

## DERIVATIVE WORKS 2.0: RECONSIDERING TRANSFORMATIVE USE IN THE AGE OF CROWDSOURCED CREATION

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**ABSTRACT**—Apple invites us to “Rip. Mix. Burn.” while Sony exhorts us to “make.believe.” Digital service providers enable us to create new forms of derivative work—work based substantially on one or more preexisting works. But can we, in a carefree and creative spirit, remix music, movies, and television shows without fear of copyright infringement liability? Despite the exponential growth of remixing technologies, content holders continue to benefit from the vagaries of copyright law. There are no clear principles to determine whether any given remix will infringe one or more copyrights. Thus, rights holders can easily and plausibly threaten infringement suits and potentially chill much creative activity. This Article examines the impact of copyright doctrine on remixes with an emphasis on crowdsourced projects. Such an analysis is particularly salient at this juncture because consumers are neither as passive nor as isolated as they once were. Specifically, large-scale crowdsourced projects raise issues relating to copyright and fair use on a scope and scale never before imaginable. As such, this Article reflects on the particular problems raised by the growth of crowdsourced projects and how our copyright regime can best address them. We conclude that future legal developments will require a thoughtful and sophisticated balance to facilitate free speech, artistic expression, and commercial profit. To this end, we suggest a number of options for legal reform, including: (1) reworking the strict liability basis of copyright infringement for noncommercial works, (2) tempering damages awards for noncommercial or innocent infringement, (3) creating an “intermediate liability” regime that gives courts a middle ground between infringement and fair use, (4) developing clearer *ex ante* guidelines for fair use, and (5) reworking the statutory definition of “derivative work” to exclude noncommercial remixing activities.

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NORTHWESTERN UNIVERSITY LAW REVIEW

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INTRODUCTION

The concept of derivative works in copyright law is inherently problematic. Section 106(2) of the Copyright Act secures for copyright holders the exclusive right to “prepare derivative works based upon the copyrighted work.”<sup>1</sup> The Act then defines a derivative work as any “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, *transformed*, or adapted.”<sup>2</sup> Thus, the very statutory definition of what constitutes a derivative work seems to reserve—to the copyright holder—the exclusive right to “transform” an original work.

At the same time, however, a related section of the federal copyright regime says something entirely different. The fair use doctrine, codified in § 107 of the Act, involves a four-part balancing test. Courts have read the first factor—“the purpose and character of the use”<sup>3</sup>—to consider whether a

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<sup>1</sup> 17 U.S.C. § 106(2) (2012).

<sup>2</sup> *Id.* § 101 (emphasis added).

<sup>3</sup> *Id.* § 107.

particular use is transformative in nature.<sup>4</sup> The more transformative the use, the more likely a court is to absolve a defendant from infringement liability. As the Supreme Court has explained, “[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . .”<sup>5</sup>

Thus, on one hand, copyright’s derivative works doctrine seems to grant the exclusive right to engage in transformative use of a work to that work’s copyright holder. On the other hand, the fair use doctrine seems to suggest that transformative uses of works are precisely the types of works that copyright law should immunize from infringement liability. In short, copyright law sends us mixed messages. This Article analyzes the impact of this inherent tension within the Copyright Act on the practice of creative remixing, with a view toward suggesting legal reforms to attenuate some of the extant ambiguities in the law. The discussion is particularly timely in light of the House Judiciary Committee’s announcement in April 2013 of its plans to conduct a comprehensive review of American copyright law<sup>6</sup>—a review that is active and ongoing.<sup>7</sup>

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<sup>4</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142–43 (2d Cir. 1998).

<sup>5</sup> *Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

<sup>6</sup> Press Release, U.S. House of Representatives Judiciary Comm., Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), available at <http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw> [<http://perma.cc/PUL5-XZ4K>].

<sup>7</sup> The Judiciary Committee continues to review a wide variety of copyright-related issues, including the scope of fair use, copyright remedies, music licensing, moral rights, termination rights, resale royalties, and copyright duration. See, e.g., *Hearing on Copyright Remedies Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Hearing on Moral Rights, Termination Rights, Resale Royalty, & Copyright Term Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Hearing on Music Licensing Under Title 17 Part I & II Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Hearing on the Scope of Fair Use Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014). Recent high-profile copyright disputes appear to have only increased the Committee’s resolve to conduct a broad reexamination of copyright law. For example, in response to the recent Supreme Court decision in the *Aereo* case, House Judiciary Committee Chairman Bob Goodlatte stated:

Today’s Supreme Court decision reinforces the importance of the House Judiciary Committee’s ongoing review of our copyright law. The review is essential in determining whether the laws are still working in the digital age. It is my hope that we can identify improvements to our copyright laws that can benefit both the content community and the technology community, as well as consumers, by maintaining strong protections for copyrighted works and strong incentives for further innovation.

Press Release, U.S. House of Representatives Judiciary Comm., Goodlatte Statement on Supreme Court Decision in *Aereo* Case (June 25, 2014), available at <http://judiciary.house.gov/>

Not surprisingly, an examination of the history and evolution of copyright law sheds some light on this apparent internal contradiction in the scope of protection given to derivative works. Long ago, copyright was a law against piracy. The concept of infringement was limited to direct, one-to-one unauthorized reproductions of books, charts, and maps.<sup>8</sup> But times have changed: today, the law of copyright does not merely protect an author against the scourge of pirated product. It secures the ability of rights holders to control entire derivative franchises that span multiple sectors of the economy and categories of consumption.<sup>9</sup> *Harry Potter* is not merely a book series: it is a movie franchise, a bankable toy line, musical recordings, video and board games, mobile apps, Halloween costumes, branded clothing, jewelry, home decor, fashion accessories, kitchenware, and even a bedding line.<sup>10</sup> And it is a singular feature of modern copyright law, the derivative rights doctrine, that allows *Harry Potter*'s author, J.K. Rowling, and her licensee, Warner Brothers, the exclusive ability to control this universe.

Derivative rights are, no doubt, a boon to rights holders. Yet they may also serve public policy by incentivizing the creation of certain types of works that may not otherwise be made. For example, they enable studios to invest hundreds of millions of dollars in the financing of a movie because, if successful, it will spur the creation of sequels, spin-off television series, and toy and clothing lines.<sup>11</sup> But there is also a dark side to the derivative rights doctrine. As digital technology and the tools of networked creativity have dispersed into the hands of ordinary people on an unprecedented scale, we are increasingly forced to confront this conundrum: At a time when individuals have a greater ability to make transformative use of creative works than ever before, the law is sharply limiting their ability to do so. If we wanted to make a remix of our favorite moments from the *Harry Potter* movies, could we do it without infringing copyright? What if we wanted to invite our friends to contribute their favorite scenes? And, if we wanted to post the resulting video mash-up on YouTube, would it make any difference if we accompanied the post with a notice asserting that the remix was fair use or that no infringement was intended?

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index.cfm/2014/6/goodlatte-statement-on-supreme-court-decision-in-aereo-case [http://perma.cc/BEU7-G7GA].

<sup>8</sup> See Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (limiting infringement claims to the unauthorized printing, reprinting, publishing, or vending of a copyrighted book, chart, or map).

<sup>9</sup> See 17 U.S.C. § 106(2) (2012) (granting copyright owners the exclusive right “to prepare derivative works based upon the copyrighted work”).

<sup>10</sup> See *Harry Potter*, WBSHOP.COM, [http://www.wbshop.com/category/wbshop\\_brands/harry+p Potter.do?nType=2](http://www.wbshop.com/category/wbshop_brands/harry+p Potter.do?nType=2) [http://perma.cc/977J-A7JB].

<sup>11</sup> This is a direct product of the exclusive right copyright holders enjoy to control the marketplace for any derivative works based on the original movie. See § 106(2).

As the law currently stands, if we do not obtain permission from the copyright holder (Warner Brothers in this case), the only way to ascertain whether our actions are infringing is to wait and see if Warner Brothers sues and then attempt to establish a successful fair use defense.<sup>12</sup> Unfortunately, the contradiction between the broad scope of the derivative rights doctrine, which seems to interdict all unauthorized transformative uses, and the first factor of the fair use defense, which strongly favors immunizing unauthorized but transformative uses from infringement liability, creates a state of affairs wrought with ambiguity. One can always litigate the question for a definitive answer, but litigation is time-consuming and expensive. Moreover, under existing law, there is a good chance we would lose the suit and suffer backbreaking penalties.<sup>13</sup> And even if we could afford litigation, assert the fair use defense, and win in the trial court, Warner Brothers would continue to appeal to higher courts where we might ultimately lose—or even win, but at staggering costs that create substantial chilling effects on remix-related activities.

Given these risks, we may simply remove our work from YouTube or refrain from complaining if Warner Brothers convinces YouTube to do so.<sup>14</sup> More worryingly, we may decide not to make—or at least not to post—the remix in the first place. Thus, despite its goal of fostering innovation,<sup>15</sup> copyright law may be chilling a significant volume of harmless, and potentially beneficial, creative activity. There is no way of empirically measuring any such chilling effect; it is impossible to know how many works are neither created nor disseminated because of concerns about copyright infringement. But examples of the law’s chilling effect on remix culture abound.<sup>16</sup>

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<sup>12</sup> See *id.* § 107 (fair use defense to copyright infringement).

<sup>13</sup> See *id.* § 504 (granting remedies in the form of statutory damages of up to \$150,000 per act of willful infringement or, in the alternative, actual damages and a disgorgement of profits); *id.* § 505 (granting courts the discretion to award costs and attorney’s fees to prevailing parties in copyright infringement suits).

<sup>14</sup> Under the “notice and takedown” mechanism in the Copyright Act, this is a simple process for copyright holders. See *id.* § 512.

<sup>15</sup> See, e.g., MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 24 (5th ed. 2010) (“On the one hand, copyright law provides the incentive to create information and a shelter to develop and protect it. On the other hand, the copyright monopoly is a limited one—limited in time and scope by such doctrines as idea/expression, originality, and fair use. Viewed in this way, copyright law represents an economic tradeoff between encouraging the optimal creation of works of authorship through monopoly incentives, and providing for their optimal access, use, and distribution through limiting doctrines.”); Rebecca Tushnet, Comment, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 684 (1997) (“Copyright’s purpose . . . is to encourage creativity for the public interest, not only to ensure monopoly profits . . .”).

<sup>16</sup> See, e.g., JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 61–62 (2011) (“There’s a lot of fun in sampling, and the sampling that we did do was a lot of fun and sparked a lot of creativity, but I think now it’s a little bit prohibitive to sample. It’s just so damn

Although one may argue that *Harry Potter* remixes and other such unauthorized uses of preexisting copyrighted materials are unimportant and contribute little to public discourse, we argue that there is significant value in encouraging this kind of creativity.<sup>17</sup> Such transformative activities as remix, sampling, mash-ups, appropriationist art, parody, and satire advance progress in the arts by criticizing or illuminating our values, assessing our social institutions, and commenting on current events and our culture.<sup>18</sup> A broad reading of the exclusive right of copyright holders to prepare derivative works threatens to enervate our creative marketplace. Remixes of popular works enable consumers to play with new technologies and to learn to use those technologies to express themselves. They are also a form of communication between consumers on a global level. Where remixes are crowdsourced, they enable people to benefit from creative interactions in developing new works. Finally, the output of these efforts provides an important benefit by publicizing new works of art imbued with original meanings, messages, and expressions.

While we do not advocate breaking or ignoring the law, we do suggest that insufficient attention has been paid in copyright discourse to the important social benefits inhering in creative remixing activities. The problem for fans of popular works is that copyright law, including the fair

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expensive, and it's such a hassle trying to clear things. As far as sampling goes, it's an interesting area these days, because it's definitely been dying out. It hasn't been arranged in a way where it's workable for musicians to do it." (quoting Beck as identifying the substantial impact of the law on his creative decisionmaking and why his more recent albums, like *Guero*, have relied less extensively on sampling)); 2 BATTLEGROUND: THE MEDIA 347 (Robin Andersen & Jonathan Gray eds., 2008) ("Public Enemy pulled the track 'Psycho of Greed' from their 2002 album *Revolverlution* because of the exorbitant fee for using a sample from the Beatles' 'Tomorrow Never Knows.'"); Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, STAY FREE! MAG., Fall 2002, [http://www.stayfreemagazine.org/archives/20/public\\_enemy.html](http://www.stayfreemagazine.org/archives/20/public_enemy.html) [<http://perma.cc/MG5L-M7YR>] (documenting how copyright litigation over sampling has caused hip-hop groups to change their production style and limit the number of samples they use); Julia Halperin, *Is Prince v. Cariou Already Having a Chilling Effect? Contemporary Artists Speak*, BLOUIN ARTINFO (Jan. 2, 2012, 8:00 AM), <http://www.blouinartinfo.com/news/story/758352/is-prince-v-cariou-already-having-a-chilling-effect> [<http://perma.cc/MD9F-29NM>] (discussing the chilling effects on appropriationist art stemming from the lower court decision in *Prince v. Cariou*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013)); Benjamin Jackson, *Why Remix Culture Needs New Copyright Laws*, BUZZFEED (Oct. 24, 2012, 3:32 PM), <http://www.buzzfeed.com/benjaminj4/why-remix-culture-needs-new-copyright-laws> [<http://perma.cc/969J-6U76>] (noting the impact of copyright law on the commercialization of creative works containing samples).

<sup>17</sup> See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 77 (2008) (noting that engaging in remixing activities is valuable even if the actual content produced by the remixes is not).

<sup>18</sup> Tushnet, *supra* note 15, at 684 ("People should be able to participate actively in the creative aspects of the world around them. When most creative output is controlled by large corporations, freedom to modify and elaborate on existing characters is necessary to preserve a participatory element in popular culture." (footnote omitted)).

use defense, is currently too vague and flexible in operation to provide necessary guidance to remixers about the legality of their activities.<sup>19</sup> Because remixes of articles of popular culture are socially beneficial and do little commercial harm to copyright holders, we argue that lawmakers should provide clearer guidelines to protect remixing activities. In many instances, the social benefits of creative remixes can outweigh the harm to copyright holders. As such, copyright law should more clearly reflect this possibility.

Part I discusses the social benefits inherent in remixing activities, with a particular focus on crowdsourced remixes. Crowdsourced projects are creative enterprises where individuals (often strangers) scattered across the globe work on editing, revising, adding to, and subtracting from creative works in an iterative process.<sup>20</sup> They are the new wave of consumer creativity online, and little has been written on the application of copyright doctrine to these activities. We intend to contribute to this debate by addressing ways in which crowdsourced projects differ from individual consumer remixes, and identifying specific problems created for crowdsourced projects by the vagaries of copyright law. While our discussion covers both individual and crowdsourced remixing projects, we aim to emphasize the differences between the two. In particular, large-scale crowdsourced works may have more commercial potential than short individual fan mash-ups. The greater potential to commercialize a large-scale project might be perceived as a threat to copyright holders, and this could impact how the fair use defense is applied. The fair use defense requires a court to conduct a significant examination of the extent to which a defendant's work potentially impacts the value or market for the plaintiff's protected material,<sup>21</sup> so the differences between individual and crowdsourced remixing projects can bear heavily on the effectiveness of the fair use defense.

Part II introduces relevant aspects of copyright law, focusing on ways in which artistic crowdsourced projects may infringe copyright and whether defenses such as fair use might excuse infringement. Again, we will contrast more traditional fan mash-ups with larger-scale crowdsourced projects. This Part concludes with a case study of the recent *Star Wars: Uncut* film as an unauthorized crowdsourced fan remix of a *Star Wars* movie. The case study demonstrates the ways in which large-scale creative

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<sup>19</sup> Jacqueline Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1, 22–23 (2010) (discussing this issue in relation to video mash-ups involving popular movies).

