than a simplifying assumption[133]—the more complicated you imagine actors in a system to be, the more difficult it is to predict how they will act. By assuming that actors in the copyright system are subject to overdeterrence or anchoring, commentators discard parsimony in search of greater predictive accuracy. I, too, rely on behavioral premises that are more complex than the standard rational actor model to argue that uncertainty doesn't inhibit and may actually promote access to copyrighted works. Because both the conventional account and my own go beyond conventional rational choice, one cannot adjudicate between the two on parsimony alone. The controversy turns on which account is more likely to track actual behavior.

The core behavioral premise of the conventional argument is that, all else equal, a potential user is less likely to use a copyrighted work when it is more difficult to predict whether his use would be deemed lawful. Whether the conventional behavioral premise is correct depends on how users and copyright holders alike respond to uncertainty. This is most obvious in licensing where negotiations are structured by the perceived value of the entitlement at issue, but it's true outside licensing as well: the use that relies on copyright law (for example, fair use) depends on the user's predictions of both his chances in court and the copyright holder's likelihood of litigating the issue, for even a user who believes he would win will often forgo a use that is likely to cost him an expensive battle in court.

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131 See Parchomovsky and Goldman, 93 Va L Rev at 1498 (cited in note 5).

132 See Gibson, 116 Yale L J at 898–900 (cited in note 125).

133 See Note, 122 Harv L Rev at 1496 (cited in note 118).

B. Prospect Theory

One tool for understanding how uncertainty shapes incentives is Kahneman and Tversky's prospect theory,[134] the principles of which have been demonstrated in myriad experimental settings and earned Kahneman a Nobel Prize.[135] According to the theory, people evaluate choices not in absolute terms but in their divergence from a reference point.[136] For example, those selling their homes tend to consider not "What is the fair market value of this house?" but instead "How much would I accept to sell this house that I bought for *X*, lived in for so many years, and now owe *Y* on?" Both losses and gains from a given reference point have a diminishing marginal effect: people value the first $1,000 they win in a raffle more than the second, just as they fear the first $1,000 in car repair costs more than the second.[137] Losses and gains are not felt equally, however. The (negative) value of the prospect of a loss is greater than the (positive) value of the prospect of an identical gain.[138]

Prospect theory's more significant asymmetry for my purposes relates to risk sensitivity. People tend to be risk seeking for potential losses and risk averse for potential gains,[139] except when the stakes are low.[140] Roughly speaking, this means that people tend to prefer

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134 See generally Kahneman and Tversky, 47 Econometrica 263 (cited in note 115). See also generally Daniel Kahneman and Amos Tversky, *Choices, Values and Frames*, in Daniel Kahneman and Amos Tversky, eds, *Choices, Values, and Frames* 1 (Cambridge 2000); Amos Tversky and Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J Risk & Uncertainty 297 (1992); George Wu, Jiao Zhang, and Richard Gonzales, *Decision under Risk*, in Derek J. Koehler and Nigel Harvey, eds, *Blackwell Handbook of Judgment and Decision Making* 399 (Blackwell 2004).

135 Kahneman won the 2002 Nobel Prize in Economics for his work. See *Daniel Kahneman, Autobiography* (The Nobel Foundation 2002), online at http://nobelprize.org/nobel_prizes/economics/laureates/2002/kahneman.html (visited Nov 7, 2011).

136 See Kahneman and Tversky, 47 Econometrica at 277 (cited in note 115).

137 In Kahneman and Tversky's terms, "the value function for changes of wealth is normally concave above the reference point . . . and often convex below it." Id at 278.

138 See id at 279 ("[T]he value function for losses is steeper than the value function for gains."). The phenomenon is called "loss aversion." See Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Persp 193, 199–203 (1991).

139 See Kahneman and Tversky, 47 Econometrica at 269 (cited in note 115).

140 In their initial work, Kahneman and Tversky identified a gain-loss dichotomy for risk attitudes. See id. Later work culminating in "cumulative prospect theory" revealed a fourfold pattern of risk attitudes, however. People are risk averse for moderate or large gains, and risk seeking for moderate or large losses. But when the stakes are low, attitudes reverse: people become risk seeking for small gains and risk averse for small losses. See Tversky and Kahneman, 5 J Risk & Uncertainty at 306 (cited in note 134). See also Amos Tversky and Peter Wakker, *Risk Attitudes and Decision Weights*, 63 Econometrica 1255, 1256–57 (1995) (describing the fourfold pattern and collecting empirical sources); George Wu and Richard Gonzalez, *Curvature of the Probability Weighting Function*, 42 Mgmt Sci 1676, 1676–77 (1996) (noting the fourfold pattern); Antoni Bosch-Domènech and Joaquim Silvestre, *Reflections on*

risking a 50 percent chance of losing $1,200 over a 100 percent chance of losing $500, even though they will lose $600 rather than $500 on average. Conversely, people tend to prefer a 100 percent chance of gaining $500 over a 50 percent chance of gaining $1,200, even though this means choosing an expected $500 gain over an expected $600 gain.[141]

This asymmetric sensitivity suggests that the optimal distribution of uncertainty in the copyright system is an asymmetric one.[142] Those seeking gains from copyright—the copyright holders—overvalue certainty: a right affording less protection may be preferred to a more protective right if the former is more predictable. In other words, the same (expected value of a) carrot is more valuable to a risk-averse actor when it is reliably awarded. So copyright's clarity in areas salient to copyright holders enhances incentives. By contrast, those who see copyright as an impediment and want only to avoid liability—the potential users—are risk seekers: holding copyright's scope constant, they prefer uncertainty. The same (expected value of a) stick is less daunting to a risk-seeking actor when it is uncertain. Because users are risk seekers, uncertainty in areas salient to them may promote access. It may also promote access by making copyright holders discount their entitlements to exclude uses at the boundaries of their entitlement and thus charge less for licenses and litigate less often. These points require elaboration, but they combine to cast doubt on the conventional argument that uncertainty inhibits access. Asymmetric uncertainty may be the best response to asymmetric sensitivity to risk.

Gains and Losses: A 2 x 2 x 7 Experiment, 33 J Risk & Uncertainty 217, 225–27 (2006) (confirming the basic risk attitudes described by prospect theory but suggesting that attitudes may be shaped more by the amount of money in play than whether one faces a gain or a loss). Because the financial stakes in copyright suits are probably at least moderate and often high, I rely on the simple gain-loss dichotomy that applies to such situations.

For other legal applications of prospect theory, see Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U Chi L Rev 163, 167–70 (2000); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S Cal L Rev 113, 128–30 (1996). See also generally Guthrie, 97 Nw U L Rev 1115 (cited in note 115) (reviewing applications).

141 The numbers here are stylized for exposition, but it is more accurate to say the risk seeker prefers a 50 percent chance of losing $1,000 to a certain loss of $500, whereas a risk-neutral person would not distinguish between the two.

142 I am eliding somewhat the distinction between risk and uncertainty, where risk represents a known probability of an event's occurrence and uncertainty an ambiguous probability. See, for example, Frank H. Knight, *Risk, Uncertainty and Profit* 19–20, 197–232 (Cambridge 1921). In any event, choice under uncertainty follows many of the same patterns as choice under risk. See Tversky and Kahneman, 5 J Risk & Uncertainty at 316 (cited in note 134). See also Marco Lauriola and Irwin P. Levin, *Relating Individual Differences in Attitude toward Ambiguity to Risky Choices*, 14 J Behav Dec Making 107, 120–21 (2001).

C. Salient Clarity for Optimal Incentives

The prospect of a gain is more valuable when it is certain than when it is probabilistic, so copyrights are most potent (buying the most incentive effect for any given scope of protection) when they are clear. And they *are* clear, at least in areas most salient to copyright holders.[143] But why stop there? One might be tempted to conclude that greater clarity always has a meaningful effect on incentives. That would be a mistake. Some features of copyright protection are more important—in particular, more likely to be a primary source of revenue—to copyright holders than others, and clarity matters more for the important features than for the unimportant ones.