<sup>20</sup> See *infra* note 53 and accompanying text.

<sup>21</sup> 17 U.S.C. § 107(4) (2012).

products that draw significantly on existing copyrighted works pose particular problems for copyright law.

Part III draws together the issues raised in Part II by discussing new challenges for copyright law and the fair use doctrine in particular. We advocate the development of new copyright policies that better account for the advent and value of large-scale remixing activities. Part IV concludes with a summary of the challenges for copyright law in the age of digital remixing, and with suggested directions for future legal developments to address the challenges posed by crowdsourcing and remixing.

## I. REMIXING AND CROWDSOURCING

### A. *Risk and Reward in Remixing: The Recent History*<sup>22</sup>

We begin our analysis by looking at the recent history of remixing, including its treatment under the law and its impact on the arts and artists. The practice of remixing has come under direct fire since the first reported decision to consider the legality of sampling resulted in substantial liability for rapper Biz Markie in 1991.<sup>23</sup> Sampling is the practice of taking portions of a preexisting recording and integrating them into a recording featuring other music and lyrics in order to form a new song.<sup>24</sup> The permissibility of sampling speaks directly to the broader issue of whether making pastiche uses of underlying materials to create new finished products—as in the case of remixing—is legal. Until the early 1990s, no court had considered whether such uses—only recently made possible with the advent of splicing technologies, and quickly popularized in hip-hop—constituted infringement or fair use.<sup>25</sup> In *Grand Upright Music*, Markie famously faced infringement allegations for using a piano riff from Gilbert O’Sullivan’s “Alone Again (Naturally)” without authorization or payment.<sup>26</sup> In a decision that betrayed the legal intricacies and novelty of the issue, the judge quoted Exodus and sophistically equated the Seventh Commandment

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<sup>22</sup> Portions of Part I.A come from Derek Khanna & John Tehranian, *Comment Regarding Reforming Statutory Damages for Transformative Uses*, Response to the National Telecommunications and Information Administration Request for Comments on Department of Commerce Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, Docket No. 130927852-3852-01 (Nov. 11, 2013), available at [http://www.ntia.doc.gov/files/ntia/khanna\\_-\\_tehranian\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/khanna_-_tehranian_comments.pdf) [<http://perma.cc/KHG8-4FDB>].

<sup>23</sup> *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

<sup>24</sup> For example, the *Oxford Dictionary* defines “sampling” (in this context) as “[t]he technique of digitally encoding music or sound and reusing it as part of a composition or recording.” *Sampling*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/sampling?q=sampling](http://www.oxforddictionaries.com/us/definition/american_english/sampling?q=sampling) [<http://perma.cc/5QUP-YB8S>].

<sup>25</sup> See Khanna & Tehranian, *supra* note 22, at 3.

<sup>26</sup> *Grand Upright Music Ltd.*, 780 F. Supp. at 183.



with the law of copyright by concluding, “Thou shalt not steal.”<sup>27</sup> By conflating copyright infringement with theft of a biblical proportion and imposing the attendant moral and ethical culpability that follows, the court failed to acknowledge the nuanced artistic and economic stakes in the sampling debate. The result of the decision was not just the issuance of an injunction against Markie; the case also triggered Markie’s referral to the United States Attorney for the Southern District of New York for potential prosecution under criminal copyright laws.<sup>28</sup> More recently, in *Bridgeport Music, Inc. v. Dimension Films*, a federal appellate court held that any unauthorized sample of a sound recording, no matter how small, constituted copyright infringement: “Get a license or do not sample.”<sup>29</sup> Such an absolute position not only ignores the existence of the fair use doctrine, but also fails to account for the competing private and social interests involved in the act of sampling.

To be fair, not all courts have found liability against unauthorized samplers.<sup>30</sup> But many have, making it difficult for artists to predict the likely outcome of a fair use defense. To avoid any specter of liability, record labels have pushed artists to be incredibly conservative in their practices, to the point where labels often will not release records with unlicensed samples even if a legitimate fair use argument exists. William Patry, author of one of the leading treatises on copyright law, explains the problematic consequences of current law:

The result of [the *Bridgeport Music* court’s] terrible decision has been an unwillingness of record companies to put out albums unless each and every sample is cleared. Producers of records must certify that all samples have been licensed . . . . Since previous hip-hop albums used hundreds (and sometimes thousands) of samples, licensing that number of samples is out of the question due to financial and transactional cost reasons. As a result, the creative process of hip-hop has changed.<sup>31</sup>

Take the case of *Paul’s Boutique* by the Beastie Boys, which came out in 1989 and is considered one of the most influential and innovative hip-

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 185.

<sup>29</sup> 410 F.3d 792, 801 (6th Cir. 2005).

<sup>30</sup> See, e.g., *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004) (excusing unauthorized sample by the Beastie Boys of underlying musical composition on the grounds that the use was *de minimis*, particularly in light of the fact that the Beastie Boys had obtained a license for use of the sound recording containing the musical composition); *VMG Salsoul, LLC v. Ciccone*, No. CV 12-05967 BRO (CWx), 2013 WL 8600435, at \*1 (C.D. Cal. Nov. 18, 2013) (finding that use of a percussive “horn hit” in Madonna’s *Vogue*, even if sufficiently original to warrant copyright protection, amounted to nonactionable *de minimis* use).

<sup>31</sup> WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 93 (2011) (footnote omitted).

hop albums of all time.<sup>32</sup> It featured more than 100 samples, some of them unlicensed.<sup>33</sup> This level of sampling led to a unique final product. As Mike Simpson, who produced the album, has explained, “[W]hat we were doing was making entire songs out of samples taken from various different sources. On *Paul’s Boutique* everything was a collage.”<sup>34</sup> Today, Simpson notes, clearing all necessary samples would be “unthinkable.”<sup>35</sup> Indeed, law professor Jason Mazzone estimates that the current cost of obtaining clearances, along with finding and tracking down every single artist, would amount to over \$3 million.<sup>36</sup> *Paul’s Boutique* could never be affordably created under the existing legal regime.

Innovators inevitably stand on the shoulders of those who came before them, and laws that restrict the inherently iterative process of creation ultimately harm the robustness of the arts. Consider Public Enemy’s “Don’t Believe the Hype” from 1988, a work that would have been economically prohibitive to produce in the wake of recent case law on sampling. The song builds on the work of at least seven different preexisting sound recordings, including James Brown, whose songs are sampled throughout the track.<sup>37</sup> But Public Enemy was not merely taking. It was giving, too—and not just to fans of rap and hip-hop; “Don’t Believe the Hype” has itself been sampled by at least sixty-six other songs.<sup>38</sup> Many prominent artists, from the expected (The Game, N.W.A., and The Roots) to the unexpected (U2, Weezer, and the unforgettable Milli Vanilli), have used the track to create their own works.<sup>39</sup>

Remixing and sampling are therefore not merely the pastime of a few college students residing in dorms and tinkering with their turntables. Instead, these practices form the cohesive tissue that connects music and people through a shared culture. They are part of a rich, referential methodology that has long fueled innovation in all forms of content creation. Long before remixing and sampling ever became viable, writer

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<sup>32</sup> Tom Mann, *How Beastie Boys ‘Paul’s Boutique’ Changed Everything*, FASTERLOUDER (Feb. 12, 2014), <http://www.fasterlouder.com.au/features/38414/How-Beastie-Boys-Pauls-Boutique-changed-everything> [<http://perma.cc/CCC9-LBR8>].

<sup>33</sup> Jason Mazzone, *The Day the Music Died*, BLSLAWNOTES, Fall 2011, at 28–29, [http://www.brooklaw.edu/~media/PDF/Admissions/49196BLS\\_LawNotes.ashx](http://www.brooklaw.edu/~media/PDF/Admissions/49196BLS_LawNotes.ashx) [<http://perma.cc/9ZT4-VKLP>]; Paul Tingen, *The Dust Brothers: Sampling, Remixing & The Boat Studio*, SOUND ON SOUND (May 2005), <http://www.soundonsound.com/sos/may05/articles/dust.htm> [<http://perma.cc/BWP2-QPX7>].

<sup>34</sup> Tingen, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> Mazzone, *supra* note 33, at 30.

<sup>37</sup> *Don’t Believe the Hype*, WHOSAMPLED, <http://www.whosampled.com/Public-Enemy/Don%27t-Believe-the-Hype/> [<http://perma.cc/NWM2-B4DX>].

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

Donald Barthelme highlighted the power of mash-ups, juxtapositions, and appropriation. The ultimate tool of the genius, he wrote, is rubber cement.<sup>40</sup> Yet the law is taking the tool of rubber cement—the very stuff that enables artistic pastiche and the repurposing and reconstructing of creative content—out of the hands of musicians and other artists.

When viewed in both comparative and historical contexts, the inability of modern creators to make use of the raw materials of their musical, literary, and artistic progenitors is nothing short of striking. Warhol could draw on the iconography of Marilyn, Mao, Marlon, and Muhammad.<sup>41</sup> Elvis Presley and the members of Led Zeppelin could riff on the rhythm and blues of their youth.<sup>42</sup> Marcel Duchamp could take Da Vinci's *Mona Lisa* and turn her into the mustachioed subject of ribald word play (*L.H.O.O.Q.*).<sup>43</sup> And, luckily, courts have not yet taken away the ability of writers to quote the words of others. Yet the rulings on digital sampling have effectively foreclosed the ability to reference and transform other music at all. The current case law on remixing and sampling impedes the development of electronic dance music, the work of mash-up artists, and innovation in virtually every genre of modern music and every facet of contemporary art.

### B. *Remixing and Crowdsourcing 101*

Despite the value of sampling and other forms of remixing to artists and the public alike, the practice has come under significant legal pressure in recent years. The law's impact on the development of the arts and on expressive activities is growing even more pronounced as modern networked technologies have enabled new forms of remixing to take place through the process of crowdsourcing. To better understand the stakes, it behooves us to examine the relationship between remixing and

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<sup>40</sup> DONALD BARTHELME, *The Genius*, in SADNESS 23, 26 (1972).

<sup>41</sup> See, e.g., *Andy Warhol Biography*, WARHOL, <http://www.warhol.org/collection/aboutandy/biography/> [<http://perma.cc/69YS-5RNX>]; Andy Warhol, *Muhammad Ali*, 1978, synthetic polymer and silkscreen inks on canvas, 101.6cm x 101.6cm; Andy Warhol, *Marlon*, 1966, silkscreen ink on canvas, 104.2cm x 117.1cm.

<sup>42</sup> Of course, such unauthorized riffing, and the subsequent economic success that came from it despite the absence of permission from or payment to the individuals whose works “inspired” Led Zeppelin, Presley, and others, is not without serious racial implications. See, e.g., Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 762–65 (2007) (discussing efforts of the Estate of Willie Dixon, an African-American blues musician, to litigate successfully against Led Zeppelin for its uncredited, unauthorized, and uncompensated lifting of “You Need Love” for its song, “Whole Lotta Love”); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1193 (2008) (“The fleecing of Black artists was the basis of the success of the American music industry . . .”).

<sup>43</sup> Marcel Duchamp, *L.H.O.O.Q.*, 1919, pencil on reproduction of Leonardo da Vinci's *Mona Lisa*, 19.7cm x 12.4cm.

crowdsourcing, and the particular legal claims at issue in this brave new world of interactive and iterative audience-driven creation.

Remixing and crowdsourcing are related, but distinct, concepts. Only in recent years have crowdsourced remixes begun to gain prominence in online culture. A remix is best described as a form of “collage” that uses text, audio, video, or some combination thereof.<sup>44</sup> As Professor Lawrence Lessig notes, new digital technologies enable anyone to create new content using existing text, music, or video<sup>45</sup> to share in this form of creativity.<sup>46</sup> The resulting creative works can serve as sophisticated commentary, pure entertainment, or simple and unadulterated self-expression.<sup>47</sup>

Though the term “remix” has largely been used in the context of digital culture in recent years, music remixes predate this technology by many years and involve similar concepts of joining together different musical elements to create a new work or new version of an existing work. Rap music is an obvious example of a musical form where different layers or sources are often piled together in a kind of collage.<sup>48</sup> On *Paul’s Boutique*, for example, the Beastie Boys interweave at least seventeen samples of preexisting works over the lyrics and music of “Hey Ladies,” a three-minute song.<sup>49</sup> Often a preexisting work is borrowed and used to create a new message.<sup>50</sup>

Creative remixes are remixes whether or not they utilize new technologies, and they are often thought of as individual or small group

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<sup>44</sup> LESSIG, *supra* note 17, at 70–71 (comparing physical collage with digital collage). Professor Lessig has also described remixing as quoting a wide range of texts to produce something new. *Id.* at 69 (“[Read/write media] remix, or quote, a wide range of ‘texts’ to produce something new. These quotes . . . happen in different layers. Unlike text, where the quotes follow in a single line[. . .] . . . remixed media may quote sounds over images, or video over text, or text over sounds. The quotes thus get mixed together. The mix produces the new creative work—the ‘remix.’”).

<sup>45</sup> *Id.* at 69 (“Using the tools of digital technology—even the simplest tools, bundled into the most innovative modern operating systems—anyone can begin to ‘write’ using images, or music, or video.”).

<sup>46</sup> *Id.* (“[U]sing the facilities of a free digital network, anyone can share that writing with anyone else.”).

<sup>47</sup> *Id.* at 71–74 (giving examples of remixes for various different purposes).

<sup>48</sup> LEAFFER, *supra* note 15, at 315 (discussing “sampling” from various musical sources when creating rap and hip-hop music).

<sup>49</sup> Tingen, *supra* note 33 (“On *Paul’s Boutique* everything was a collage. There was one track on which the Beastie Boys played some instruments, but apart from that everything was made of samples.”); *Hey Ladies*, WHOSAMPLED, <http://www.whosampled.com/Beastie-Boys/Hey-Ladies/> [<http://perma.cc/LBH9-RVMY>].

<sup>50</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (finding 2 Live Crew’s hip-hop parody of Roy Orbison’s “Pretty Woman” transformative and entitled to the fair use defense because, inter alia, “2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility” and because “[t]he later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies”).

projects.<sup>51</sup> Crowdsourcing, on the other hand, has quickly blossomed with the birth and evolution of digital communications media and networked technologies, and crowdsourced work is typically defined by the artistry of numerous contributors. Wikipedia—perhaps the world’s most successful crowdsourced work<sup>52</sup>—defines crowdsourcing as “the process of obtaining needed services, ideas, or content by soliciting contributions from a large group of people, and especially from an online community, rather than from traditional employees or suppliers.”<sup>53</sup> Although crowdsourcing is not new to the Internet age,<sup>54</sup> interactive Web 2.0 technologies<sup>55</sup> enable crowdsourced projects of a scope and on a scale never before possible.<sup>56</sup> Much early digital crowdsourcing was more scientific or functional than artistically creative. For example, although it technically constitutes a literary work,<sup>57</sup> Wikipedia is fundamentally a contribution to general knowledge in a variety of areas of human interest. Recent Search for Extraterrestrial Intelligence (SETI)<sup>58</sup> projects<sup>59</sup> invoked crowdsourcing to gather and share data involving the search for intelligent life outside the Earth environment.<sup>60</sup> The National Aeronautics and Space Administration (NASA) has used crowdsourcing to map the surfaces of extraterrestrial bodies.<sup>61</sup>

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<sup>51</sup> LESSIG, *supra* note 17, at 71–74 (giving examples of remixes that happen to have been created by individuals).

<sup>52</sup> Wikipedia describes itself as a “free-access, free content Internet encyclopedia” that allows “[a]lmost anyone who can access the site [to] edit almost any of its articles.” See *Wikipedia*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia> [<http://perma.cc/4HXL-DXZA>] (footnote omitted).

<sup>53</sup> See *Crowdsourcing*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Crowdsourcing> [<http://perma.cc/L8SP-PTHU>].

<sup>54</sup> See, e.g., SIMON WINCHESTER, *THE PROFESSOR AND THE MADMAN* 101–14 (1998) (describing the way in which the original *Oxford English Dictionary* was created via crowdsourcing).

<sup>55</sup> LEAFFER, *supra* note 15, at 27 (describing “Web 2.0” as “the current jargon commonly associated with interactive information sharing, interoperability, and user centered design”).

<sup>56</sup> *Id.* (“[T]oday’s web, with its rich user generated material, metadata, and dynamic content, allows users to do more than retrieve information and it promotes innovative ways to both create, exploit, and preserve copyrighted works.” (footnote omitted)).

<sup>57</sup> 17 U.S.C. § 101 (2012) (“‘Literary works’ are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.”).

<sup>58</sup> SEARCH FOR EXTRATERRESTRIAL INTELLIGENCE INST., <http://www.seti.org/> [<http://perma.cc/K5GS-QZ92>].

<sup>59</sup> SETIQUEST, <http://setiquest.org/about> [<http://perma.cc/SSX-79LH>] (“[S]etiQuest is a community involvement that will lead to a significant improvement in our ability to search for other intelligent civilizations in the cosmos, and in the process, to use SETI to change the world.”).

<sup>60</sup> Jane Wakefield, *SETI Live Website to Crowdfund Alien Life*, BBC NEWS (Feb. 29, 2012, 7:24 AM), <http://www.bbc.com/news/technology-17199882> [<http://perma.cc/XX82-FNY3>].

<sup>61</sup> *NASA and Planetary Resources Sign Agreement to Crowdfund Asteroid Detection*, NASA (Nov. 21, 2013), <http://www.nasa.gov/content/nasa-and-planetary-resources-sign-agreement-to-crowdfund-asteroid-detection/#.UsGKV7R0IH0> [<http://perma.cc/GRD8-ZA7Y>].

However, some crowdsourced projects are more creative and artistic than functional. For example, a virtual world like Second Life<sup>62</sup> is effectively a crowdsourced project. Individuals from around the globe contribute the characters and environments of these virtual worlds. People create avatars<sup>63</sup> and participate in these virtual communities to fulfill expressive and creative, rather than scientific or functional, goals. Virtual worlds involve both artistic development (in the designing of elements of the virtual milieu) and social interaction (in the communications between participants). They promote very different values from the Wikipedia, NASA, and SETI projects. They are not about gathering, collating, and disseminating information. Rather, they foster self-expression, creativity, and individual autonomy.

While it is possible to crowdsource a remix, not all crowdsourced projects will be creative remixes of existing works. Many involve technological or scientific advances, and many revolve around the creation and development of new data or information, rather than remixing existing works.<sup>64</sup> The *Harry Potter* remix described in the Introduction is intended as a paradigmatic example of a creative crowdsourced remix.<sup>65</sup> It is this kind of project on which the remainder of our discussion focuses.

In our *Harry Potter* scenario, we are engaging in a crowdsourced project for an expressive purpose, as in the case of a virtual world. The difference is that, in our *Harry Potter* scenario, we are borrowing—or copying or remixing—protected material created and owned by someone else. Even if we add new text, music, or insights to the video clips, we still take underlying video clips (and potentially some of the additional music or text) from works created by others.

Our aim is to express ourselves and our affection for, or commentary upon, the movies. We do not intend to compete commercially with the

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<sup>62</sup> JOHN PALFREY & URS GASSER, BORN DIGITAL 350 (2008) (“[Second Life is an] Internet-based, virtual world released by Linden Lab in 2003. . . . Inspired by the cyberpunk literary movement, Second Life is a user-generated world where people can play, interact, do business, and communicate using an avatar interface and a virtual currency, the Linden dollar, which is tied to the U.S. dollar.”).

<sup>63</sup> An “avatar” is “a graphical image that represents a person, as on the Internet.” *Avatar*, DICTIONARY.COM, <http://dictionary.reference.com/browse/avatar?s=t> [<http://perma.cc/9FLR-WN2H>].

<sup>64</sup> Two examples of information or data-based crowdsourcing include the traffic and navigation app Waze and the health app OutSmart Flu. See Jacquelyn Bengfort, *Crowdsourcing Campus Health with Mobile Apps and Data*, EDTECH (Nov. 6, 2013), <http://www.edtechmagazine.com/higher/article/2013/11/crowdsourcing-campus-health-mobile-apps-and-data> [<http://perma.cc/FS8C-N7C8>] (“Waze users form a community, allowing them to report hazards and accidents through the app, which sends out updates to other users in the area. . . . Like Waze, OutSmart Flu appeals to users’ altruism. ‘It’s not unlike if you and I were to meet, and I wasn’t feeling well, and you put out your hand to shake mine. I might say, ‘You don’t want to touch me, I’m not feeling well.’” OutSmart Flu lets the UW–Madison community amplify that warning to a larger group.”).

<sup>65</sup> See *supra* notes 10–18 and accompanying text.

copyright owners. However, copyright law to date has not done a particularly good job of clarifying whether, or the extent to which, this kind of noncompetitive expressive use of protected works can be regarded as fair use.<sup>66</sup> In other words, if we ask ten copyright lawyers whether our *Harry Potter* remix would be protected by the fair use doctrine, we could easily get ten different, nuanced responses. The answers would likely depend on variables such as where the remix is posted, whether there is advertising revenue generated from it and how many video clips we use, how long they are, and the context in which they are used.<sup>67</sup> However, in any formal opinion letter, virtually all of the lawyers would agree on one thing: our safest course of action would be to get a license. The reason is simple: even if there is a compelling reason to believe that our planned activity falls under the fair use exception, there is always a chance that a court would disagree. Therefore, to protect us from liability and to immunize themselves from a malpractice suit—lest you rely on their advice and things go awry—rational lawyers will generally recommend paying the rights holder. Considerable rights accretion for copyright holders results from the fear of litigation (no matter the outcome) and the need for legal counsel to protect itself from allegations of malpractice.

This Article seeks to identify whether there are ways in which the law could provide clearer, upfront guidance to expressive remixers about the degree to which their activities may be regarded as fair use, or otherwise lawful. While this discussion will apply to individual as well as crowdsourced remixes, the latter may raise different concerns to copyright holders than the former, depending on the scope and scale of the group project. As our case study of the *Star Wars: Uncut* project, discussed in Part II, demonstrates, crowdsourcing enables the creation of new work, the individually contributed components of which may not infringe copyrights but which taken as a whole may amount to infringement.<sup>68</sup>

To borrow from computer science terminology, thinking separately about “inputs” and “outputs” of a creative crowdsourced project assists in the analysis. Inputs represent those elements of a crowdsourced project that are contributed by individual participants. Inputs are then collated together, either by the group as a whole or by the project organizers, to create a single output: the finished crowdsourced work. The output may be fixed as to form or may be constantly updated.

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<sup>66</sup> The fair use doctrine and its ambiguities will be discussed in further depth in *infra* Part II.C.

<sup>67</sup> See, e.g., *Wade Williams Distribution, Inc. v. Am. Broad. Cos.*, No. 00 Civ. 5002(LMM), 2005 WL 774275, at \*7–11 (S.D.N.Y. Apr. 5, 2005) (weighing a fair use defense for a *Good Morning America* segment exploring portrayal of aliens in American film by considering, inter alia, the commerciality of the segment as well as the number of clips used, their nature and length, and their contextual proximity to the segment’s commentary).

<sup>68</sup> See *infra* Part II.D.

For example, in our *Harry Potter* scenario, “inputs” include the individual video clips our friends forward to us. Together, we mash up the videos to create the “output”—the completed fan remix video. Unlike Wikipedia—a crowdsourced project whose output is constantly evolving—we might choose to fix the form of our remix such that it will not change after we have posted it publicly.

In the case of the *Harry Potter* remix, our inputs are likely to be predominantly drawn from the work of others. If our work is a compilation of our favorite scenes from the movies, perhaps joined together with some commentary or music, much of that input will be protected work. Some of these individual borrowings may, at least in theory, infringe copyrights.<sup>69</sup> Additionally, our final product—the crowdsourced remix—may itself infringe copyright.<sup>70</sup> The remix would undoubtedly be regarded as a derivative work drawn from the work of others, and, of course, copyright law reserves to original copyright holders the right to make derivative works.

But with both inputs and outputs, there is a potential fair use defense. For example, we could argue that our uses are fairly minor in substance<sup>71</sup> and are not commercially competing with Warner Brothers’ copyrighted movies.<sup>72</sup> We might also argue express or implied license, if Warner Brothers has ever released video clips for use by fans for noncommercial purposes.<sup>73</sup> While our fair use arguments may have a good chance of success, the only way to know for sure would be to incur the costs of going to court and arguing the case.

Additionally, it is worth noting that some crowdsourced creative projects may look more like copyright infringement than others. *Star Wars: Uncut*, for example,<sup>74</sup> is a creative crowdsourced project that recreates the entire storyline of *Star Wars Episode IV: A New Hope*.<sup>75</sup> Because it is a full-length movie in and of itself and follows the general storyline of the original movie, it may more easily be regarded as infringing on Lucasfilm’s

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<sup>69</sup> Posting to the Internet individual scenes from copyrighted films violates, inter alia, the copyright holder’s exclusive right to reproduce, publicly perform, and make derivative versions of the work. 17 U.S.C. § 106(1)–(2), (4) (2012).

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* § 107(3).

<sup>72</sup> *See id.* § 107(4).

<sup>73</sup> Conduct and communications by a rights holder can, depending on their context and nature, give rise to a cognizable implied license to make use of protected works in ways that go beyond any express agreement. *See, e.g.,* *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) (recognizing an implied license from context of rights holder’s conduct).

<sup>74</sup> *See* discussion *infra* Part II.D.

<sup>75</sup> STAR WARS EPISODE IV: A NEW HOPE (Lucasfilm 1977).



(now Disney's<sup>76</sup>) derivative works right than, say, our hypothetical *Harry Potter* remix. However, the question remains whether such a derivative work actually does any harm to Disney's valuable property. Although modern courts are unlikely to see it this way, the work might in fact increase the market for the original movie by reminding people how much they enjoyed the movie and that they would like to watch it again and compare it with the remix.<sup>77</sup>

These issues are taken up in more detail below. Part II examines the mechanics of copyright law as it might apply in the crowdsourced remix context. It focuses specifically on the application of the fair use defense in this context. However, before turning to that discussion, it is important to identify the kinds of social interests inherent in online remixing. Having identified these interests, we then examine whether today's copyright law is capable of appropriately protecting these interests in a meaningful way. Copyright law should ideally be able to effectively balance the rights of copyright holders against the interests of others who may seek to use protected works in an expressive manner. To the extent the law fails to create such a balance, it may ultimately chill more artistic innovation than it facilitates.

### C. Crowdsourcing and Consumer Interests in Copyright Works

Both individual and crowdsourced remixing have represented an important source of creative enterprise for many generations. Our copyright laws and their surrounding mythology of creativity have historically embraced a romantic notion of authorship—one that envisions creative enterprise as the product of a lone genius conceiving of canonical works *ex nihilo*.<sup>78</sup> Despite its powerful imagery, this romantic canard has never fully captured the realities of artistic creation. Notwithstanding the popular idea that creators operate in a vacuum, authors in the material world inevitably “stand on the shoulders of giants” by building on the work of others to arrive at their creative output.<sup>79</sup> Throughout history, the act of creation has been an iterative process. In some cases, this process has involved the

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<sup>76</sup> Matt Krantz et al., *Disney Buys Lucasfilm for \$4 Billion*, USA TODAY, Oct. 30, 2012, <http://www.usatoday.com/story/money/business/2012/10/30/disney-star-wars-lucasfilm/1669739/> [<http://perma.cc/K3C7-ZJJ8>].

<sup>77</sup> See David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 378–85 (2014) (articulating a taxonomy of ways in which unauthorized uses of copyrighted works of authorship may enhance, rather than reduce, demand for the work).

<sup>78</sup> See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51–60 (1996); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 629 (1988); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 455–63.

<sup>79</sup> Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945).

collective efforts of dozens or even hundreds of individuals who revise and edit works over the course of months or years, often independently of one another (sometimes unwittingly, as in our next example), passing around drafts until the work reaches a final fixed form. In other words, creative crowdsourcing has taken place since time immemorial even though the process occurred organically and without an entity or individual intentionally mining the creativity of the crowd.

*The Serenity Prayer* provides a powerful example of this heretofore underappreciated process in action. While using Google Books as well as several other digital archives, Yale Law School librarian Fred Shapiro recently discovered that the most famous piece of liturgy in the twentieth century<sup>80</sup> may not have been authored by the man who has historically received credit for the text, theologian Reinhold Niebuhr.<sup>81</sup> Shapiro uncovered various versions of *The Serenity Prayer*'s text published and in use as early as 1936—at least five years before Niebuhr had apparently claimed its creation.<sup>82</sup> As Shapiro speculates, Niebuhr may have subconsciously adopted the prayer as his own after having come into contact with prior incarnations.<sup>83</sup> Indeed, Shapiro's work led to the unearthing of a number of prior versions of the *Prayer* that existed before the date of Niebuhr's ostensible creation, when the *Prayer* took "final" and "official" form. Like different versions of an edited page on Wikipedia, these iterations of the *Prayer* gradually evolved into the precise verbiage and format of the final product that we know today: "God grant me the serenity to accept / the things I cannot change, / courage to change the things I can, / and wisdom to know the difference."<sup>84</sup> As such, Shapiro's new evidence suggests that the work was collective in nature and that it was crowdsourced in voluntary, educational, and religious circles for a number of years before being popularly attributed to Niebuhr.<sup>85</sup>

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<sup>80</sup> Fred R. Shapiro, *Who Wrote the Serenity Prayer?*, YALE ALUMNI MAG., July–Aug. 2008, at 34–35, 37, available at [http://archives.yalealumnimagazine.com/issues/2008\\_07/serenity.html](http://archives.yalealumnimagazine.com/issues/2008_07/serenity.html) [<http://perma.cc/6C8L-6WPY>].

<sup>81</sup> *Id.* at 35.

<sup>82</sup> *Id.* at 35, 37–38. Interestingly, the prior versions of the *Prayer* unearthed by Shapiro were by women, most of whom were involved in some sort of volunteer and educational activity. Elisabeth Sifton, *It Takes a Master to Make a Masterpiece*, YALE ALUMNI MAG., July–Aug. 2008, at 40, available at <http://www.yalealumnimagazine.com/articles/3416> [<http://perma.cc/L6LN-GKFK>].