Incentives operate ex ante: copyright aims to get people to produce works they otherwise would not. To design optimal incentives, we need to consider the motivations of the copyright holder before he creates his work. The novelist who depends on copyright[144] imagines making money by selling novels or by selling the right to sell novels. The recording artist expects to make money by selling recordings, or again by selling that right. Licensing for derivative works[145]—the book that becomes a movie, for example—can be lucrative, but the producer of a work rarely expects to make much of his money on derivative uses. And the typical recording artist would never imagine cashing in by selling the right to use a two-second clip from his song in the background of a new recording.[146] The copyright holder's right to exclude others from using his expression in novel applications is unclear, but it is also not a salient concern ex ante. Because the right isn't salient, providing clarity isn't likely to make much difference in incentives.

This distinction between interventions that meaningfully affect ex ante incentives and those that do not is hardly novel. It was central to Justice Stephen Breyer's dissent in *Eldred v Ashcroft*,[147] for example. There the Supreme Court considered the constitutionality of a statute that extended copyright's term of protection from fifty to seventy years after the death of the author. Breyer argued that, because the extension provided royalties long after an author's death

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143 See Part I.A.

144 Again, recall that not all information producers rely on an exclusion strategy. See Benkler, *The Wealth of Networks* at 41–48 (cited in note 10).

145 See 17 USC § 103. See also 17 USC § 101.

146 There is cash to be had. See, for example, *Bridgeport Music, Inc v Dimension Films*, 410 F3d 792, 796, 809–10 (6th Cir 2005) (upholding the district court's judgment granting an award of $41,813.30 against the defendant, who used seven seconds of plaintiff's song without his permission).

147 537 US 186 (2003).

and affected no more than about 1 percent of all works (the few with long-lasting commercial value), the statute could not be thought to encourage production ex ante.[148] Shyamkrishna Balganesh similarly argues that the author should control only those uses of his work that he could have foreseen when he created it; the scope of the entitlement should be tied to the imaginable revenue streams that could have affected the author's incentives to produce.[149] He believes, for example, that the copyright to a novel from 1970 shouldn't cover a 1998 computer video game based on that novel, since income from derivative computer games could not have affected the novelist's decision to write.[150] Whether Breyer and Balganesh are correct about the implications of salient incentives, the virtue common to both is a focus on the areas where copyright actually makes a difference: for Breyer, near-term exclusion and, for Balganesh, the foreseeable uses of a work. Broader—or, more relevant here, clearer—rules buy meaningful incentives only when they concern issues salient to copyright holders.

An important wrinkle, however, is that while the salient features of a copyright holder's entitlement are clear, the reward he desires is not. The copyright itself is not the incentive that drives production. Most copyrights are worthless.[151] The real incentive is the chance to make money by selling a work exclusively, or by licensing others to do the same—what Christopher Buccafusco and Christopher Sprigman describe as the "the probabilistic value of the rents that an owner can obtain from holding the right to a given work."[152] This reward is and will be uncertain regardless of the clarity of copyright entitlements. Many copyright-dependent industries have a few blockbusters and a long tail of failures and modest successes,[153] and it is impossible to predict which works will become blockbusters because popularity depends not only on a work's quality but also on contingent features of the social network into which it is

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148 Id at 255 (Breyer dissenting) ("What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?"). Of course, the majority did not expressly disagree.

149 See Balganesh, 122 Harv L Rev at 1603 (cited in note 119) (proposing a new test of "foreseeable copying").

150 Id at 1614.

151 Anything is copyrighted once fixed, and there are no buyers for the vast majority of works.

152 Christopher Buccafusco and Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 Cornell L Rev 1, 17–18 (2010).

153 See Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 Am U L Rev 845, 855 (2006) ("The distribution of rewards from both cultural and technological innovation is highly skew.").

introduced.[154] Such deep uncertainty might appear to cast into doubt the claim that US copyright capitalizes on risk aversion by providing predictable entitlements—there is just too much risk inherent in creative industries to encourage risk-averse actors to do much of anything.

But by reducing uncertainty in entitlements, copyright does what it can to maximize their incentive effect; market risk is beyond its control. Anyway, producers are likely to be overly optimistic on average about the chances that their works will be commercially successful,[155] in part because the only visible works and artists are the successful ones.[156] The long tail disappears into obscurity. A producer who believes his work will be special (thus discounting the risk of commercial failure) wants to be sure that his special work will be reliably protected, and copyright law provides assurance in its salient clarity.

D. Risk-Averse Copyright Holders and User Access

Copyright holders value certainty, and for this reason clarity in salient areas increases incentives to produce expressive works. Perhaps more interestingly, uncertainty in areas less salient to copyright holders increases user access. Access is in part a function of the price—either the expected cost of litigation (including liability) or the cost of a license. Both of these, in turn, depend on the copyright holder's valuation of his right to bar a particular use, for he is more likely to sue or to demand a substantial royalty the higher he values the right. But uncertainty in the doctrines of user access leads copyright holders to "undervalue"[157] their right to block such access, which makes access cheaper. This conclusion follows

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154 See Michal Shur-Ofry, *Popularity as a Factor in Copyright Law*, 59 U Toronto L J 525, 533 (2009).

155 See David A. Armor and Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in Thomas Gilovich, Dale Griffin, and Daniel Kahneman, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* 334, 334 (Cambridge 2002) ("By a number of metrics and across a variety of domains, people have been found to assign higher probabilities to their attainment of desirable outcomes than either objective criteria or logical analysis warrants."); Jolls, Sunstein, and Thaler, 50 Stan L Rev at 1524–25 (cited in note 115) (discussing the relationship between this phenomenon and hindsight bias). See also Buccafusco and Sprigman, 96 Cornell L Rev at 27 (cited in note 152).

156 The phenomenon of overestimating the probability of salient events is referred to as the availability heuristic. See Amos Tversky and Daniel Kahneman, *Judgment and Uncertainty*, in Kahneman, Slovic, and Tversky, *Judgment under Uncertainty* 1, 11 (cited in note 115).

157 I do not intend to make a normative judgment that the copyright holder's discount is irrational. Some argue that heuristics and biases are adaptive. See generally Gerd Gigerenzer, *Adaptive Thinking: Rationality in the Real World* (Oxford 2000); Gerd Gigerenzer, Peter M. Todd, and the ABC Research Group, *Simple Heuristics That Make Us Smart* (Oxford 1999).

from the general observation that probabilistic gains—here, the gains from the copyright holder's entitlement—are less highly valued than certain ones. If copyright law were amended to adjudicate disputes over transformative uses more predictably, the copyright holder would value more highly the entitlement to exclude others from engaging in such uses, even if the amendment did not affect the expected value of any given suit.

Uncertainty decreases the felt value of the copyright holder's entitlement to exclude derivative uses, holding the scope of copyright constant. When copyright holders discount their right to exclude potential users, users enjoy greater access. This effect is clearest in the licensing context, where the price of a license depends directly on the owner's valuation. If uncertainty decreases a copyright holder's valuation, then it lowers the price he will demand for a license to use his work. The price of a license is lower in an uncertain regime than a clear one even if the scope of the right is held constant. Cheaper licenses mean more licensed uses, which means greater access to copyrighted works.

In addition to increasing access, the uncertainty discount in the licensing market has the fortunate consequence of limiting judicial intervention. Begin with Wendy Gordon's classic argument that fair use is a solution to market failure.[158] Whether in copyright or property, the standard route to lawful access or use is permission: I could ask the state to take part of your property for my economic revitalization project,[159] but more commonly I would pay you for your permission or for your property. But sometimes licensing isn't an option, even when a license would be socially desirable, for example where the cost to the owner of permitting a use is less than society would pay for it, if only the interested parties could be organized to do so.[160] Fair use is a kind of regulatory intervention aimed at correcting such market failures.[161] By increasing the availability of licenses, uncertainty reduces the number of cases in which intervention is sought or needed. This observation is further

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158 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, 1614–15 (1982).

159 See *Kelo v City of New London*, 545 US 469, 489–90 (2005) (allowing the City of New London to use the power of eminent domain to acquire property in order to further the city's goal of revitalizing the city).

160 This is a familiar story, in which private ordering of property through contract becomes too expensive, justifying a liability rule. See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1106–10 (1972). The "liability rule" for fair uses is a bargain, providing access for $0.

161 See Stephen Breyer, *Regulation and Its Reform* 7 (Harvard 1982).

supported by the argument that muddy rules make it more difficult for a copyright holder to drive a hard bargain: when the outcome of copyright litigation is hard to predict, owners may feel forced to deal with users outside the courts to avoid both litigation costs and the risk of losing.[162]

The copyright holder's uncertainty discount also increases access outside the licensing context. User access depends in part on the expected costs of using the work and thus the risk of litigation. That risk depends in turn on how highly the copyright holder values his entitlement. Certainty increases the copyright holder's valuation and thus his propensity to sue, which increases the user's risk of litigation costs. Reducing that risk is yet another way copyright's uncertainty may promote user access.

E. User Uncertainty for Optimal Access

1. Risk-seeking users.

Prospect theory suggests the counterintuitive conclusion that potential users may enjoy greater use of copyrighted works under an unpredictable regime of access rights than under a clearer one. Any potential use carries potential liability, a risk of loss. For any scope of copyright protection, users prefer an unpredictable liability rule over a predictable one, even if the former tends to cost them more on average. As liability becomes more certain, users may not bother to make use of a preexisting work at all. They enjoy greater access to copyrighted works under conditions of uncertainty, again and as always holding copyright's scope constant.

But there is an obvious objection to this basic argument. Users may prefer a probabilistic loss to a certain one, but surely they prefer a reliable immunity to both. My argument appears to assume away the possibility of immunity, even though that is precisely the solution offered by the critics of copyright's uncertainty. Lessig, for example, would exempt amateur remix from copyright altogether,[163] and Parchomovsky and Goldman's fair use harbors provide clear exemptions for what are likely obvious fair uses.[164] The first of these policy innovations is irrelevant to my thesis, and the second is

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162 On "muddy" entitlements, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan L Rev 577, 580–90 (1988). For their connection to hard bargains, see Dan L. Burk, *Muddy Rules for Cyberspace*, 21 Cardozo L Rev 121, 138 (1999). Consider also Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L J 1027, 1072 (1995). But see Fagundes, 50 BC L Rev at 162–70 (cited in note 1).

163 Lessig, *Remix* at 266–68 (cited in note 43).

164 See Parchomovsky and Goldman, 93 Va L Rev at 1510 (cited in note 5).

actually counterproductive, but each helps to elucidate the significance of copyright's uncertainty for user access.

Lessig's proposed amateur exemption from copyright is irrelevant for my purposes because it concerns copyright's scope as much as its uncertainty. It is true that Lessig has long lamented copyright's unpredictable doctrines of access, especially fair use.[165] But in *Remix*, his concern is not, or at least not exclusively, the uncertainty of access regulation but more importantly the existence of regulation at all. Expressive works are tools for participating in culture, and for Lessig noncommercial cultural participation ought not to be regulated. And even if he were chiefly concerned with uncertainty, his remedy for uncertainty is a fundamental change in copyright's scope. My aim is to evaluate the effects of the uncertainty holding scope constant.

Parchomovsky and Goldman's fair use harbors are not so easily dismissed. The safe harbors are not aimed at copyright's scope but instead would provide clear but minimalist protection for largely uncontroversial fair uses.[166] A de minimis doctrine might be a species of such a safe harbor,[167] if it were true that all de minimis uses were fair for purposes of § 107.[168] Importantly, safe harbors do not eliminate uncertainty; they marginalize it. Those who advocate safe harbors assume that users have greater access to copyrighted works under a system of safe-harbor clarity with uncertainty at the margins than under a system of pervasive uncertainty. The reasonableness of such an assumption is best adjudicated through careful empirical study, but safe harbors may well do more harm than good.

2. Anchoring at safe harbors.

Parchomovsky and Goldman's fair use harbors move copyright's uncertainty toward the margins. A stylized example helps to reveal how. Suppose a potential user is intent on mixing a sample from a copyrighted musical recording with his original work. Suppose also that the ideal sample would be fifteen seconds, that such a sample has the greatest expected value—his gains from using it discounted

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165 See Lessig, *Free Culture* at 185–87 (cited in note 1).

166 See Parchomovsky and Goldman, 93 Va L Rev at 1489 (cited in note 5). To the extent that the safe harbors would diminish copyright scope, Parchomovsky and Goldman assert that they still have almost no effect on copyright holders because "[m]any of the uses we seek to protect are of relatively small value, such that, given positive transaction costs, users would generally choose to forgo them rather than negotiate a license." Id at 1520.

167 See id at 1528–29 (arguing that de minimis is vague and standardless).

168 They are not. See, for example, *Dun & Bradstreet Software Services, Inc v Grace Consulting, Inc*, 307 F3d 197, 208 (3d Cir 2002) (copying 27 of 525,000 lines of code was not de minimis).

by the risk of liability are greater than for any other potential use. The current regime is uncertain all the way down from the user's perspective, such that he does not know whether any particular sample is sure to escape liability. The fair-use-harbors approach might guarantee immunity for the first two seconds, since (again, by assumption) two seconds is an uncontroversial fair use. The question, then, is whether the potential user is likely to use a longer sample under the uncertain status quo or under a fair-use-harbors regime.

Prospect theory suggests that the fair use harbor might actually hold the user back. Under that regime the user faces the choice between zero liability risk at two seconds and some significant risk at fifteen. Even though the expected value of exceeding the fair use harbor is positive, the user is likely to prefer the certain gain at two seconds over the potential loss at fifteen. After all, the value of each additional second is less than the last—losses and gains alike have a diminishing marginal effect[169]—and at two seconds he has already gotten use out of the recording. Like everyone else, the potential user is loss averse, and the fair use harbor helps him to avoid having ever to confront a risk of losing anything.

In our own murky world of fair use, however, the decisional calculus is different. It is true that loss aversion makes the very first second of use a costly one, but once the user takes that step he is much more likely to approach the ideal sample of fifteen seconds. Again, the effect of losses is a diminishing one, so he feels the cost of each additional second's added liability risk less acutely than that of the second before. There is no point at which his liability is certain, so there is no sample size in particular to shy away from. So long as he is committed to using some portion of the copyrighted work, he will likely end up using more under the current system than under a fair-use-harbors regime.

An important counterargument is that, while the potential user here may end up using less copyrighted work under the safe-harbor regime, many other users will either seek and pay for licenses unnecessarily or forgo accessing copyrighted works altogether under the current system.[170] For them, the risk just isn't worth the first step. The overlicensing aspect of this objection is the lesser concern. An unnecessary license simply represents a transfer of some of the user's surplus—the use is worth more to him than nothing, and nothing is the price he would otherwise pay—to the copyright holder in exchange for a kind of insurance against the risk that the use would

169 See Kahneman and Tversky, 47 Econometrica at 278–79 (cited in note 115).

170 See Parchomovsky and Goldman, 93 Va L Rev at 1526 (cited in note 5).

not be deemed fair.[171] The argument that uncertainty leads many users to forgo accessing copyrighted works altogether is more troubling. Whether this set of forgone uses outweighs the set of forgone uses beyond the safe harbors in the proposed system is a difficult empirical question, but prospect theory at least casts doubt on the conventional wisdom that uncertainty reduces expression.

The well-known anchoring-and-adjustment heuristic is another reason to fear that fair use harbors may in practice become ceilings rather than floors.[172] That heuristic describes the tendency to make estimates based on some initial value as an anchor and then to adjust up or down to arrive at the result. The adjustments tend to be insufficient to arrive at the correct answer.[173] For example, if asked to estimate the average surface temperature on Mars, one might start with an estimate of Earth's average surface temperature (say, 60 degrees Fahrenheit) and adjust down from there to compensate for Mars's greater distance from the sun—perhaps twenty degrees would be a reasonable guess.[174]

A regime of fair use harbors would lead judges to begin the fair use inquiry at the anchor and adjust up from there. When considering whether fifteen seconds is a fair use, a judge would start with the proposition that two seconds is permissible and then ask whether users can lawfully take advantage of the additional thirteen seconds. Because adjustments from the anchor tend to be insufficient, the safe harbor is likely to reduce the scope of fair use. And this anchoring affects not just judges but users and copyright holders, too. Anchoring and adjustment makes users less likely to use and copyright holders more likely to litigate the fifteen-second sample. Thus in their attempt to expand access through fair use harbors, Parchomovsky and Goldman's proposal may constrict it.