<sup>83</sup> Shapiro, *supra* note 80, at 39. Elisabeth Sifton, Niebuhr's daughter, has adamantly denied Shapiro's allegations. In an intervention entitled *It Takes a Master to Make a Masterpiece*, she argues, among other things, that the prayer must have come from a gifted practitioner from a particular theological context who could have only been her father. Sifton, *supra* note 82, at 40–41. Interestingly, the title of her article immediately plays into our most romantic notions of authorship, which seek to reduce creation to a lone genius rather than to the iterative and accretive contributions of many.

<sup>84</sup> See WILLIAM V. PIETSCH, *THE SERENITY PRAYER BOOK* (1992).

<sup>85</sup> In 2009, Duke researcher Stephen Goranson found a citation to Niebuhr as the *Prayer*'s author contained in a Christian student newsletter published in 1937. Laurie Goodstein, *Serenity Prayer*

Thus, crowdsourcing creation is not a new phenomenon. However, it has long gone unnoticed and unappreciated. In part, the romantic mythology surrounding Western notions of authors (as in the case of Niebuhr and *The Serenity Prayer*) has deemphasized the existence of crowdsourcing. In addition, the reality of crowdsourcing complicates authorship issues and legal rights.<sup>86</sup> And since the operation of crowdsourcing in the past has occurred over the course of many years and in relative obscurity (often times even accidentally and without coordinated effort), it has not received much attention. However, with the speed and visibility of modern digital collaboration over networked technologies, crowdsourced creative activities are now everywhere we look, especially online.

As with any transformative utilization of underlying creative materials, the act of creative crowdsourcing vindicates critical interests for both its participants and the public. To this end, it is worth focusing on two particular ends achieved by transformative activities. First, transformative uses advance the utilitarian goals of the copyright regime by giving the public new creative works imbued with original insights, meanings, and messages.<sup>87</sup> Second, beyond merely serving the core function of the copyright regime, transformative interactions with creative works also advance identity formation and expressive interests by mediating the development of cultural networks, regulating or undermining insider-outsider relationships, and demarcating or blurring social strata.<sup>88</sup> Specifically, our ability to make (or not make) transformative use of cultural content shapes identity formation, and our ability to exhibit or display publicly such uses impacts the way in which individuals can engage in semiotic use of cultural content and, thereby, express themselves to the world.

As one of us has previously argued, identity formation takes place internally as an individual's sense of self "is shaped through interaction

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*Skeptic Now Credits Niebuhr*, N.Y. TIMES, Nov. 28, 2009, at A11. Shapiro responded that "[t]he new evidence does not prove that Reinhold Niebuhr wrote [*The Serenity Prayer*], but it does significantly improve the likelihood that he was the originator," and that he would list *The Serenity Prayer* under Niebuhr's name in the next edition of *The Yale Book of Quotations*. *Id.*

<sup>86</sup> For example, it raises issues of originality that might call into question the relatively low bar for copyrightability post-*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Id.* at 346 (finding that the federal copyright regime's originality requirement only necessitates "independent creation plus a modicum of creativity"). It may also lead to important questions about who might count as an author or joint author under 17 U.S.C. § 201(a) (2012).

<sup>87</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.").

<sup>88</sup> See generally John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 23 (2011).

with objects in the external world. . . . [T]he expression of personhood occurs when the individual communicates some aspect of her (already formed) identity to others as a way of contextualizing herself, through her relationship with objects, within the broader community.<sup>89</sup> These objects, of course, include those of an intangible nature, including the films, music, books, art, and television that comprise popular culture. Transformative interactions with creative works mediate the development of social relationships by allowing users to draw upon those creative works for expressive purposes, couching their interests or activities within a particular context—communicating their alignment with cultural, political, and economic networks and facilitating their interaction with the broader community.<sup>90</sup> Expressive interaction with creative works also allows users to define their relationship with, and status in, their social milieu—be it oppositional or harmonious, insider or outsider. The creative choices users make when creating fan mash-ups, music remixes, or parodies of popular television shows or movies communicate important details about users’ perceived relationships with the world, their self-images, and their links to certain social, cultural, or political networks.<sup>91</sup> A musical parody of Disney’s wildly popular *Frozen* film called “Fuck It All,” for instance, communicates a tongue-in-cheek disdain for the ubiquitous “Let It Go” and positions the creator of the parody as outside of the mainstream audience for the film,<sup>92</sup> whereas a more traditional, homage-style *Breaking Bad* remix video may announce that its creators see themselves as in-the-know cultural insiders.<sup>93</sup>

Transformative interactions with creative works also serve personhood interests by serving to demarcate or blur social boundaries. Where class lines were once easily defined and perceived by tangible property markers such as cars, homes, or brand of jeans, the explosion of technologies that gives users access to creative content online can have either subversive consequences by neutralizing those boundaries, or hegemonic consequences by giving new means to solidifying those boundaries. On the former point, for example, the advancement of identity formation and expressive interests through transformation of creative works, instead of through the conspicuous consumption of days past, can unshackle users from the constraints of their pocketbooks and can free them to express themselves to limits defined only by their creativity and imagination.

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 30.

<sup>91</sup> *Id.* at 31.

<sup>92</sup> Iodine Cerium, *Fuck It All – Parody of Let It Go*, YOUTUBE (Jan. 11, 2014), <http://www.youtube.com/watch?v=3DIZdZYLCfU> [<http://perma.cc/VV8K-8Q2G>].

<sup>93</sup> Mc GillaCutty, *Breaking Bad Remix (Seasons 1 and 2)*, YOUTUBE (Sept. 6, 2012), [http://www.youtube.com/watch?v=2yd9vW\\_lfsk](http://www.youtube.com/watch?v=2yd9vW_lfsk) [<http://perma.cc/QSF9-SNXS>].

Contributing a scene to *Star Wars: Uncut*, for instance, announces alignment with the global *Star Wars* fan community—income or social strata be damned. People once separated by class (or race, age, or gender) can now forge connections through collaborative creative efforts that transcend those categories. On the latter point, limiting the ability of users to engage in transformative uses of certain creative works can create a world of expressive “haves” and “have-nots” and can further perpetuate existing social hierarchies by determining who, for example, might be able to make meaningful use of important patriotic or cultural symbols and to what end.<sup>94</sup>

Thus, ordinary transformative works advance both the constitutionally mandated goal of the copyright regime—progress in the arts—and the expressive and personhood interests of the individuals who create and consume them. Critically, for the purposes of our analysis, crowdsourced transformative works have the potential to provide even further benefits along both lines.

First, crowdsourced transformative activity may result in particular types of creative output that ordinary transformative activity is unlikely to produce. Thus, crowdsourced transformative activity fuels progress in the arts. After all, by accessing the knowledge, cultural experiences, and perspectives of hundreds (if not hundreds of thousands) of individuals, crowdsourcing has the unique ability to harness the strength of collective wisdom and insight. This can result in a final creation that draws on elements of which any one author (or group of authors who exist in a common social circle) would be unable, or at least unlikely, to make use.

In the parlance of documentarian Kirby Ferguson, who wrote and directed the powerful and poignant *Everything Is a Remix* series, creative evolution is—like physical evolution—a process of copying, transforming, and combining,<sup>95</sup> except instead of genes, the raw materials for creative evolution are memes.<sup>96</sup> Crowdsourcing enables the copying, transformation, and combination of memes in a unique manner. It speeds up cultural evolution and also enables the creation of unknown blends and fusions. This mixing and remixing of cultural memes from around the globe is a dynamic amalgamating process that spurs innovation by giving rise to new forms of creativity.

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<sup>94</sup> Tehrani, *supra* note 88, at 33–56 (using the examples of intellectual property rights to flags, the term “Olympic,” and songs associated with cultural heritage and pride to illustrate how referential, reverential, and subversive uses of creative works can impact insider–outsider boundaries within mainstream society and perpetuate or attack social hierarchies).

<sup>95</sup> Kirby Ferguson, *Everything Is a Remix Part 4: System Failure*, EVERYTHING IS A REMIX (Feb. 16, 2012), <http://everythingisaremix.info/blog/everything-is-a-remix-part-4> [http://perma.cc/K2TX-669J].

<sup>96</sup> *Id.*

Wikipedia exemplifies the ability of crowdsourcing to yield remarkable results from the proper harnessing of collective knowledge.<sup>97</sup> Indeed, by some measures, Wikipedia is nearly as factually accurate as such traditional repositories of knowledge as the *Encyclopedia Britannica*, and the two services achieve similar accuracy marks for serious errors.<sup>98</sup> And it does so while remaining more nimble and timely than the laudable encyclopedias of yore.<sup>99</sup> Finally, and perhaps most importantly, unlike the learned tomes of the twentieth century, it is readily and freely accessible by anyone.

Second, crowdsourced creative activities vindicate particularly unique expressive interests. The process of creating crowdsourced works often involves collaboration across the world through networked technologies, which allows individuals to engage with new technologies in a highly collaborative manner. It also enables those engaged in crowdsourcing to create at speeds never before possible. Casey Pugh, the creator of *Star Wars: Uncut*, said that one of the motivations for engaging in the project was to ascertain how fast he could make an entire film through crowdsourcing.<sup>100</sup> It took him only nine to ten months to get all of the scenes he needed to put the film together<sup>101</sup> and, by all accounts, the time taken to get the scenes together for his current project, *The Empire Strikes*

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<sup>97</sup> Admittedly, Wikipedia represents more of an example of functional, rather than expressive, crowdsourcing. Nevertheless, the benefits it exemplifies from the harnessing of collective experiences and perspectives can advantage progress in the creative realm as well.

<sup>98</sup> See Daniel Terdiman, *Study: Wikipedia as Accurate as Britannica*, CNET NEWS (Dec. 15, 2005, 3:35 PM), [http://news.cnet.com/Study-Wikipedia-as-accurate-as-Britannica/2100-1038\\_3-5997332.html](http://news.cnet.com/Study-Wikipedia-as-accurate-as-Britannica/2100-1038_3-5997332.html) [<http://perma.cc/L5VJ-WXNQ>] (citing a peer-review–expert study in *Nature* comparing side-by-side entries in Wikipedia and Encyclopedia Britannica on a variety of topics, and concluding that the two services achieve similar accuracy marks); see also Tim Worstall, *It's an Interesting World Where Wikipedia Is More Accurate than Both the CIA and the Wall Street Journal*, FORBES (Dec. 6, 2013, 5:58 AM), <http://www.forbes.com/sites/timworstall/2013/12/06/its-an-interesting-world-where-wikipedia-is-more-accurate-than-both-the-cia-and-the-wall-street-journal/> [<http://perma.cc/GA92-3XS3>] (providing anecdotal evidence that Wikipedia's use of statistical measurements of inequality and poverty is more accurate than the CIA and *Wall Street Journal*'s use thereof).

<sup>99</sup> But see Tom Simonite, *The Decline of Wikipedia*, MIT TECH. REV., Oct. 22, 2013, <http://www.technologyreview.com/featuredstory/520446/the-decline-of-wikipedia/> [<http://perma.cc/3U2D-UUWX>] (critiquing Wikipedia for, inter alia, the 90% male demographic of its administrators, its “crushing bureaucracy,” its “abrasive atmosphere that deters newcomers,” and its “skewed coverage: its entries on Pokemon and female porn stars are comprehensive, but its pages on female novelists or places in sub-Saharan Africa are sketchy”).

<sup>100</sup> Lesley Coffin, *Tribeca: Interview with Star Wars Uncut Creator Casey Pugh*, FILMORIA (Apr. 18, 2013), <http://www.filmoria.co.uk/2013/04/tribeca-interview-with-star-wars-uncut-creator-casey-pugh/> [<http://perma.cc/5LH2-VL8B>] (“I was also just interested in how fast I could remake a film using crowdsourcing.”).

<sup>101</sup> *Id.* (“[W]ithin [nine] or [ten] months, I got all the scenes and *Star Wars Uncut* was born.”).

*Back: Uncut*, was even less.<sup>102</sup> Pugh is also now experimenting with crowdsourcing to make the viewing experience for his *Empire Strikes Back* project more interactive, allowing viewers to choose between versions of the scenes they want to experience.<sup>103</sup> Thus, crowdsourced remixes not only offer new avenues for those providing creative inputs to a project, but also offer new ways for those experiencing the work to engage with what they see and hear.

All told, crowdsourcing contributes to progress in the arts by encouraging the creation and dissemination of new artistic works. Meanwhile, it also vindicates important expressive interests. Yet, despite these seemingly positive virtues, crowdsourcing faces serious obstacles. While crowdsourcing is not a new phenomenon, it is now more visible and ubiquitous than ever before. And with its new high profile have come new legal challenges. The explosion of creative crowdsourcing activities raises serious copyright concerns and forces our legal regime on creative monopolies to address issues that were never fully anticipated by the Framers, let alone the drafters who gave us the (still reigning) Copyright Act of 1976.

## II. EXPRESSIVE CROWDSOURCING AND COPYRIGHT LAW

### A. Copyright Infringement

Copyright law protects the rights of those who create literary, artistic, dramatic, and musical works.<sup>104</sup> Its goal is to foster innovation in these areas by granting limited rights to authors to reap the commercial rewards of their efforts.<sup>105</sup> Absent copyright law, others could reproduce and exploit

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<sup>102</sup> *Id.* (“In less than a year, *Star Wars Uncut* was edited into a single, feature length remake of *Star Wars: A New Hope*. A few years later he began work on *The Empire Strikes Back Uncut* and in a third of the time, every scene was complete.”).

<sup>103</sup> *Id.* (“What I ended up doing for *A New Hope Uncut* was what we call a director’s cut, where I literally hand picked scenes which I thought would make the most entertaining final cut of the project. We have a liking system online, but even that wasn’t always the best way. And there are multiple versions with different scenes in each version. For *The Empire Strikes Back Uncut*, we will be releasing some new ways to watch different versions as well.”).

<sup>104</sup> LEAFFER, *supra* note 15, at 2 (“[T]he first copyright act gave authors the exclusive right to make copies of their books. Today, copyright law covers much broader ground, including not only most artistic, literary, and musical works, but computer software and some kinds of databases as well.”).

<sup>105</sup> *Id.* at 21–22 (“Without specifying the form of protection, art. 1, § 8, cl. 8 of the United States Constitution empowers Congress to legislate copyright and patent statutes, conferring a limited monopoly on writings and inventions. By implication, the Constitution recognizes that copyright law plays an important role in our market economy. Rather than encouraging production of works by government subsidy, or awards or prizes, the author is given, through the limited monopoly of copyright law, a private property right over his creation, the worth of which will ultimately be determined by the market. The underlying policy of this constitutional provision is to promote the public welfare through private market incentives.”).

the works of a creator without recompense. Under the Copyright Act, a copyright owner—who may or may not be the author of the work—is granted a number of exclusive rights.<sup>106</sup> These rights include the right to reproduce the work and the right to make derivative works based on the original work. Copyright holders are also granted the exclusive rights to distribute protected works to the public, to publicly display the works, and to engage in public performances of relevant works. These rights are tempered by several defenses, the most relevant for the purposes of this discussion being the fair use defense.<sup>107</sup>

All of these rights may be implicated in expressive crowdsourced remixes both in terms of their inputs and their output. If the inputs to a *Harry Potter* fan video remix are film and music clips from the movies, and perhaps from some other sources, most if not all of the inputs will be copyrighted. When individuals contribute parts of existing works into a creative crowdsourced project, each individual will be reproducing the relevant segment of the work, and potentially contravening the copyright holder's reproduction right.