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171 I assume no transaction costs.

172 See Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Sci 1124, 1128–30 (1974) (giving examples of studies that show how often people under- or overestimate things such as "the probabilities of failure in complex systems" and "the probability of conjunctive events"). A recent study explores the heuristic in tipping practices. See John S. Seiter, Garett M. Brownlee, and Matthew Sanders, *Persuasion by Way of Example: Does Including Gratuity Guidelines on Customers' Checks Affect Restaurant Tipping Behavior?*, 41 J Applied Soc Psych 150, 154–55 (2011) (finding that "customers left significantly larger tips . . . when their server included gratuity guidelines for them than when their server did not"). The argument here about anchoring is similar to Gibson's. See Gibson, 116 Yale L J at 887–903 (cited in note 125) (describing the self-reinforcing feedback loops created by the fair use doctrine).

173 See Tversky and Kahneman, 185 Sci at 1128 (cited in note 172).

174 The temperature on Mars is closer to thirty below. See Nadine G. Barlow, *Mars: An Introduction to Its Interior, Surface and Atmosphere* 163 (Cambridge 2008).

I have thus far assumed and used stylized examples to suggest that the uncertain copyright system could be made more predictable through the introduction of clear safe harbors. But due to the diversity of expression that copyright protects and the diversity of uses and users, the replacement of copyright's open-ended standards with finely tailored rules may not lead to clarity but instead may lead to a different kind of uncertainty. And this different uncertainty could have a greater deterrent effect than the current system does.

3. Rule proliferation and the problem of postdiction.

If uncertainty in the doctrines of access is a problem, it might seem to have a ready solution: replace amorphous standards with rules. Fair use harbors are a modest example of this solution, operating at the margins, but there is no need to stop there. We could displace entirely the open-ended standards of "fair use" and "substantial similarity," providing instead a list of rules of access.[175] The list would be long, for copyright governs too many disparate forms of expression used by too many different actors in different contexts to permit a small number of access rules to substitute for fair use and related doctrines.

In addition to multiplying interpretive ambiguity local to each rule, a proliferation of rules leads to greater potential conflict across rules and doubt as to which of several rules applies.[176] As the number of relevant rules increases, the likelihood that potential users will be aware of the precise rule that governs their contemplated use diminishes. Far from curing uncertainty, rule proliferation promotes it.

The uncertainty caused by rule proliferation is different from the uncertainty pervasive in the current copyright system, however. The current system announces a set of general norms and postpones until litigation the elaboration of those norms. Users are therefore left to predict the legal rule that a court will later apply, a rule given content ex post.

The rule proliferation alternative provides all of the potential governing rules in advance, and in principle the rules determine whether any use is lawful or infringing at the moment it occurs. But users who are unsure which of myriad rules controls are still left to guess as under the current system whether the use would be

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[175] This is the European approach. See, for example, Urheberrechtsgesetz (Copyright Act) § 7, arts 45–60 (1965) (Ger), translation online at http://www.iuscomp.org/gla/statutes/UrhG.htm#45 (visited Nov 8, 2011) (enumerating in exhaustive detail the types of materials that may be reproduced, the people authorized to make and receive the reproductions, and the purposes for which such reproductions may be distributed).

[176] See text accompanying notes 67–70.

adjudicated lawful. The difference is that their guesses are not predictions of how a court will give content to a general norm but instead "postdictions"—estimates of the likelihood of an uncertain past event—of the rule that already governs.[177]

Experimental research suggests that individuals are more willing to take risks under predictive uncertainty than under postdictive uncertainty.[178] For example, subjects are willing to bet more when predicting the results of a future die toss than when attempting to postdict the results of an already-completed but unrevealed die toss.[179] Similarly, subjects overwhelmingly prefer to bet on whether the price of a randomly selected stock will go up or down tomorrow rather than on whether the price went up or down yesterday.[180]

Advocates of rule-like, clear doctrines for access to copyrighted works emphasize the deterrent effect of copyright's ex ante uncertainty, but these findings regarding postdiction suggest that the advocates' preferred solution may reduce user expression even more.[181] Users are less likely to exercise their rights of access when they know that they may or may not be immune from copyright liability depending on which of a tangled array of ex ante norms controls than when they are forced by pervasive uncertainty to predict the norm that will be adopted after the fact.

It is true that rule proliferation is not the paradigmatic case of postdictive uncertainty. More common is where a known rule governs but the consequences of the rule in a situation are unknown. A good example is drunk driving: drivers face a clear prohibition on exceeding a 0.8 percent blood alcohol concentration (BAC), but they typically cannot know whether their BAC exceeds the permissible limit.[182] Fair use safe harbors are unlike this, one might object, because potential users can both identify the relevant law and easily apply it to their own case. If the law exempts any sampling under ten seconds, then a potential user will easily determine how much she may safely sample. This objection assumes that users can learn the governing law cheaply, and this assumption may be reasonable for

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177 Regarding prediction and postdiction, see generally Ehud Guttel and Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 Mich L Rev 467 (2008).

178 See id at 473–75.

179 See Myron Rothbart and Mark Snyder, *Confidence in the Prediction and Postdiction of an Uncertain Outcome*, 2 Can J Behav Sci 38, 42–43 (1970).

180 See Chip Heath and Amos Tversky, *Preference and Belief: Ambiguity and Competence in Choice under Uncertainty*, 4 J Risk & Uncertainty 5, 8–9 (1991).

181 See Guttel and Harel, 107 Mich L Rev at 482 (cited in note 177) ("The experimental findings . . . imply that individuals will be less inclined to engage in uncertain rule-governed activities than in uncertain standards-governed activities.").

182 See id at 483.

large repeat players—though even they may struggle to find clarity in a complicated list of exceptions. Individual users are unlikely to be able to navigate the morass, so they are more like the drunk driver. Ironically, a safe-harbors regime may thus disproportionately benefit business, even as it aims to facilitate amateur creativity.

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The copyright system exploits asymmetric sensitivity to risk through its asymmetric distribution of uncertainty. Copyright holders enjoy clarity in the areas most salient to them, which enhances the incentive effect of protection. Uncertainty in less salient areas leads copyright holders to discount the value of their entitlement to exclude borderline uses by potential users, and that discount makes licensing cheaper and lawsuits less attractive. Both lead to greater access for users, holding the scope of copyright constant. Because users see copyright as a source of potential liability, they are risk seekers. Uncertainty in areas salient to users makes them more likely to rely on copyrighted works. These observations suggest that proposals to eliminate or reduce uncertainty could backfire,[183] in part because a proliferation of rules would simply create a new and more problematic kind of postdictive uncertainty. But to say that clarifying the law is bad economics is not to say it is a bad idea. Indeed, commitment to the Rule of Law may require it.

III. ASYMMETRIC UNCERTAINTY AND THE RULE OF LAW

The Rule of Law ideal[184] has been described and defended in various ways, but an insight common across leading accounts is that law should provide directives clear and stable enough to be understood in advance, so that citizens may follow them and plan their affairs accordingly.[185] That insight—which requires specification to avoid devolving to platitude[186]—provides the foundation for an

183 There may be other economic benefits of uncertainty. See, for example, Fred von Lohmann, *Fair Use as Innovation Policy*, 23 Berkeley Tech L J 829, 840–43 (2008).

184 Richard Fallon Jr helpfully develops a set of four ideal-typical accounts of the Rule of Law in *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum L Rev 1, 5 (1997) (identifying the four ideal-typical accounts of the Rule of Law as "(i) historicist, (ii) formalist, (iii) Legal Process, and (iv) substantive").

185 See Friedrich A. Hayek, *The Road to Serfdom* 72 (Chicago 1944); Joseph Raz, *The Authority of Law: Essays on Law and Morality* 213 (Oxford 1979); Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 Vand L Rev 1497, 1507 (2007).