To the extent that the project organizers also make copies of those segments, they may additionally infringe the reproduction right. Further, they may be infringing the copyright holder's derivative works right. Where the crowdsourced work is effectively a digital collage based on *Harry Potter* or some other particular protected work, the resulting product is likely a derivative work. Other common examples of derivative works include unauthorized prequels and sequels based on popular books or movies.<sup>108</sup>

One salient difference between a crowdsourced digital remix and a more traditional derivative work (like a prequel or sequel) is that the remix is less likely to be for commercial profit and is less likely to occupy a market space that the copyright holder would exploit. Whereas one might argue that the market for sequels and prequels should be reserved to the copyright holder as a logical extension of its original market, the same is less true for most remixes, at least those of a noncommercial nature.

The copyright holder's exclusive public performance and distribution rights might also be implicated by remixing activities. In the digital age, courts have held that disseminating copyrighted works online may, depending on the circumstances, amount to a public performance,<sup>109</sup> public

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<sup>106</sup> 17 U.S.C. § 106 (2012).

<sup>107</sup> *Id.* § 107.

<sup>108</sup> See Jacqueline D. Lipton, *A Taxonomy of Borrowing*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 951, 980 (2014).

<sup>109</sup> See, e.g., *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (holding that a system for the electronic delivery of movies via video to hotel guests in different rooms in a hotel was a public performance).



display,<sup>110</sup> or a distribution to the public.<sup>111</sup> Thus, when remixers post their creations online, they are arguably displaying, distributing, or publicly performing those works under broad judicial interpretations of these terms. Individual contributors to a crowdsourced remix likely do not infringe these particular rights if they simply send their input directly to the organizer of the remix. A private communication of a copyrighted work may infringe the reproduction right to the extent that it involves a digital copy being made of the work during the transmission process, but it is unlikely to be regarded as sufficiently “public” to infringe these other rights.

*B. Creative Crowdsourcing: The Trouble with Several Arguments Against Infringement Under Current Law*

Multiple arguments have been made, mostly unsuccessfully, in favor of limiting liability for remixers. For example, one might argue that the uses of existing works by remixers are simply *de minimis*. One might also think that no copyright holder would ever sue—or threaten to sue—over these kinds of uses, or that a plaintiff could never establish sufficient harm to sway a court to grant a remedy. However, evidence suggests that copyright holders often sue or threaten to sue individuals for apparently nonharmful, noncommercial uses of their works.<sup>112</sup> They regularly issue takedown notices to popular media-sharing sites such as YouTube.<sup>113</sup> This effectively puts the onus on the alleged infringer to prove a defense, such as fair use, before the fact. Although fair use is a complete defense to a copyright infringement claim, it is very difficult for an individual with limited resources and limited knowledge of copyright law to establish fair use outside the litigation context. Even within the litigation context, the burden of proving fair use falls squarely on the defendant,<sup>114</sup> and it is a

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<sup>110</sup> See, e.g., *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993) (holding that a computer bulletin board operator may be held liable for displaying a work to the public where the work was originally posted on the bulletin board by a third party; the display is regarded as being “public” even if only a limited number of bulletin board subscribers can access it).

<sup>111</sup> *Id.* at 1559.

<sup>112</sup> JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* 99 (2011) (noting the onslaught of copyright suits brought by the Recording Industry Association of America against peer-to-peer file sharers); *id.* at 149 (noting that thousands of individual music file sharers have faced suits brought by the Recording Industry Association of America and its members).

<sup>113</sup> *Id.* at 134–35 (describing the way in which content holders have issued takedown notices to YouTube in the most questionable cases of copyright infringement); *id.* at 135–36 (example of Universal’s use of a takedown notice, issued to YouTube, to have YouTube remove a home video of a small child dancing to Prince’s hit single “Let’s Go Crazy” on the basis of copyright infringement).

<sup>114</sup> *Id.* at 5 (“[F]air use is an affirmative defense. Although this fact makes little difference to theorists speaking about fair use in a vacuum, it makes a profound difference to copyright defendants facing the specter of multiple millions in liability in federal court as the doctrine places the burden squarely on the defendant to prove fair use.”).

burden few private individuals can bear in practice—often for reasons having nothing to do with the merits of the defense.

Although remix artists' uses of copyrighted materials may be seen as inconsequential, or at least as not causing any significant commercial harm to a copyright holder, courts have generally ignored arguments about *de minimis* uses in the copyright context.<sup>115</sup> Additionally, copyright courts have, in general, broadly construed notions of commercial use and commercial harm to a copyright holder.<sup>116</sup>

A second argument that has largely failed is that people who create fan remixes in the form of homage to, or parody of, the original work would never be sued because they would positively affect the copyright holder's bottom line. In other words, much fan activity provides free publicity for copyright holders and should be welcomed or even encouraged. While many copyright holders encourage, welcome, or at least ignore fan works, others prefer to assert more absolute control over their works. For example, Summit Entertainment has been particularly proprietary about even *de minimis* fan uses of material from its popular *Twilight* film franchise.<sup>117</sup> Copyright holders may want to control all aspects of marketing and publicity themselves or may desire royalties for use of proprietary materials even where charging a royalty chills free publicity within the fan community.

Another argument against infringement liability is that remixing is predominantly an expressive activity and that expressive uses of copyrighted works should receive protection under the First Amendment. However, in recent copyright jurisprudence, courts have held that the fair use defense provides the necessary balance between free speech and copyright.<sup>118</sup> Thus, the First Amendment argument against copyright infringement is dealt with by saying that a defendant making an expressive use can rely on the fair use defense. For example, the Supreme Court

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<sup>115</sup> *Id.* at 13 (“[A] *de minimis*-use [sic] defense is typically ignored by courts in copyright cases.”).

<sup>116</sup> *Id.* (“[C]ourts have frequently adopted broad readings of what constitutes commercial use.”); *id.* at 14 (“[O]ne could argue that virtually all use is commercial in nature because, at some level, any unpaid use of a copyrighted work causes someone to lose potential revenue.”).

<sup>117</sup> *See, e.g.*, Lipton, *supra* note 19, at 37–42.

<sup>118</sup> *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“[C]opyright’s built-in free speech safeguards are generally adequate to address [any conflict with free speech rights.]”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (noting that copyright law needs no independent First Amendment scrutiny because it already incorporates such concerns through its “distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) (“Copyright law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves.”); *New Era Publ’ns Int’l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (“[T]he fair use doctrine encompasses all claims of [F]irst [A]mendment in the copyright field.”).

famously stated in *Eldred v. Ashcroft* that copyright is generally immunized from independent First Amendment scrutiny because it only restricts the ability of individuals to make “other people’s” speech, not their own.<sup>119</sup>

Although the Supreme Court’s distinction between an individual’s own speech and the speech of others might make sense when read against copyright law as it existed at the time of the Framing—when it only prohibited direct, one-to-one copying of books and maps—the dichotomy has become less clear because copyright now protects derivative works. Whereas in some cases, there may be little doubt that an accused infringer is merely making another’s speech (as in *Eldred*, where the accused infringer adopted, word-for-word, the writings of others), there are a multitude of transformative instances where accused infringers combine the fruit of another’s intellectual labor with their own to create something new and original. For example, George Harrison was famously and successfully found liable for subconscious infringement when he purportedly usurped key elements from the Chiffons’ 1963 doo-wop hit “He’s So Fine” in composing his stately and saturnine spiritual “My Sweet Lord.”<sup>120</sup> Yet there is little doubt that his composition contained strong elements of *his* speech, including his unique lyrical and musical sensibilities. Such uses as Harrison’s can and should muddy the notion of speech ownership. Nevertheless, as it stands, copyright claims generally enjoy immunity from independent First Amendment scrutiny.<sup>121</sup>

Another potential argument against liability is that remixers are usually “innocent infringers”—that few remixers have any intention to infringe the copyrights of the underlying rights holders of the sampled works. Indeed, a brief survey of fan video mash-ups on YouTube suggests that many remixers assume this to be a legitimate defense: remixers who reuse copyright materials without permission often affix notices to their mash-ups stating that no infringement was intended.<sup>122</sup> Presumably, remixers have done this to negate a claim of copyright infringement, on the mistaken assumption that a copyright infringement action includes a *mens rea* requirement.<sup>123</sup>

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<sup>119</sup> Writing for the majority, Justice Ginsburg pronounced that “[t]he First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make *other people’s speeches*.” *Eldred*, 537 U.S. at 221 (emphasis added). The Court then confidently asserted that copyright law’s built-in checks—rather than heightened constitutional scrutiny—could generally solve any potential free speech issues. *Id.*

<sup>120</sup> See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 178–79 (S.D.N.Y. 1976) (demonstrating the musical similarities between the two motifs), *aff’d sub nom.* *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

<sup>121</sup> *But see* *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001).

<sup>122</sup> Lipton, *supra* note 19, at 22–23.

<sup>123</sup> *Id.* at 23.

Most remixers—in fact, most people who are not copyright lawyers—do not realize that copyright infringement attaches strict liability.<sup>124</sup> There is no *mens rea* requirement for infringement.<sup>125</sup> Thus, even an individual with no intent to infringe may be liable for direct infringement if she performed any of the acts reserved to the copyright holder. The affixation of a notice to a work asserting that “no infringement was intended” is irrelevant to liability. The question, therefore, becomes whether the law, as it currently stands, is striking an appropriate balance between the rights of copyright holders and those of creative and expressive users who do not intend to compete with the copyright holders. The answer appears to be no because with First Amendment and innocent infringement defenses unavailing,<sup>126</sup> artists are left to seek salvation in the fair use doctrine. Unfortunately, such reliance is all too often unhelpful.

### C. *Remixing and Fair Use*

As noted in the previous Section, many have argued that fair use is the solution to concerns about overzealous enforcement of copyrights.<sup>127</sup> Because fair use is touted as the answer to First Amendment concerns, it bears detailed scrutiny in the remixing context. However, the application of the fair use defense is problematic in practice largely because of its unpredictability and because it can be used only as a sword and not a shield. In other words, fair use can be raised only as a defense in an infringement action.<sup>128</sup> It cannot be effectively established outside this

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<sup>124</sup> TEHRANIAN, *supra* note 112, at 13 (“[C]opyright law is a strict liability regime with no *mens rea* requirement for liability. Infringement occurs whether an individual acts with bad faith or complete innocence.”).

<sup>125</sup> *Id.*

<sup>126</sup> Innocent state of mind does not ever impact the liability calculus, but it can impact damages awards. *See, e.g.*, *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 35 (2d Cir. 1990) (“[A] finding of innocent infringement does not absolve the defendant of liability under the Copyright Act. Rather, it triggers an equitable remedy that affords the district court discretion to award damages commensurate with the defendant’s culpability.” (citation omitted)). Actual damages are not mitigated in any way by a defense of innocent infringement, but statutory damages can be. *See* 17 U.S.C. § 504(c) (2012); *Fitzgerald Publ’g Co. v. Baylor Publ’g Co.*, 807 F.2d 1110, 1113 (2d Cir. 1986) (“Even an innocent infringer is liable for infringement. . . . Innocence is only significant to a trial court when it fixes statutory damages, which is a remedy equitable in nature.”); *see also* R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 182–83 (2007) (noting the declining value of the innocent infringement defense through the course of American copyright history).

<sup>127</sup> *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–65 (11th Cir. 2001) (“Because of the First Amendment principles built into copyright law through the idea/expression dichotomy and the doctrine of fair use, courts often need not entertain related First Amendment arguments in a copyright case.”).

<sup>128</sup> *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring) (“Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to

context. In addition, fair use jurisprudence has provided enough unfavorable precedent against remixing activities that a well-financed rights holder can make colorable, if not ultimately winning, infringement claims against remixing defendants.

The fair use defense was initially developed through case law as an equitable rule of reason that could be adapted to new fact scenarios.<sup>129</sup> It retained this flexible quality when Congress incorporated it into the 1976 Copyright Act. As legislatively enacted, the defense provides courts with a list of at least four interests they must balance in any given case, but it provides little additional guidance. In practice, this gives rise to great ex ante uncertainty about the outcome of a fair use defense.

The text of the defense appears in § 107 of the Copyright Act and provides that:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>130</sup>

Section 107 sets out examples of particular activities—such as criticism, comment, teaching, scholarship, and research—that are typically regarded as fair use. However, the statute does not demand that a court deem such uses fair. Instead, it simply provides examples of the types of practices that past cases may have excused from liability under the fair use doctrine. As it turns out, courts have frequently denied fair use defenses for some of the examples seemingly contained in the statute itself, including news reporting, classroom photocopying, and research.<sup>131</sup> For example, in

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exploit existing works and then later claim that their rendition was a valuable commentary on the original.”).

<sup>129</sup> LEAFFER, *supra* note 15, at 487 (“The doctrine of fair use is a judicially created defense to copyright infringement that allows a third party to use a copyrighted work in a reasonable manner without the copyright owner’s consent. Although codified in the 1976 Act, the doctrine of fair use has retained its nature as an equitable rule of reason to be applied where a finding of infringement would either be unfair or undermine ‘the Progress of Science and the useful Arts.’”).

<sup>130</sup> § 107.

<sup>131</sup> *Id.*

*Los Angeles News Service v. KCAL-TV Channel 9*, the Ninth Circuit rejected a fair use defense brought by a television news broadcast that used thirty seconds of a four-minute video capturing the infamous beating of Reginald Denny in Los Angeles in 1992.<sup>132</sup> Other circuit courts have not hesitated to reject fair use defenses for the photocopying of copyrighted materials for classroom<sup>133</sup> or scientific research purposes.<sup>134</sup> Meanwhile, to add to the ambiguity, the case law is clear that none of the four fair use factors listed in § 107 are necessarily determinative in any given case. Indeed, the factors may be weighted differently from case to case and from court to court.<sup>135</sup>

Along with the flexibility in application of the fair use factors comes flexibility in interpretation of each factor. For example, as epitomized by the landmark Supreme Court case of *Campbell v. Acuff-Rose*, courts have imported a “transformative use” test into the first factor: the purpose or character of the defendant’s use.<sup>136</sup> However, even the nature of transformative use is fluid in practice. Originally, a court was more likely to find fair use under the first factor where the defendant’s use was transformative in the sense of adding new meanings and perspectives to the plaintiff’s work.<sup>137</sup> The most obvious and most often upheld type of fair use

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<sup>132</sup> 108 F.3d 1119, 1120 (9th Cir. 1997).

<sup>133</sup> *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (“This is a copyright infringement case. The corporate defendant, Michigan Document Services, Inc., is a commercial copyshop that reproduced substantial segments of copyrighted works of scholarship, bound the copies into ‘coursepacks,’ and sold the coursepacks to students for use in fulfilling reading assignments given by professors at the University of Michigan. The copyshop acted without permission from the copyright holders . . .”). But the digital world is different. See *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012); J.D. Lipton, *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VAND. J. ENT. & TECH. L. 585 (2014).

<sup>134</sup> *Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881 (2d Cir. 1994), *amended by* 60 F.3d 913 (2d Cir. 1994). However, digitization of library materials has recently been allowed in several cases as a fair use with reference to the ease of access and use for scientific and research purposes, amongst other issues. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013); *Authors Guild, Inc. v. Hathitrust*, No. 11 CV 6351(HB), 2013 WL 603193 (S.D.N.Y. Feb. 15, 2013).

<sup>135</sup> LEAFFER, *supra* note 15, at 488 (“[T]he fair use defense continues to defy precise definition and remains an ad hoc equitable rule of reason where finding an infringement would undermine the ultimate purpose of copyright law.”).

<sup>136</sup> TEHRANIAN, *supra* note 112, at 40 (noting that this test was imported from Judge Pierre Leval’s article, *Toward a Fair Use Standard*, and that Judge Leval, in this article, advocated making transformative use the focus of the first factor of the fair use test); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

<sup>137</sup> TEHRANIAN, *supra* note 112, at 156 (noting the Supreme Court’s reigning definition of “transformative use” as holding that a work “is transformative if it ‘adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message’” (alteration in original)).

in this regard has been parody of, and sometimes other forms of commentary on, an original work.<sup>138</sup>

More recently, however, courts have started using the transformative use test in a different way, focusing not just on transexpressive uses but also on transpurposive ones (i.e., the new functional aspects of the defendant's use). Thus, courts have held that a defendant makes a transformative use of the plaintiff's work in cases where the defendant's use does not add any new insights to the work, but rather presents it in a new technological or functional context.<sup>139</sup> For example, courts have held that directly reproducing a graphical work as a thumbnail image in image search results is a fair use even though the search engines' reproductions of the plaintiffs' images in and of themselves added no new insights to the works in question.<sup>140</sup> The same results have been obtained even more recently in cases involving the digitization of materials for full text searches in libraries and for digitized university coursepacks.<sup>141</sup> While the material itself was not transformed, the new uses to which they were put were regarded by the court as functionally transformative with respect to the first factor of the fair use test.<sup>142</sup>

Other vagaries of the first fair use factor relate to its invitation to a court to consider whether the defendant's use of the plaintiff's work "is of a commercial nature or is for nonprofit educational purposes."<sup>143</sup> One obvious problem with this approach is that many kinds of uses will fall

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<sup>138</sup> *Id.* at 40 ("[F]air use has consistently favored criticism and parody over other transformative uses. Thus, with the exception of parody, cases have repeatedly demonstrated that the slightest appropriation of a copyrighted work will result in a finding of infringement . . ." (footnote omitted)).

<sup>139</sup> See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) ("Although Arriba made exact replications of Kelly's images, the thumbnails were much smaller, lower-resolution images that served an entirely different function than Kelly's original images. Kelly's images are artistic works intended to inform and to engage the viewer in an aesthetic experience. His images are used to portray scenes from the American West in an aesthetic manner. Arriba's use of Kelly's images in the thumbnails is unrelated to any aesthetic purpose. Arriba's search engine functions as a tool to help index and improve access to images on the internet and their related web sites."); *Authors Guild*, 954 F. Supp. 2d at 291 ("Google's use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books has become an important tool for libraries and librarians and cite-checkers as it helps to identify and find books. The use of book text to facilitate search through the display of snippets is transformative."); see also Lipton, *supra* note 108, at 973.

<sup>140</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) ("The fact that Google incorporates the entire Perfect 10 image into the search engine results does not diminish the transformative nature of Google's use. As the district court correctly noted, we determined in *Kelly* that even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work." (citation omitted)); *Kelly*, 336 F.3d at 818–20.

<sup>141</sup> *Authors Guild*, 954 F. Supp. 2d at 282; *Authors Guild, Inc. v. Hathitrust*, No. 11 CV 6351(HB), 2013 WL 603193 (S.D.N.Y. Feb. 15, 2013); see also Lipton, *supra* note 108, at 974.

<sup>142</sup> Lipton, *supra* note 108, at 974.

<sup>143</sup> 17 U.S.C. § 107(1) (2012).

somewhere in between “commercial use” and “nonprofit educational use.” Additionally, many educational uses can be regarded as commercial, given that education itself is increasingly a commercial enterprise. The defense also does not contemplate nonprofit uses outside the educational context, perhaps implying that a noncommercial use that is not educational is less likely to be regarded as a fair use than a noncommercial use that is related to education.

Even restricting the inquiry to the definition of commercial use has proved problematic in practice. There are many different ways to define the term. Courts have not established any consistent guidelines on the definition.<sup>144</sup> In many recent cases, courts have generally erred on the side of finding a commercial use.<sup>145</sup> This has not been a difficult task given that almost any use not authorized or paid for could be regarded as having deprived someone of a royalty.<sup>146</sup> To the extent that courts easily find commercial use under the first factor in contexts where the defendant has allegedly caused some kind of market harm, courts have also tended to conflate the first factor with the fourth.<sup>147</sup> The fourth fair use factor requires courts to consider the impact of the defendant’s use on the potential market for or value of the work.<sup>148</sup> Given the similarity of the issues that may be considered under the first and fourth factors, a court can often effectively “double count” or at least overemphasize elements of a defendant’s conduct that might implicate both factors.

Given all of these uncertainties inherent in applying the first fair use factor, the challenges for creative remixing begin to come into sharp relief. Remixes may or may not be regarded as commentary or parody—the types of uses most typically protected under the first fair use factor. However,

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<sup>144</sup> TEHRANIAN, *supra* note 112, at 44 (“Finding a meaningful and consistent definition of commercial use has proved an elusive goal.”).

<sup>145</sup> LEAFFER, *supra* note 15, at 496 (“Generally, if a challenged use of a copyrighted work is for commercial gain, a presumption against fair use arises.”); *see, e.g.*, *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (finding that file sharing on the Internet constituted commercial activity because, even though no money was exchanged, users could act as “leeches” and download music from other people’s computers without reciprocating); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1113, 1117–18 (9th Cir. 2000) (finding that the giving away of thirty thousand free copies of a religious work constituted commercial activity because the defendant “profited” from the use of the work by attracting new members who might ultimately tithe to the church). As the Supreme Court has noted, “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

<sup>146</sup> TEHRANIAN, *supra* note 112, at 44 (“[F]air use always causes some loss in potential revenue to someone.”).

<sup>147</sup> *Id.* (“To the extent market harm is an appropriate consideration, it is already covered by the fourth factor in the fair use test and need not be redundantly considered in the first factor as well.”).

<sup>148</sup> 17 U.S.C. § 107(4) (2012).



even though a use is not a parody, it may yet be expressive and meaningful.<sup>149</sup>

Many crowdsourced fan projects will not have any obvious commercial purpose. One might therefore think that they would be more likely to be protected as fair use under the first factor. However, there is a risk that, in some cases of creative crowdsourcing, a commercial aspect will become incidentally incorporated into the work when it is distributed online. For example, video mash-ups on YouTube and other similar video-sharing services<sup>150</sup> may attract advertising revenues and hence be regarded as a commercial use on that basis. Even where there is no advertising, the possibility of future advertising revenues may be enough to convince a court of a commercial use. As an alternative, a video hosting website may charge fees for access or may have the potential to charge fees in the future, again potentially satisfying the commercial use element of fair use. Finally, in some cases, a crowdsourced project may itself attract such a consumer following that it is potentially commercializable in its own right. This might (sometimes unwittingly) establish a potential commercial use or market harm under the first or fourth factors.

The second fair use factor—the nature of the copyrighted work<sup>151</sup>—is unlikely to prove particularly useful for those engaging in creative crowdsourcing. This factor will frequently cut against crowdsourced projects in which inputs are themselves copies of segments of creative works, such as movie and music clips. The second fair use factor generally grants greater protection to works that lie at the heart of creative innovation than more functional works such as computer software or informational works.<sup>152</sup> Where the works in question are movies and music, the second factor will often favor the plaintiff.

The third fair use factor—the amount and substantiality of the portion of the work used<sup>153</sup>—could help or hurt a creative crowdsourced project. While some video mash-ups, for example, will be much shorter than the works from which they are taken, the third factor might still cut against the

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<sup>149</sup> TEHRANIAN, *supra* note 112, at 42 (“As many appropriationist artists have demonstrated, something new, expressive, and meaningful can emerge from the combination or alteration of copyrighted works of the past.”).

<sup>150</sup> PALFREY & GASSER, *supra* note 62, at 351 (defining “video-sharing services” as “Websites, such as YouTube and Metacafe, that allow users to upload video files, including video clips from popular movies and TV shows as well as original footage”).

<sup>151</sup> § 107(2).

<sup>152</sup> LEAFFER, *supra* note 15, at 497 (“The second [fair use] factor reflects the view that to support the public interest greater access should be allowed to some kinds of works than others. Because the ultimate goal of copyright law is to increase our fund of information, the fair use privilege is more extensive for works of information such as scientific, biographical, or historical works than for works of entertainment.”).

<sup>153</sup> § 107(3).

crowdsourced project because the factor is not concerned only with quantity.<sup>154</sup> Courts have interpreted the amount and substantiality inquiry as focusing on what is being taken from an underlying work, not how significant that use is to the allegedly infringing work.<sup>155</sup> Furthermore, if only a small portion of a work is copied, a court may nevertheless hold that the taking is *qualitatively* substantial under the third fair use factor.<sup>156</sup> For example, courts have held that copying the key points of a literary work may infringe copyright even if the defendant has not copied a large quantity of the text.<sup>157</sup>

There are few clear *ex ante* guidelines as to what kinds of borrowing a court would consider qualitatively substantial under the third fair use factor. Even a five-minute fan mash-up may run afoul of the third fair use factor if a court holds that what has been taken by the defendant is qualitatively significant. In the case of a longer crowdsourced project like *Star Wars: Uncut*, the amount taken by the defendants may be regarded as both quantitatively and qualitatively substantial under the third factor. Some examples might be the *Johnny Finder* video games, which, to a significant extent, follow the characters and storylines of several *Indiana Jones* movies.

In sum, both adverse precedent and its unpredictable nature combine to make the fair use defense not useful to those seeking to engage in creative projects by using existing copyrighted works as inputs. Further, the time and cost burdens associated with litigation may deter many potential defendants from pursuing a fair use argument. They may instead simply cease their activities if a copyright holder complains. There is also no accurate way of counting the number of projects that are never commenced in the first place for fear of copyright liability.

Again, we are not arguing that copyright protection is unimportant or that those who develop valuable commercial properties should not be entitled to protect their markets. Rather, our concern is where the

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<sup>154</sup> LEAFFER, *supra* note 15, at 500 (“Questions of amount and substantiality [under the third fair use factor] have a qualitative, as well as quantitative, dimension. Even small takings can exceed fair use when the essence of the work is taken.” (footnote omitted)).

<sup>155</sup> *See, e.g.*, § 107(3) (weighing “the amount and substantiality of the portion [of the copyrighted work] used in relation to the copyrighted work as a whole”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (noting that the third fair use factor requires an analysis of both what was taken quantitatively and qualitatively from the copyrighted work); *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028 (9th Cir. 2000) (holding that the third fair use factor weighed in favor of defendants because the use of screen shot from a video game constitutes the usurping of only a tiny fraction of substance from the copyrighted work).

<sup>156</sup> *Roy Export Co. v. Columbia Broad. Sys. Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (finding that use of copyrighted Charlie Chaplin movies that may have been qualitatively, though not quantitatively, great was sufficient to weigh the third factor against a finding of fair use).

<sup>157</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

boundaries of those markets should be set. Some of the appropriate boundaries are obvious: for example, few would argue in favor of large-scale commercial pirating of movies and music. However, providing appropriate protections to copyright holders should not extend to every possible use of a work, especially where the use is not intended to be commercialized and does not appreciably damage the copyright holder's bottom line.

The following case study considers in more detail the *Star Wars: Uncut* project as an example of a creative crowdsourced derivative work. It examines the social benefits inherent in the work and the current uncertainties in ascertaining whether such works could be regarded as infringing copyrights. We argue that copyright law as currently drafted and enforced is unfortunately vague in its application to these kinds of projects. We advocate the development of clearer guidelines that would facilitate creative crowdsourcing in cases where the crowdsourced projects pose little realistic threat of commercial harm to copyright holders.

It is important for the law to facilitate, rather than chill, creative crowdsourced projects because these projects promote important social goals and values. Much of what we say about *Star Wars: Uncut* will also apply to creative remixes that do not involve crowdsourcing. The potential to engage in expressive crowdsourcing of this kind, and on a global scale, is only now beginning to be tapped. Those who engage in these kinds of projects should be encouraged to communicate, collaborate, and play with available technologies for expressive and self-actualization purposes.

#### D. *Star Wars: Uncut: A Case Study in Crowdsourcing and Copyright*

1. *The Value of Creative Crowdsourcing.*—In 2009, Casey Pugh, a self-described “creative technologist,”<sup>158</sup> launched a project called *Star Wars: Uncut*.<sup>159</sup> His aim was to combine his passion for creative crowdsourced technology with his passion for the *Star Wars* saga. The project was relatively simple in its conception: Pugh broke down the first released *Star Wars* film, *Episode IV: A New Hope*, into 473 individual fifteen-second video segments.<sup>160</sup> He then put out an open call on his website for amateur filmmakers to choose a segment and film their own version of it.<sup>161</sup> The segments were then submitted to him and his team for

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<sup>158</sup> See CASEY PUGH, <http://www.caseypugh.com> [<http://perma.cc/ZNS4-WV79>].

<sup>159</sup> Brian Stelter, *An Emmy for Rebuilding a Galaxy*, N.Y. TIMES, Aug. 27, 2010, <http://www.nytimes.com/2010/08/28/arts/television/28uncut.html> [<http://perma.cc/PS8J-5WD4>].

<sup>160</sup> *Id.*

<sup>161</sup> Casey Pugh et al.: *Star Wars Uncut*, AKSIOMA INST. FOR CONTEMP. ART, <http://www.aksioma.org/star.wars.uncut/> [<http://perma.cc/VYE3-94X8>] (“Described as ‘the biggest fan remake of all time,’ *Star Wars Uncut* is a crazy fan [mash-up] remake of the original *Star Wars* movies. In 2009, Casey was inspired to use the Internet and an ever-ready pool of passionate *Star Wars* fans to

compilation into a full-length version of the original film told through the eyes of the amateur filmmakers.<sup>162</sup>

There were no real rules about content other than that each contribution had to be faithful to the storyboarding of the relevant segment.<sup>163</sup> This left individual contributors free to film cartoon versions, stop-motion versions, low budget home video versions, computer generated graphics versions, and even a few gender-bending versions of their segments with storm-troopers appearing in the form of armored women.<sup>164</sup> In one segment, a Jawa even appears in the guise of Homer Simpson.

Pugh ultimately collated the chosen contributions into a full-length movie that he entitled *Star Wars: Uncut*. His film received significant media attention, ultimately garnering an Emmy award.<sup>165</sup> This award established that a creative crowdsourced project could attain the status of a feature film in its own right despite the fact that it was not intended for commercial release. Pugh subsequently launched a similar project, for *Star Wars Episode V: The Empire Strikes Back*, at the Tribeca Film Festival in April 2013.<sup>166</sup>

While creative crowdsourcing like *Star Wars: Uncut* bears some structural similarity to more functional crowdsourcing (such as Wikipedia), it provides quite different societal benefits. Functional crowdsourcing is generally aimed at increasing the store of human knowledge, while creative crowdsourcing applies the group mind in the artistic context to add to the store of human expression. Both functional and creative crowdsourcing enable individuals to communicate with each other across great distances and to play with new technologies to create something novel that is larger

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crowdsource the classic film *Star Wars IV: A New Hope* (1977). The original movie has been split in 480 scenes of [fifteen] seconds each, and Internet users and Star Wars fans have been invited to claim a scene and to make a remake within [thirty] days. Each scene could be recreated in any possible way: live action, homemade re-enactment, stop motion, flipbooks, action figures, 3D animation, animated ASCII art, etc. Once all 480 scenes were claimed, all the scenes have been unlocked again so that more people could participate. About a thousand fans from 300 countries all around the world took part in the process, and all the scenes are available online on the project's website and on YouTube.”)