186 See Fallon, 97 Colum L Rev at 6 (cited in note 184) ("[M]ost judgments of consistency and inconsistency with the Rule of Law should be regarded as relatively ad hoc and conclusory."); George P. Fletcher, *Basic Concepts of Legal Thought* 11 (Oxford 1996) ("[L]egality and the 'rule of law' are ideals that present themselves as opaque even to legal

argument against copyright's uncertainty. From this perspective, copyright's asymmetric distribution of uncertainty is exactly backwards. Clarity is prized because it permits individuals to act without having to worry that the law will intervene, and therefore it is implicated more where the law imposes prohibitions than where it confers benefits. Copyright's benefits could be awarded more haphazardly without much cost to the Rule of Law, but the pervasive uncertainty in doctrines that affect liability and damages are intolerable.

If this is correct, then the conventional "overdeterrence" argument against copyright's uncertainty is right for the wrong reasons. Asymmetric uncertainty may in fact promote social welfare, but it evinces disrespect for users' interest in and ability to act under a system of law, and that disrespect is inconsistent with the Rule of Law. The theory matters, even if the conclusion were the same. The Rule of Law argument, unlike the economic one, is not contingent on empirics. Even if uncertainty is a social good, the Rule of Law argument denounces it. Furthermore, the appropriate judicial and legislative responses to the problem of uncertainty depend on the reason uncertainty is to be rooted out.

A. The Rule of Law

The Rule of Law ideal begins with the phrase "rule of law,"[187] and the idea that the government should operate according to law, and not according to the whims of officials—a rule of law and not of men. From here accounts diverge, emphasizing different features, norms, and implications. Identifying the principles on which the ideal is based can refine its meaning, and although the foundational principles are contested,[188] my preferred starting point is respect for the dignity and autonomy of persons. This principle of respect justifies the Rule of Law ideal and helps to explain and provide its content.

The Rule of Law entails that persons may be ruled by law.[189] This requires that officials respect the ability of individuals to conform to

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philosophers."); Judith N. Shklar, *Political Theory and the Rule of Law*, in Allan C. Hutchinson and Patrick Monahan, eds, *The Rule of Law: Ideal or Ideology* 1, 1 (Carswell 1987) ("[T]he phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use.").

187 Raz, *The Authority of Law* at 212 (cited in note 185).

188 See, for example, Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BU L Rev 781, 791–92 (1989). See also Fallon, 97 Colum L Rev at 1–2 (cited in note 184).

189 John Rawls, for example, begins "with the precept that ought implies can"—that is, that "the actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid." John Rawls, *A Theory of Justice* 236–37 (Belknap 1971).

law,[190] but the law must also be susceptible of being followed. Among other things, the laws must be public,[191] announced in advance of their application, comprehensible, and more or less stable, and they must guide the judgments of officials in practice.[192] A legal system in which these conditions obtain preserves the individual's capacity to conform to law.

A law that is susceptible of being followed respects each person's freedom to make whatever choices the law does not proscribe.[193] Officials, like everyone else, are bound by law, and they may not interfere with an individual's affairs except according to law. Freedom is thus both the result and a part of the Rule of Law ideal. A legal system fails to realize the ideal to the extent that it frustrates an individual's ability to order his own affairs consistent with the law.[194]

The virtue of clarity here emerges. Clear rules are easy to follow, providing the objects of any prohibition maximal freedom by permitting them to know and to choose any of the paths available under the law. Hayek provides a classic account:

> Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[195]

Clarity keeps the state out of private choice by delineating the boundaries within which choices are free.

Clarity is of course not the sole or even paramount value associated with the Rule of Law. It may come at the expense of some other Rule of Law value, and there is no obvious procedure for

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190 Consider Raz, *The Authority of Law* at 220–23 (cited in note 185).

191 See Lon L. Fuller, *The Morality of Law* 34–35 (Yale rev ed 1969).

192 See id at 39 (describing the need for "congruence between the rules as announced and their actual administration").

193 See Rawls, *A Theory of Justice* at 235–43 (cited in note 189); Hayek, *The Road to Serfdom* at 72–87 (cited in note 185).

194 See Rawls, *A Theory of Justice* at 239 (cited in note 189) ("[Where t]he boundaries of our liberty are uncertain . . . liberty is restricted by a reasonable fear of its exercise."). See also Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 Ratio Juris 79, 84–85 (1989) (arguing that the main ideal of the ideal of rule of law lies in the notion of predictability).

195 Hayek, *The Road to Serfdom* at 72 (cited in note 185). See also Radin, 69 BU L Rev at 785 (cited in note 188) (emphasizing two principles: "first, there must be rules; second, those rules must be capable of being followed"); Raz, *The Authority of Law* at 218 (cited in note 185) ("[I]n the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance.").

adjudicating conflicts between them.[196] The tradeoff problem gets even harder where clarity and some substantive value collide,[197] as where making the law clearer decreases its efficiency or makes a policy aim harder to attain. But clarity is nonetheless an important feature of many accounts of the Rule of Law. As well it should be. If, as I believe, the Rule of Law is valuable because it recognizes the dignity of persons and promotes freedom, then the ideal should include a commitment to legal directives clear enough to be followed. Copyright's asymmetric distribution of uncertainty is inconsistent with that commitment for a variety of reasons, to which I now turn.

B. Asymmetric Uncertainty and the Rule of Law

1. Uncertainty and the Rule of Law.

Uncertainty is prima facie inconsistent with the Rule of Law ideal, although this observation obscures too much complexity to be of much use on its own in evaluating copyright. As revealed by the leading proposed policy innovations, the question is whether copyright law can better realize the Rule of Law ideal by substituting rules (such as fair use harbors[198]) for its amorphous standards in the doctrines of user access. Or in Justice Antonin Scalia's terms, does the Rule of Law require making copyright a "law of rules"?[199]

Recall the problem: uncertainty is pervasive in the doctrines salient to users of copyrighted works. Even if uncertainty promotes greater access, it does so at the cost of predictability. Users cannot know whether a given use will be adjudicated lawful because the lawfulness of the use turns on answers to nebulous questions, such as whether the use incorporates copyrighted expression or instead just the uncopyrightable idea, whether the use is substantially similar to the copyrighted work, and, even if so, whether the use is fair or otherwise justified by laches or copyright misuse.[200] And it is not as if there is a rule of thumb to which users might appeal, for the all-

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196 See Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga L Rev 1, 6–9 (2008) (deemphasizing predictability). Fallon identifies the lack of an "integrated theory." Fallon, 97 Colum L Rev at 54–55 (cited in note 184).

197 The Rule of Law is not identical to a good or just legal system. See Raz, *The Authority of Law* at 211 (cited in note 185). See also id at 223–24. But consider Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685, 1685 (1976) (connecting rules to individualism, standards to altruism).

198 Parchomovsky and Goldman, 93 Va L Rev at 1502 (cited in note 5).

199 See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

200 See Part I.B.2.

important doctrine of fair use is premised on a set of inconsistent theoretical foundations.[201] The doctrines of access are incompatible with a principle of respect for users' ability to conform to law, for even with the help of a lawyer there is often no way to be sure that a use is lawful.

This failure of the Rule of Law ideal results in a system in which use is not ruled by law—infringing uses are rampant, and privileged uses may be forgone or undertaken only pursuant to unnecessary licenses. I argued above that unnecessary licenses are no cause for concern,[202] and in economic terms they may not be. Suppose *A* is willing to pay $100 to use *B*'s work: if the law sets the price at $0, *A* enjoys a $100 surplus, but if *A* gives *B* $50 to engage in the use, that is just a transfer of half of *A*'s surplus to *B*.[203] But the unnecessary license is troubling for those committed to the Rule of Law. *B*'s demand for a fee to engage in a legally privileged use is like a private toll for travel on a public highway. The law permits anyone to drive on Interstate 95, but *B* erects a roadblock and demands $5 in the name of the law.[204] *B*'s private toll, and a system murky enough to make *B*'s claim of legal entitlement colorable, represents the exploitation of rather than respect for persons and the law. It would remain objectionable on Rule of Law grounds even if the toll stopped no one from using the highway.

The apparent solution is to replace standards with rules. A rule is meant to be simple. When the factual conditions for the rule obtain, the rule applies and directs a particular result.[205] Simplicity is not identical to clarity, however. Any proposal to substitute copyright's standards with rules will require many such rules, and the question is whether users will be able to better predict outcomes under a large body of rules than under the current system of standards.