<sup>162</sup> *Id.*

<sup>163</sup> Daniel Rubinton, *Interview: Casey Pugh, “Star Wars Uncut,”* FILM SOC’Y OF LINCOLN CENTER (Nov. 27, 2012), <http://www.filmlinc.com/daily/entry/interview-with-casey-pugh-star-wars-uncut> [<http://perma.cc/QB9C-EE52>] (“I told all the contributors to be as creative as possible when recreating their scenes.”).

<sup>164</sup> *FAQ – Empire Uncut, STAR WARS UNCUT*, <http://www.starwarsuncut.com/faq> [<http://perma.cc/6XF4-HGAC>] (“You can re-create your scene however you want: live action, stop motion, flipbooks, action figures . . . animated ASCII art, whatever! The more creative, the better.”).

<sup>165</sup> Stelter, *supra* note 159.

<sup>166</sup> *See Empire Uncut, STAR WARS UNCUT*, <http://www.starwarsuncut.com/empire> [<http://perma.cc/FE4Z-5DNA>]; Karen Kemmerle, *Casey Pugh on Star Wars Uncut*, TRIBECA FILM FESTIVAL (Apr. 11, 2013), <http://www.tribecafilmfestival.org/stories/casey-pugh-starwars-uncut> [<http://perma.cc/G7MD-2672>].

than any individual contribution. However, the values inherent in creative crowdsourcing have more to do with self-expression than with exploring new scientific or functional capabilities of the new technologies. Creative crowdsourcing offers new opportunities for individuals to engage in expression about popular culture. However, in order to draw from popular culture, participants in creative crowdsourcing will likely run into some of the copyright concerns described above.<sup>167</sup>

Creative crowdsourcing like *Star Wars: Uncut* provides opportunities for society to experience aspects of popular culture in new ways. Remixes and mash-ups are likely to contain new insights into their component original works by way of parody, commentary, or the simple adding of new perspectives. Remixing popular culture enables viewers to experience myriad different artistic perspectives relating to an underlying work. Segments involving female stormtroopers, for example, create a sense that some viewers were disappointed in the lack of female presence in the story, while segments that insert, say, Simpsons characters, suggest the potential to laugh at aspects of the original film.

Crowdsourced remixes achieve this potential on a large scale, incorporating many different voices by way of creative inputs.<sup>168</sup> These projects involve the opportunity to create new meanings and perspectives on a work by juxtaposing different interpretations within a collective body. The ability to express and experience views on matters of popular culture is an important aspect of personhood. Individuals in a free society need space to explore ideas about the cultural fabric surrounding them.<sup>169</sup> People must have the ability to access and use popular cultural icons for their own self-expression as both consumers and creators.

The right of publicity is an area of law where commentators, courts, and legislators have increasingly recognized the importance of access to cultural icons. Commentators have identified conflicts between creative play with cultural icons, on the one hand, and the protection of economic intellectual property rights on the other.<sup>170</sup> With respect to the theoretically ambiguous right of publicity,<sup>171</sup> for example, scholars have expressed concern that if the right becomes too proprietary, it will negatively affect

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<sup>167</sup> See *supra* Part II.C.

<sup>168</sup> See *supra* Part II.C.

<sup>169</sup> See *supra* Part II.C.; see also Tushnet, *supra* note 15, at 655–58.

<sup>170</sup> Tushnet, *supra* note 15, at 685–86 (“[F]andom demonstrates that unlimited economic incentives to create in the form of expansive intellectual property protection are unnecessary to spur productivity and may even inhibit it. Creative activity has inherent satisfactions; economic gain is not the only motivation for creators. Purely market-oriented theories of copyright disregard the inherent power of storytelling.”).

<sup>171</sup> LEAFFER, *supra* note 15, at 43–45 (explaining the nature and genesis of the state right of publicity tort).

the ability of the public to engage in important speech about cultural icons.<sup>172</sup> Commentators have noted the complex relationship between public icons and the public at large, noting that icons use the media and the public to develop a commercially valuable persona.<sup>173</sup> They have also observed the absorption of public icons into the fabric of cultural discourse, and the importance of individuals having ready access to those icons for expressive purposes.<sup>174</sup> The law governing the use of celebrity likenesses—the right of publicity—has made dramatic strides in recent years to account for the public interest in unauthorized and uncompensated transformative use of such icons for expressive purposes.<sup>175</sup> However, copyright has not enjoyed such a dramatic evolution.<sup>176</sup>

Copyright law raises similar challenges in balancing incentives to create allowances for expressive discourse. The more absolute control afforded to content owners, the less popular material will be available for creative play. However, allowing unbridled access to, and use of, protected works potentially risks negatively impacting incentives to create in the first place.<sup>177</sup> Of course, even this discussion of balancing creative play against commercial interests is an oversimplification on a number of levels. Many who start out playing creatively with the raw materials of popular culture end up making a living out of their work.<sup>178</sup> However, the law currently

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<sup>172</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 134 (1993) (“[P]ublicity rights exact a higher cost in important competing values (notably, free expression and cultural pluralism) than has generally been appreciated.”); *id.* at 138 (“[P]ublicity rights facilitate private censorship of popular culture.”).

<sup>173</sup> *Id.* at 193–94 (“However strenuously the star may fight the intertextuality of his image, however scrupulously he may try to monitor and shape it, the media and the public always play a substantial part in the image-making process. True, audiences cannot make media images mean anything they want to, but they can (and do) select from the complexity of the image the meanings and feelings, the variations, inflections and contradictions, that work for them. It is not just that the audience, by giving the public figure cues as to what it is it wants from him, helps to determine the particular image he seeks to create and project.” (footnotes and internal quotation marks omitted)).

<sup>174</sup> *Id.* at 239 (“[P]roperty rights in our culture’s basic linguistic, symbolic, and discursive raw materials should not be created unless a clear and convincing showing is made that very substantial social interests will thereby be served. . . . [N]o such showing has yet been made with respect to star images. The proponents of publicity rights still have work to do to persuade us why these images should not be treated as part of our cultural commons, freely available for use in the creation of new cultural meanings and social identities, as well as new economic values.”).

<sup>175</sup> Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 33–34 (2013) (comparing the vast difference in expressive defenses in copyright law versus in right of publicity law, especially as evidenced by the transformative use defense developed for right of publicity claims in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001)).

<sup>176</sup> *Id.*

<sup>177</sup> *See, e.g.*, LEAFFER, *supra* note 15, at 490 (suggesting that the point of the fair use defense is to protect uses that are not so excessive as to undermine the production of copyrighted works).

<sup>178</sup> Lipton, *supra* note 108, at 983.

does not sufficiently recognize the benefits of remixing, and, therefore, the balancing of incentives is skewed too much in favor of copyright holders.

2. *Copyright Infringement, Fair Use, and Star Wars: Uncut.*—The example of *Star Wars: Uncut* helps elucidate some of the challenges for modern copyright law. One reason why *Star Wars: Uncut* is a useful case study is that the copyright holder in question was originally Lucasfilm, which had developed a sophisticated relationship with its fans in respect to derivative fan works before being sold to Disney. The case study is useful to this discussion because it is one of the most high profile examples of creative crowdsourcing in popular arts and entertainment. Additionally, it raises the specter of what may happen when corporate control of the foundational work (the *Star Wars* films in this case) changes hands from a company initially permissive about crowdsourced secondary works in principle to a company that is historically more proprietary about its valuable copyrighted properties. In other words, when Lucasfilm was sold to Disney, there was some concern that the sale would negatively impact the kinds of fan activities that had previously been tolerated, and even encouraged, by Lucasfilm.<sup>179</sup> Before its sale to Disney, Lucasfilm retained tight control over the commercialization of its properties, but it also encouraged fans to engage in noncommercial expressive activities using its works.<sup>180</sup> Historically, Lucasfilm made its own copyrighted materials available to fans for noncommercial purposes,<sup>181</sup> while retaining its rights to license its property for authorized commercial purposes.<sup>182</sup>

Copyright law provided the backbone for these arrangements between Lucasfilm and others because copyright in Lucasfilm's works guided its commercial and noncommercial licensing arrangements. However, copyright law gave Lucasfilm the right to decide who received a license, on what terms, and for what purposes. Copyright grants the property right that Lucasfilm used in making these arrangements.<sup>183</sup> The law gave Lucasfilm the authority to decide at any time that it no longer wished to encourage or

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<sup>179</sup> Joe Mullin, *Disney Owns Lucasfilm: Will It Have Room for Star Wars Fan Movies?*, ARS TECHNICA (Oct. 30, 2012, 6:18 PM), <http://arstechnica.com/tech-policy/2012/10/disney-owns-lucasfilm-will-it-have-room-for-star-wars-fan-movies/> [<http://perma.cc/M8BQ-PX7P>].

<sup>180</sup> *Id.* (“In 2007, Lucasfilm even released tools that would more easily enable remixing of *Star Wars* content. A top Lucasfilm lawyer, Jeffrey Ulin, began speaking at conferences and to the media about the value of fan mash-ups and remixes. Those works were ‘part of keeping the love of *Star Wars* and the franchise alive. . . . We’re really trying to position ourselves for the next [thirty] years,’ Ulin told the *Wall Street Journal* in 2007.” (alteration in original)).

<sup>181</sup> *Id.*

<sup>182</sup> See *List of Star Wars Books*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_Star\\_Wars\\_books](http://en.wikipedia.org/wiki/List_of_Star_Wars_books) [<http://perma.cc/T2TS-FMMY>] (list of authorized *Star Wars* books).

<sup>183</sup> See 17 U.S.C. § 106 (2012) (copyright provides the owner of the work the exclusive rights to control reproduction and distribution of their works, thus allowing a copyright owner to create express and implied licenses).

support noncommercial fan works, a right that Disney could now exercise if it chose to put a stop to Casey Pugh's work on *The Empire Strikes Back* remix.

The fact that there has been a lot of consumer remixing of the *Star Wars* movies to date does not mean that there has been no copyright infringement. It simply means that Lucasfilm, and now Disney, has not aggressively objected to the uses. Of course, an objection by a copyright holder to a remix also does not mean the remix is in fact an infringing use. The creators of the remix could potentially argue estoppel, waiver, license, and fair use defenses. The problem is that there may be no way to know, with any certainty, which uses are infringing under the current state of copyright law, and the fair use doctrine in particular.

In the case of *Star Wars: Uncut*, Casey Pugh has commented that he initially avoided getting in touch with someone at Lucasfilm because he thought such a communication would be "difficult."<sup>184</sup> Subsequently, he discovered that George Lucas himself was a fan of the project,<sup>185</sup> particularly because of its noncommercial, fan-focused spirit.<sup>186</sup> Nevertheless, this position is at the discretion of the copyright holder.

Another potential challenge for creative remixers is that remixes of any kind will typically draw from several copyright sources. Thus, there are more copyright holders who potentially could bring actions, which increases the chilling effect on this kind of creative activity. Even where a creative project is based on one work, like a movie, different copyright concerns may arise in relation to different aspects of the work. As with *Star Wars: Uncut*, the apparent ability for a remixer to use script, dialogue, characters, or plotlines in a creative remix might not support an ability to use the soundtrack: for example, if copyright in the soundtrack is held by the composer separately from the other elements of the original film.

Would it be better, or even possible, for copyright law to create clearer guidelines for when consumer remixes of protected content should not be regarded as infringing? This question is not easy to answer. Because copyright law is intended to encourage artistic innovation, one could argue that ideally copyright law should support, for example, both the original

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<sup>184</sup> Coffin, *supra* note 100 ("I didn't reach out to them initially because I knew getting in touch would be very difficult. But I launched the project and [four] months later, I got a call and found out that they were huge fans of the project and flew me out there to see if there were ways we could collaborate in the future. They've always been huge supporters of it and it's been great to have their blessing.").

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* ("For me, this has always been an art project built by one person, rather than a commercial project. So I think he appreciated that, the fact that this was an experiment and not some company trying to take advantage. I've made no money from the project, but it's just such an exciting ride for me.").



*Star Wars* movies and Casey Pugh's project. Copyright law should protect the original movies against unauthorized copying as an incentive to create those movies in the first place. It should also protect Pugh's remix for the same reasons. Both works are creative in nature, and both draw from the fabric of popular culture. The original *Star Wars* movies utilize common popular storylines, themes, characters,<sup>187</sup> and, according to some commentators, usurp specific copyrighted materials that arguably render the movie itself an unauthorized derivative work.<sup>188</sup> The protection afforded the original movie assists Lucasfilm and Disney to propertize and commercialize it, while any protection afforded to Pugh would encourage artistic innovation in the fan community.

However, copyright law does not work that way. An unauthorized derivative work such as *Star Wars: Uncut* cannot be made without potentially infringing the derivative works right. The Copyright Act provides that the maker of an unauthorized derivative work cannot herself assert any copyright in the derivative work to the extent that it makes unauthorized use of another's work.<sup>189</sup> Copyright law's stance on derivative works may seem unnecessarily draconian when applied to a noncommercial project created for expressive purposes by fans (and rabid consumers) of the original.

For the reasons discussed above, the fair use defense is unlikely to be of much practical use to expressive consumers in these kinds of situations.<sup>190</sup> There is no upfront certainty for expressive consumers that a fair use defense would succeed in any given case. In any event, many of these consumers will not have the financial wherewithal to defend against infringement litigation. When he started with *Star Wars: Uncut*, Casey Pugh likely took the view that he was engaging in a noncommercial fair use, but he was understandably hesitant about contacting Lucasfilm to

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<sup>187</sup> CHRISTOPHER VOGLER, *THE WRITER'S JOURNEY: MYTHIC STRUCTURE FOR WRITERS* 286–90 (3d ed. 2007) (analyzing the original movie as a paradigmatic example of the familiar “Hero’s Journey” story structure from popular culture and mythology).

<sup>188</sup> See, e.g., Charlie Jane Anders, *Did George Lucas Copy Star Wars’ Opening Catchphrase from an Ad in a Fashion Magazine?*, IO9 (Dec. 26, 2012, 1:53 PM), <http://io9.com/5971374/did-george-lucas-copy-star-wars-opening-crawl-from-an-ad-in-a-fashion-magazine> [<http://perma.cc/ZD9E-6BEE>] (wondering whether George Lucas lifted the opening catchphrase and sequence in *Star Wars* from a 1974 advertisement featured in *Vogue*); Kirby Ferguson, *Everything Is a Remix Part 2 (Remix Inc.)*, EVERYTHING IS A REMIX (Feb. 1, 2011), <http://everythingisaremix.info/blog/everything-is-a-remix-part-2> [<http://perma.cc/G7E3-57WX>] (detailing how George Lucas’s *Star Wars* itself draws on and extensively borrows (without permission or payment) from the films of Akira Kurosawa, *Flash Gordon*, John Wayne and spaghetti westerns, Leni Riefenstahl propaganda films, Fritz Lang’s *Metropolis*, and other works).

<sup>189</sup> 17 U.S.C. § 103(a) (2012) (“The subject matter of copyright . . . includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

<sup>190</sup> See *supra* Part II.C.

discuss it. Many other creators might not engage in such remixing activities in the first place for fear of attracting copyright infringement liability.