Even this restatement of the question is too simple. It relies on a crisp distinction between rules and standards, but reality is more muddled. Any body of rules of sufficient complexity to govern the use of copyrighted works may require appeal to more general principles to determine which rule applies to a given situation, which

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201 See Fisher, 101 Harv L Rev at 1669–92 (cited in note 80).

202 See text accompanying note 171.

203 The real problem is that the transaction costs might be prohibitive. Consider orphan works. See note 47.

204 See, for example, Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U Chi L Rev 711, 752 (1986) (describing norms for private toll roads).

205 See Ronald M. Dworkin, *The Model of Rules*, 35 U Chi L Rev 14, 25 (1967).

rules should be read narrowly, which broadly, and so on.[206] And even the formal distinction between rules and standards may be confused. If what makes a directive a "rule" is that the factual conditions for the rule's application are clear in advance, then whether a directive is a rule depends not on its form but on social practice.[207] "No vehicles in the park" is a rule only if there is widespread agreement on when it applies,[208] and even an open-ended directive like one that requires filing a claim "as promptly as the circumstances allow" can be a rule if its application is predictable in advance.[209] On this account, it is better to ask whether formal specification increases predictability—to invoke the language of "rules" is to assume the conclusion, since rule is defined to include predictability.

Two features of copyright complicate the project of increasing clarity through formalization. The first is that copyright's scope is vast, governing entitlement to all forms of fixed expression, regardless of the medium or purpose. The variety of copyrighted works and uses thereof implies that formal specification of the doctrines of access will be intricate and complex. Consider even what might appear to be the simplest of rules, replacing "fair use" with a 10 percent rule: any use of 10 percent or less of a copyrighted work is permissible, and anything more is forbidden. What could 10 percent of a work even mean? Six seconds of a one-minute song? Perhaps, but suppose the one-minute song consisted of fifty-four seconds of preexisting public domain expression, and the six seconds represented the entirety of the author's copyrightable contribution—

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206 See, for example, Dworkin, 88 Harv L Rev at 1082–83 (cited in note 70); Fuller, 71 Harv L Rev at 663 (cited in note 68):

> Surely a paragraph does not have a "standard instance" that remains constant whatever the context in which it appears. If a statute seems to have a kind of "core meaning" that we can apply without a too precise inquiry into its exact purpose, this is because we can see that, however one might formulate the precise objective of the statute, *this* case would still come within it.

See also Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand L Rev 533, 548–49 (1992).

207 The basic point comes from Ludwig Wittgenstein via Margaret Jane Radin. See Radin, 69 BU L Rev at 799–800 (cited in note 188) ("Only the fact of our seemingly 'natural' agreement on what are instances of obeying rules permits us to say there are rules. The rules do not cause the agreement; rather, the agreement causes us to say there are rules."). See also Cass R. Sunstein, *Problems with Rules*, 83 Cal L Rev 953, 957 (1995) (criticizing the unreflective retreat to rules).

208 See Hart, 71 Harv L Rev at 607 (cited in note 67).

209 This example is from *Walker v Martin*, 131 S Ct 1120 (2011), in which the Supreme Court considered whether dismissal pursuant to a California rule requiring the "prompt[ ]" filing of petitions could qualify as an adequate and independent state-law ground, which would bar federal relief. "Indeterminate language is typical of discretionary rules. Application of those rules in particular circumstances, however, can supply the requisite clarity." Id at 1128.

if so, six seconds would be 10 percent or 100 percent, depending on your perspective.[210] The quantification problem is both different and more difficult for other forms of expression, such as sculpture.[211] Even taking the 10 percent rule as a guide, formal specification will be complex, and as rules multiply it is harder to claim that the system is clearer or more predictable.[212] Instead of resorting to formal specification, it might make more sense to announce a straightforward guiding principle, clear enough to predict across its domains of application but also general enough to account for the diversity of expression.

The guiding principle approach runs into a second and countervailing feature of copyright: its principles are hotly contested, and indeed the current doctrines of user access lack any coherent theory.[213] Disagreement begins at the foundations of copyright. Notwithstanding the constitutional prescription that copyright "promote the Progress of Science and useful Arts,"[214] many contend that copyright is at its core a protection for the moral rights of the author.[215] This foundational disagreement manifests itself in doctrine. In the leading cases on fair use we learn both that incentives are central—"a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create"[216]—and also that desert is central—"[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."[217] The lack of normative consensus frustrates

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210 See *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539 (1985). In *Harper & Row*, a magazine story was based on a copyrighted manuscript of President Gerald Ford's autobiography, and the story included 300 words copied from the manuscript. The dissent argued that the quotation of "300 words from the unpublished 200,000-word manuscript" was fair use, id at 579 (Brennan dissenting), but the majority emphasized that the portion used was "the heart of the book," id at 565 (majority).

211 Is the 10 percent by mass or by volume? What about color and material? Jeff Koons's *Balloon Flower (Magenta)* would not have sold for $25 million if it were actually made out of standard balloons. See *Jeff Koons (b. 1955), Balloon Flower (Magenta)* (Christie's 2011), online at http://www.christies.com/LotFinder/lot_details.aspx?intObjectID=5101408 (visited Nov 8, 2011) (reporting the 2008 sale of the work for $25,752,059).

212 See Guttel and Harel, 107 Mich L Rev at 484 (cited in note 177) ("[I]t is often (wrongly) believed that only standards produce uncertainty and therefore only standards can have chilling effects."); Fallon, 97 Colum L Rev at 50 (cited in note 184).

213 See Fisher, 101 Harv L Rev at 1669–92 (cited in note 80).

214 US Const Art I, § 8, cl 8.

215 See note 14. There are nonconsequentialist features of copyright law, including VARA, see text accompanying notes 71–72, and the author's right to terminate a transfer or license thirty-five years after its execution. See 17 USC § 203(a)(3).

216 *Sony Corp of America v Universal City Studios, Inc*, 464 US 417, 450 (1984).

217 *Harper & Row*, 471 US at 546. See also Fisher, 101 Harv L Rev at 1691–92 (cited in note 80).

the project of realizing the Rule of Law through the announcement of general principles.[218]

2. The problem of asymmetry.

Intervention in the name of the Rule of Law is more urgent than this initial survey of copyright suggests. The asymmetry of copyright's uncertainty may be a virtue from an economic perspective, but it exacerbates the concern that the law of copyright fails to accord respect to users' interest in and ability to plan their affairs in light of the law.

Clarity is desirable primarily because it enables individuals to go about their lives free from intervention. As a result, the Rule of Law value of clarity is implicated more where the law imposes penalties than where it confers benefits. Benefits, like government grants for the arts,[219] may be awarded according to discretionary criteria without much cost to the Rule of Law, for potential beneficiaries are permitted to do what they will and can treat any grant as a happy windfall. Criminal laws, by contrast, proscribe conduct people might otherwise engage in, and the price of transgression is high. For this reason, criminal laws must provide sufficient notice of the scope of their prohibition, or else risk invalidation for vagueness.[220] The void-for-vagueness doctrine confirms that penal laws with intolerably unpredictable application are not law; the content of the prohibition

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218 See Fallon, 97 Colum L Rev at 50 (cited in note 184) ("[T]he greater the normative consensus, the less the realization of Rule of Law values depends on the law being a law of rules."). People tend to internalize directives more easily when they recognize the underlying value, which is often easier with directives framed as general principles. See generally Edward L. Deci and Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 Psych Inq 227, 235–39 (2000). Consider Note, 122 Harv L Rev at 1504 (cited in note 118).

219 See *National Endowment for the Arts v Finley*, 524 US 569, 585 (1998) (upholding grant program notwithstanding discretion in the provision of funds, and noting that "[t]he 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply 'inconceivable'"). The point in *Finley* is a substantive one—that the First Amendment is not implicated—but the common thread is that the First Amendment, like the Rule of Law, is concerned with securing liberty.

220 *City of Chicago v Morales*, 527 US 41, 53, 64 (1999) (invalidating an ordinance prohibiting "loitering," that is, "remain[ing] in any one place with no apparent purpose," on vagueness grounds). See also *Skilling v United States*, 130 S Ct 2896, 2931 (2010) (reading "honest services" mail fraud statute narrowly to proscribe only bribes and kickbacks to avoid vagueness concerns). Three justices in *Skilling* would have invalidated the statute as unconstitutionally vague. Id at 2935 (Scalia concurring in part and concurring in the judgment). Justice Scalia's commitment to enforcing the void-for-vagueness doctrine resurfaced twice the following term. See *Sykes v United States*, 131 S Ct 2267, 2284 (2011) (Scalia dissenting); *Derby v United States*, 131 S Ct 2858, 2860 (2011) (Scalia dissenting from denial of certiorari).

is subject to the arbitrary discretion of government officials.[221] If this basic point is correct, then copyright's distribution of uncertainty is exactly backwards—those who benefit from entitlement enjoy clarity where arbitrariness might be tolerable, while those subject to potential liability face unjustifiable uncertainty at every turn.

Asymmetric uncertainty may provide the optimal access-incentives balance in light of asymmetric risk sensitivity. But that instrumental argument only highlights the problem for the Rule of Law. The ideal derives in part from a commitment to respect for the equal autonomy of persons. No one may exercise authority over another except according to law. Neither may the autonomy of some be sacrificed for the good of others.[222] Copyright imposes on the objects of potential liability unique uncertainty that prevents them from planning their affairs according to the law. To justify this result in economic terms is to ask users to bear a disproportionate share of uncertainty—to ask them but not copyright holders or others to operate outside of the law—in the name of social welfare. The result is inconsistent with the principle of equal respect for all,[223] even if everyone is better off for it.

Copyright's impressive remedies exacerbate the concern.[224] Remedies include up to $150,000 in statutory damages for even a

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221 See *Morales*, 527 US at 52 (explaining that a statute "may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests").

222 This argument is more or less Kantian and derives from the second formulation of the categorical imperative. See Immanuel Kant, *Groundwork of the Metaphysics of Morals* 38 (Cambridge 1997) (Mary Gregor, ed and trans) ("[A]ct [so] that you use humanity . . . always at the same time as an end, never merely as a means.") (emphasis omitted).

223 The concentration of burdens on a select few is, for some at least, an economic concern as well. See, for example, Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 46 (Yale 1970) (describing "secondary costs" to be avoided through spreading losses). The principle is more familiar in the nonutilitarian domain. See, for example, Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* 187–200 (Harvard 1971) (explaining the concept of the "risk pool," that we agree to impose "normal" risks upon one another, and that tort liability is appropriate where an individual imposes risk beyond those he would accept from others); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv L Rev 537, 542 (1972):

> The general principle expressed in all of these situations governed by diverse doctrinal standards is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks.

224 Mark Lemley and Eugene Volokh argue that injunctions are the real problem for liberty. See Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L J 147, 211–13 (1998). Consider also *eBay Inc v MercExchange, LLC*, 547 US 388, 396–97 (2006) (Kennedy concurring) (emphasizing that the vagueness and suspect validity of some patent claims are reasons to refrain from providing injunctive relief in patent cases).

single act of infringement,[225] and in extreme cases criminal liability.[226] Even without actual criminal sanctions, the availability of damages far in excess of harm makes copyright look punitive rather than compensatory in many of its applications.

Where the law turns punitive, the interests protected by the Rule of Law become all the more important.[227] A principle of compensation shifts the burden of a harm from the plaintiff to the defendant—the tortfeasor rather than his victim bears the costs of his tort.[228] But punitive laws single out the defendant for exemplary treatment.[229] His offense is against the community, and the price he pays for his transgression may exceed any harm he causes. Because punishment carries this stigma, the need for notice to enable individuals to avoid it is acute. The special commitment to the Rule of Law in punitive matters is revealed in the Constitution, through the prohibitions on ex post facto laws and bills of attainder, the requirement of due process and the Suspension Clause's preservation of the habeas remedy to enforce it, and even the Double Jeopardy Clause.

The Supreme Court has recognized similar concerns in its punitive damages jurisprudence. It has emphasized, for example, that punitive damages "serve the same purposes as criminal penalties" but lack the procedural protections the Constitution affords to criminal defendants.[230] Without invoking the Rule of Law ideal by name, it has described the "constitutional concern, itself harkening back to the Magna Carta, aris[ing] out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion."[231] The

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225 See 17 USC § 504(c)(2). See also Samuelson and Wheatland, 51 Wm & Mary L Rev at 441 (cited in note 4).

226 See 17 USC § 506.

227 Consider Fuller, *The Morality of Law* at 93 (cited in note 191).

228 See, for example, Oliver Wendell Holmes Jr, *The Common Law* 97 (Legal Classics 1982):

> One who diminishes the value of property by intentional damage knows it belongs to somebody. If he thinks it belongs to himself, he expects whatever harm he may do to come out of his own pocket. It would be odd if he were to get rid of the burden by discovering it belonged to his neighbor.

229 This observation is consistent with the terminology, for "punitive damages" is used interchangeably with "exemplary damages." Note, *Exemplary Damages in the Law of Torts*, 70 Harv L Rev 517, 517 (1957).

230 *State Farm Mutual Automobile Insurance Co v Campbell*, 538 US 408, 417 (2003).

231 *BMW of North America, Inc v Gore*, 517 US 559, 587 (1996). See also *State Farm*, 538 US at 418 ("Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior."), quoting *Pacific Mutual Life Insurance Co v Haslip*, 499 US 1, 59 (1991) (O'Connor dissenting); *Exxon Shipping Co v Baker*, 554 US 471, 525 (2008) (Breyer concurring) ("Like the Court, I believe there is a need, grounded in the rule of law itself, to

Court's solution to the arbitrariness of punitive damage awards has been to require judges to reduce excessive awards as inconsistent with due process. Some argue similar substantive constitutional review of statutory damages awards in copyright is appropriate,[232] but the substantive solution is less significant here than the urgency of the procedural problem it addresses. Punitive remedies require particularly clear ex ante notice. Where the law fails to provide notice, the Court has been willing to intervene.[233]

Copyright's asymmetric distribution of uncertainty may make economic sense, but welfare comes at the expense of the Rule of Law ideal. The ideal prizes clarity to enable individuals to order their lives under the law. The need for notice is stronger where the law imposes a prohibition, and strongest where the law turns punitive. Copyright is exactly backwards. The clearest questions concern the provision of benefits, and the most vexing concern the scope of copyright's prohibitions—and the price of transgression. The Rule of Law ideal provides good reason to clarify copyright, even if doing so inhibits rather than promotes expression.

C. Theory Matters

The conventional wisdom is that copyright's uncertainty is problematic. Although I would offer some refinement—that copyright is not just uncertain but asymmetrically so, and that distribution matters—my argument thus far suggests the conventional wisdom is right for the wrong reasons. We should dispense with "overdeterrence" and focus on the Rule of Law. Doing so helps to bring the problem of uncertainty into focus, and solutions, both in doctrine and in policy, depend in large part on the way we conceive of the problem.

The economic argument is contingent in a way the Rule of Law argument is not. There is good reason to think that the uncertain status quo promotes more expression than a clearer system would. If that is correct, either for the reasons I have offered or for others, then the economic argument against uncertainty vanishes. Uncertainty is intrinsically neither good nor bad from an economic perspective, which evaluates questions in terms of net effect on social welfare. By contrast, the Rule of Law value of notice remains

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assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished.").

232 See note 110.

233 Note that four of the six justices in the *State Farm* majority have retired, and it is difficult to know whether Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan will police punitive damages awards as vigilantly as some of their predecessors did.

regardless of whether it is good policy from any substantive perspective, economic or otherwise. The Rule of Law counsels in favor of improving copyright's clarity even at the cost of expression. True, the magnitude of the concern may vary depending on particulars; it becomes less pronounced for example as the penalties for violating the law decrease. But it always points in one direction. Uncertain legal prohibitions conflict with a principle of respect for individuals to order their affairs according to law.

In addition to supplying a context-independent justification for clarity, the Rule of Law argument counsels in favor of different innovations at the level of legal doctrine. Consider, for example, the judicial problem of resolving ambiguity in copyright statutes. Where a statute remains ambiguous even after a court deploys all of the standard tools of statutory construction—textual and structural analysis, descriptive canons of interpretation,[234] and the like—it may have to resort to a more substantive default rule. Were the uncertainty problem uniquely an economic one, the default rule might be to resolve ambiguity in light of the progress-promoting purposes of copyright law, and sometimes that might mean adopting a copyright-friendly interpretation to preserve the incentives of copyright holders. But focusing on the Rule of Law suggests an alternative default, namely a normative canon (like that of lenity[235]) that uncertainty should be resolved in favor of users,[236] who are subject not only to prohibition but also to a sometimes-punitive remedial regime. Which of these canons should prevail depends on the relative force of the economic and Rule of Law arguments for clarity.[237]

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234 "Descriptive" here refers to canons that aim to identify the meaning of the enacted words. Descriptive canons are contrasted with "normative" ones that favor particular substantive policies. See, for example, Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 393–94 (2005).

235 See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S Ct Rev 345, 349–56; John Calvin Jeffries Jr, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 198–200 (1985); Note, *The New Rule of Lenity*, 119 Harv L Rev 2420, 2421 (2006). Canons like lenity have sometimes been called "dice-loading rules." See *The Supreme Court 2007 Term: Leading Cases*, 122 Harv L Rev 465, 474 n 72 (2008).

236 See, for example, *Harper & Row*, 471 US at 603 (Brennan dissenting):

> In any event, because the appropriation of literary form—as opposed to the use of information—was not shown to injure Harper & Row's economic interest, any uncertainty with respect to the propriety of the amount of expression borrowed should be resolved in favor of a finding of fair use.

237 The Rule of Law position would also permit a rule of construction that narrows access to improve clarity, even if doing so were bad policy. An example might be a narrow but well-defined approach to parody. See *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 599 (1994) (Kennedy concurring) ("More than arguable parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given

The two accounts may also suggest different forms of legislative intervention. For one thing, the Rule of Law argument emphasizes the appeal of reforming copyright's remedial framework in a way the economic argument does not. The sometimes-punitive character of statutory damages exacerbates the problem of notice, and one partial solution would require damages to be tied more directly to harm. It might make sense, or it might be a necessary concession to effect such change, to compensate for the loss of potency by expanding the scope of copyrights. The Rule of Law position would not object to a compensating adjustment, but the economic position would reject the adjustment if the costs outweigh the benefits.

More comprehensive remedial interventions could abolish copyright's problematic asymmetry. One example would start by eliminating liability for derivative uses altogether. To ensure that copyright holders maintain their current streams of revenue, the new system would impose a tax on all sales of derivative works (lawful under the current system or not), and copyright holders could seek compensation equal to what they would enjoy under the current system from an agency charged with distributing royalties. This derivative-use tax would require a substantial overhaul of the current system, but it is not unprecedented. For example, in the National Childhood Vaccine Injury Act of 1986[238] (NCVIA) Congress largely displaced vaccine tort litigation with an ex parte vaccine court, where those injured by vaccines may seek compensation from a fund created by a tax on each vaccine dose.[239] The Google Books settlement works in a similar way, collecting money from the otherwise-infringing uses of Google Book Search and putting it in a separate fund, to be distributed among copyright holders.[240]

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use is fair should not be resolved in favor of the self-proclaimed parodist."). But see Louis Kaplow and Steven Shavell, *Fairness versus Welfare*, 114 Harv L Rev 961, 1381 (2001) (arguing that legal policies should be assessed based only on their effects on welfare, and rejecting notions of fairness).

238 Pub L No 99-660, 100 Stat 3755, codified at 42 USC § 300aa-11 et seq. See generally Mary Beth Neraas, Comment, *National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 Wash L Rev 149 (1988).

239 See *Bruesewitz v Wyeth LLC*, 131 S Ct 1068, 1073–74, 1082 (2011).

240 See *Google Book Settlement* (Rust Consulting 2011), online at http://www.googlebooksettlement.com (visited Nov 8, 2011). See also Picker, 5 J Competition L & Econ at 391–94 (cited in note 47). One difference is that the settlement is private, although its scope and the fact that it adjudicates rights relating to orphan works (whose copyright holders are not involved in negotiation) gives it a public flavor. The better analogy might be Terry Fisher's alternative compensation system for music file sharing. See William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* 199–258 (Stanford 2004). Fisher proposes legalizing file sharing, taxing relevant devices, and sharing the tax revenues among those whose files are shared in proportion to downloads.

From an economic perspective, this intervention might be a terrible idea. The costs of such a system—setting tax rates, collecting taxes, creating and staffing an agency, and litigating within it—may far outstrip the costs of litigation in the current system.[241] And the system would eliminate many of the advantages of a property rights regime, above all its ability to allocate resources through private ordering at prices that reflect the value of the resources to those who use them. An agency would aim to set similar prices, but it would doubtless err. The agency might also be subject to capture by copyright holders, for only copyright holders would appear before it, further distorting its awards.

From a Rule of Law perspective, however, this derivative use agency represents an important improvement. No longer would users be subject to unpredictable liability. Instead they would face predictable tax liability on any revenues their uses produce. The uncertain doctrines of access would remain but be adjudicated before an agency whose decisions affect only the copyright holder seeking benefits. There are obvious and perhaps insurmountable problems with this proposal, of course. It makes sense for low- or no-revenue uses, but less so for film versions of Michael Crichton novels[242]—or any other blockbuster work whose derivative uses are predictable and valuable. Perhaps the system can be more finely tuned through caps on revenues recoverable through the agency, with private actions making up the balance and thereby preserving the licensing market at the high end. But the point is that the system is an attractive one for the Rule of Law, even if it is bad economics. Uncertainty may be undesirable for various reasons, and the cure will vary based on the perceived cause of the disease. In short, the theory matters.

CONCLUSION

Scholars have long lamented that copyright's uncertainty is intolerable. This Article confirms the conclusion but not the reasons, and it provides the tools for evaluating judicial and legislative interventions to remedy the problem. Any such intervention must navigate the three asymmetries of copyright's uncertainty.

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241 To the extent that concentrating attorney's fees on copyright holders is a concern, it can be alleviated by providing fees to successful claimants in the administrative process, as the National Childhood Vaccine Injury Act does. See NCVIA § 2115, 100 Stat at 3768, 42 USC § 300aa-15.

242 Michael Crichton wrote Captain John Connor in his novel *Rising Sun* with the actor who would later play the role (Sean Connery) in mind. See David Denby, *Dim* Sun, NY Mag 50, 50 (Aug 2, 1993).

First, copyright is asymmetrically rather than pervasively uncertain. Copyright holders enjoy clarity in doctrines they care most about, but users cannot hope to predict their liability or the prices they may pay for violating the law.

Second, the relevant players are asymmetrically sensitive to risk. Copyright holders value clarity, and therefore the salient clarity the system affords buys greater incentive effect than murkier rules would, holding scope constant. Copyright holders also discount their entitlement to exclude derivative uses in light of the uncertainty in doctrines of access, and that discount makes licenses cheaper and litigation less likely. Uncertainty in the doctrines of access also makes users more likely to risk liability and take advantage of copyrighted material, for the deterrent effect of liability is reduced where the costs are uncertain for risk-seeking users. Asymmetric uncertainty makes economic sense in light of asymmetric risk sensitivity. Of course, the empirics are contingent, but I have aimed here to refine the behavioral assumptions that underlay the conventional wisdom. In the absence of contrary evidence, there is reason to doubt that uncertainty inhibits access.

The contingency of the economic argument leads to the third asymmetry, one that does not depend on empirics: the Rule of Law value of notice is asymmetric. Users face stiff penalties for engaging in prohibited activity, so the need to provide sufficient notice to permit users to plan their affairs is acute. The concern is much diminished for copyright holders who enjoy the benefits of a government-sponsored monopoly. From the perspective of the Rule of Law, copyright's asymmetric uncertainty is exactly backwards.

The conflicting prescriptions of the second and third asymmetries reveal that an attempt to clarify doctrines of access in the name of the Rule of Law risks stifling the purposes of copyright. Copyright aims to promote maximal expression, but commitment to the Rule of Law may require sacrificing expression in order to provide clearer notice of the boundaries of the law. Or if the project of clarifying copyright is too daunting, the better course may be to refine copyright's remedial framework either legislatively or through careful judicial scrutiny to mitigate uncertainty's cost to the Rule of Law.