Another problem with relying on fair use is the fact that large scale consumer remixes such as *Star Wars: Uncut* may have a significant commercial potential, unlike individual video mash-ups and more small-scale fan works. The recognition *Star Wars: Uncut* received in the media, and by receiving an Emmy award, suggests a strong commercial potential. Even if Pugh originally had no intentions to commercialize the work, what would stop him from changing his mind once he realized he had a potentially valuable commercial property on his hands? If he did decide to release the work commercially, or use his website for profitable advertising, or charge fees to access the work on his website, there is nothing that could stop Disney from pursuing him under copyright law or demanding royalties in relation to any profits he made. Many creative activities that start out as purely expressive pursuits end up being commercialized so this is not a minor concern.

In the past, copyright law has not squarely dealt with these kinds of temporal problems—the idea that something that might initially qualify as a fair use might later grow into commercial competition with the copyright holder. In the next Part, we advance some suggestions for dealing with this temporal issue. Our hope is that we may foster debate about the ways in which copyright principles could be developed to provide more leeway for creative remixing than currently exists while still protecting commercial markets for copyright holders.

### III. REFORMING COPYRIGHT AND FACILITATING REMIX

There are a number of ways copyright laws and policies might be revised to strike a better balance between the commercial interests of copyright holders and the expressive interests of individual and group remixers. None of them are perfect, but some of them may well be more effective than the current situation if the aim of the law is to foster and maximize artistic innovation. Any new laws or policies will need to strike a careful balance between a number of competing interests. It is not our hope to definitively strike the appropriate balance with our suggestions; after all, we recognize the limitations of our expertise and understand that there will be no panacea to the problems we have identified with the current regime. Rather, we aim to generate a discussion as to how a better balance may ultimately be achieved. In particular, we advocate that law- and policymakers should focus not only on the needs of copyright holders, but also on the important contributions remixers make to society in terms of self-expression, communication, collaboration, and self-actualization.

Our suggestions for reform include the following: (1) removal or reworking of the strict liability basis for copyright infringement, at least in

the case of noncommercial works; (2) tempering the size of statutory damages or available criminal penalties for noncommercial or innocent copyright infringement; (3) an “intermediate liability” proposal that gives courts options other than finding infringement or fair use;<sup>191</sup> (4) developing clearer ex ante guidelines for fair use, particularly with respect to the commercially driven factors one and four; and (5) removing noncommercial remixing activities from the definition of “derivative work.” Clearly any of these suggestions that change notions of fair use will also somehow have to deal with the temporal issue of derivative works that are not initially intended to be commercialized, but later achieve a commercial potential. This problem should not be insurmountable in practice. The more difficult issue will be whether there are any ways to create fairer, more clearly delineated guidelines for what uses of copyrighted works in the “transformative consumer use” area should be exempted from infringement liability.

#### A. Reworking Strict Liability

Each of us has argued previously—and in more detail than this Article will allow—that the strict liability basis for copyright law needs to be revisited in the digital age.<sup>192</sup> There are a number of reasons to revisit strict liability for the Web 2.0 generation. Everything we do online involves making digital copies of something—underlying code that represents functionality (as in software) or content (as in digital music, movies, images, and text).<sup>193</sup> Thus a copyright regime that attaches strict liability to any unauthorized copies places substantial power over our online lives in the hands of powerful commercial content owners who often threaten litigation first and negotiate later.<sup>194</sup> Additionally, while everything online involves copying, it is very difficult for Internet users to know when the

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<sup>191</sup> This proposal is based on the theory advanced in TEHRANIAN, *supra* note 112, at 155–66. More detail can be found in that text. The theory is merely summarized *infra* Part III.C

<sup>192</sup> TEHRANIAN, *supra* note 112, at 142–43 (“[O]ne of the most inequitable and unbalanced aspects of our copyright regime is its strong embrace of strict liability. There is no mens rea requirement in copyright. Thus, everyone in the chain of supply can be held hostage to claims of infringement, a particularly pernicious state of affairs in the digital era where works can pass through multiple agents and contact points before getting to an end user. Moreover, in a networked world where we all violate copyright law multiple times a day, the risk of penalties—even for innocent infringements—can be staggering.”); Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 767, 775–84 (2011) (questioning the appropriateness of strict liability to copyright in the digital context).

<sup>193</sup> See Ned Snow, *Copytraps*, 84 IND. L.J. 285, 290 (2009) (“[I]n cyberspace, the legal distribution process requires consumer copying.”).

<sup>194</sup> TEHRANIAN, *supra* note 112, at 145 (describing a situation where record label EMI mistakenly claimed copyright infringement against a website that was authorized to give away MP3 versions of its copyrighted songs for free).

copying is actually permissible and when it is not. This places the risks and burdens of innocent infringement squarely on the shoulders of those playing with technology for noncommercial purposes.<sup>195</sup>

The risks of copyright infringement are increased exponentially with Web 2.0 technologies with respect to remix culture. As discussed above, the whole point of remixing is to take what has gone before and build a new kind of “collage” out of it to create or express something new.<sup>196</sup> When one considers the massive amount of copying in furtherance of creativity and self-expression, and the meager likelihood that much of this activity will cause any harm to copyright holders, one must at least begin to question the need for strict liability, at least in this context.

Although the strict liability doctrine has clearly provided much protection to copyright holders, it has also perhaps granted them more power than their creations warrant, particularly when applied in a Web 2.0 culture. There are a number of potential solutions to this imbalance. One option would be to remove strict liability from copyright law and put the burden on copyright holders to establish that the alleged infringer intended to infringe, at least for transformative uses of works (rather than for outright piracy or bootlegging). Copyright holders would likely argue that this would impose an unfair burden on them and that it would be very difficult for them to prove the state of mind of an alleged defendant. However, there are many torts and crimes that incorporate *mens rea* as an element. There is no reason why a similar jurisprudence could not develop in copyright.

Additionally, establishing a defendant’s state of mind in a copyright infringement action may be easier in the digital world than it would have been in the pre-digital era. People can, and frequently do, express their intentions online with respect to use of a copyright work. A brief look at YouTube shows that many individuals borrowing from copyrighted works attach notices to their remixes indicating that they believe they are making a fair use or that “no infringement was intended.”<sup>197</sup>

While, of course, these assertions in and of themselves do not mean anything decisive in terms of the law, in context, they can speak to a defendant’s best intentions, no matter how naive. Where someone posts a homemade remix on YouTube for no commercial profit and attaches a “no infringement” notice, the totality of the circumstances usually (though not always) suggests the defendant intends no injury to the economic value of

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<sup>195</sup> *Id.* (“[I]t can be difficult for [Internet] users to ascertain whether a website truly has permission to distribute the copyrighted work. Due to the strict liability nature of our copyright regime, users frequently face unwitting infringement liability, a growing problem . . . .”); Snow, *supra* note 193.

<sup>196</sup> See *supra* Part I.B.

<sup>197</sup> Lipton, *supra* note 19, at 22–23.

the original work, even if technically an infringement may have been committed because of the current strict liability basis of copyright law. If strict liability were removed from copyright law for strictly noncommercial uses in such contexts, Internet users would have much greater leeway to engage in creative play with segments of copyrighted works.

Another option to mitigate the harshness of the strict liability doctrine in the expressive remixing context would be to adopt noncommercial remixing as a defense to copyright infringement outside of the fair use defense. Given the vagueness of fair use, it might make sense to create a new defense for noncommercial digital copying that excuses the kinds of activities described in this Article. The defense would cease to apply if the defendant later attempted to commercialize the work in question. However, it would remain in force as long as the defendant was not making an unauthorized commercial profit from the plaintiff's work. The other way of achieving this kind of defense would be to develop a "noncommercial remix defense" as an aspect of fair use. This could be done legislatively or judicially and is discussed in more detail below.<sup>198</sup>

### B. *Tempering Remedies for Noncommercial Infringement*

The potential deterrents for an innocent copyright infringer, or at least a noncommercially motivated infringer, are very grave. Under the Copyright Act, statutory damages may be available to plaintiffs far in excess of the licensing fees they could otherwise recoup under a negotiated agreement with defendants.<sup>199</sup> Criminal charges have also been threatened and imposed against individual copyright infringers.<sup>200</sup> The likely congressional intent behind the statutory damages regime in copyright law is that it can be very difficult for copyright holders to establish actual damages in some cases, and absent actual damages, potential infringers would not face much of a deterrent effect.<sup>201</sup> If defendants only have to pay actual damages—often just the licensing fee they would otherwise have paid had they negotiated with the copyright holder in the first place—there will be little downside to infringing.<sup>202</sup>

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<sup>198</sup> See *infra* Part III.B.

<sup>199</sup> TEHRANIAN, *supra* note 112, at 147 (noting the imposition of statutory damages deters defendants by imposing punishment over and above the licensing fees they would have had to pay if they had negotiated with the plaintiff).

<sup>200</sup> *Id.* at 150–51 (noting several cases of criminal charges being brought against individuals for activities that probably did not cause much in the way of commercial harm to copyright holders); see also Lipton, *supra* note 19, at 38–42 (observing the imposition of criminal charges for an unauthorized video of a small segment of the movie *The Twilight Saga: New Moon*).

<sup>201</sup> TEHRANIAN, *supra* note 112, at 147.

<sup>202</sup> *Id.* (“[W]ithout the availability of statutory damages, one could not adequately dissuade infringement. Absent some form of statutory or punitive damages, potential infringers would usurp the

Although there may be good reason for the existence of statutory damages, their current design (both in terms of their expansive range and the way they are imposed<sup>203</sup>) creates significant problems. Existing law allows plaintiffs who have timely registered their works to recover up to \$150,000 in statutory damages per act of willful infringement (plus recovery of attorneys' fees). Such a policy might make sense when seeking to deter pirates and bootleggers. But it makes no sense to use the same blunt instrument to squelch transformative activity that promotes progress in the arts. In addition, bootlegging can both be difficult to catch and require heavy deterrence. Neither of these rationales exists for transformative works.

To wit, under current law, artists such as the Beastie Boys and Biz Markie are treated as little different from the pirates of Napster, Grokster, and Megaupload. For example, with its more than one hundred samples, *Paul's Boutique* could create \$7.5 million in potential liability for the Beastie Boys if just half of the samples are not deemed "fair use."<sup>204</sup> A mash-up that makes use of several songs can quickly rack up millions of dollars in liability—even if the mash-up is noncommercial in nature, causes no cognizable actual damages, and generates no revenues whatsoever. This is the potential liability that any artist faces if she is on the wrong side of the "fair use" Rubicon.

Judicial rulings over the past two decades have caused copyright's Sword of Damocles, through massive statutory damages, to precariously hang over the heads of would-be sampling and remixing artists and, in turn,

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works of others with impunity, knowing that, in a worst case scenario, they may only have to pay the licensing fee they should have paid at the outset.").

<sup>203</sup> The Supreme Court has held that the Seventh Amendment requires that statutory damages awards remain within the province of juries. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). This creates numerous problems. Among other things, there is little precedent and few parameters to guide juries, who do not have the luxury or ability to sift through prior case law. As such, award assessments can be wildly disparate under similar fact patterns, raising potential due process concerns. Meanwhile, significant statutory damage awards regularly issue in cases with thin-to-nonexistent evidence of actual damages. *See, e.g., Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) (awarding \$31.68 million in statutory damages for copyright infringement in the absence of any evidence of actual damages); *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 461–62 (S.D.N.Y. 2000) (imposing a \$275,000 statutory damages award in the absence of any evidence of actual damages), *aff'd in part and rev'd in part*, 262 F.3d 101 (2d Cir. 2001); *see also* Nate Anderson, *Thomas Verdict: Willful Infringement, \$1.92 Million Penalty*, ARS TECHNICA (June 18, 2009, 4:32 PM EST), <http://arstechnica.com/tech-policy/2009/06/jammie-thomas-retrial-verdict/> [http://perma.cc/53RH-X3CL] (noting the assessment of a \$1.92 million statutory damages award in a peer-to-peer file sharing case where the trial judge recognized that the actual damages were approximately \$50).

<sup>204</sup> Courts can award statutory damages of up to \$150,000 per act of willful infringement. *See* 17 U.S.C. § 504(c)(2) (2012). So, if a court found the Beastie Boys liable for maximum statutory damages penalties for just half (50) of the samples used on *Paul's Boutique*, the record could result in \$7.5 million in infringement liability.

have fundamentally changed the type of creative output the public can and does enjoy. The threat of enormous statutory damages results in overdeterrence of potentially lawful, and clearly beneficial, future content creation.

Many artists facing copyright's statutory damages regime have elected to eschew sampling, mash-ups, or any other type of transformative activity altogether. Even when someone who makes use of a copyrighted work has a good chance at a successful fair use defense, the terrifying consequences of being wrong will lead rational actors to get a license—even where the law does not require one. As a result, millions of dollars are spent every year to obtain licenses for works that are in the public domain or otherwise do not require a license to use.<sup>205</sup> This permission culture stifles legitimate artistic activities rather than promoting the arts.

These problems with the current statutory damages regime have been exacerbated with the emergence of the Web 2.0 remix culture and with crowdsourcing production in particular. Even if a copyright holder were willing to license the work for these purposes, chances are that copyright holders would seek royalties that remixers could not afford. Because most remixers are not intending to commercialize their work, they are unlikely to be in a position to pay royalties purely for the purpose of engaging in expressive remixing. Even if some remixers could pay, the imposition of royalties would create a two-tiered system of creativity: wealthy individuals who could afford royalties could engage in creative remixing, whereas those lacking the financial wherewithal to pay royalties would not have the same access to building blocks of cultural expression.

Because negotiating licenses in the remix context is generally not realistic, imposing damages in excess of a standard licensing fee is even less realistic. When one is not talking about commercial uses of valuable intellectual property, conceiving of damages and penalties in terms of commerce makes little practical sense. It is also likely to be the case that whatever penalties are imposed, many expressive remixers will be unable to pay them. Thus, many people who want to be creative with elements of popular culture have the choice of potentially going bankrupt or deciding not to engage in the creative expression in the first place.

Again, one might argue that copyright holders would never sue those who are not intending to make commercial profits from unauthorized uses of protected works. But recent history has demonstrated that this is not the case. Copyright holders have brought a significant volume of litigation against private individuals who have infringed copyrights. This has played

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<sup>205</sup> See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1030 (2006); John Tehranian, *Curbing Copyblight*, 14 VAND. J. ENT. & TECH. L. 993, 1003–04 (2012).

out most notably in the peer-to-peer file-sharing scenario.<sup>206</sup> However, infringement litigation has also been threatened—and takedown notices issued—with respect to poor-quality home videos on YouTube that incorporate snippets of copyrighted material.<sup>207</sup>

Removing or minimizing statutory damages and criminal penalties for noncommercial copyright infringements may be a step in the right direction. Judges would have more leeway to award insubstantial or *de minimis* damages for noncommercial infringements. However, to avoid chilling expression and bringing private individuals into court on copyright infringement suits, it may be better to find a way for expressive noncommercial conduct to be regarded as noninfringing. Thus, perhaps a reworking or clarifying of the fair use defense to exempt noncommercial remixing activities would be a better option.<sup>208</sup>

Another limitation to focusing on the tempering of damages is that many individuals are likely deterred from using copyrighted materials for fear of litigation itself, as opposed to fear of the kinds of damages or penalties that are currently available. As a result, altering the basis for awarding damages or criminal penalties may not have sufficient practical impact on individual Internet users. Those who do not think they will be caught and sued will proceed with their activities regardless of awareness of potential damages, and those whose expression is currently chilled would continue to be deterred even if penalties were lessened for noncommercial infringement.

### C. *An Intermediate Liability Approach*<sup>209</sup>

One of the problems with the current copyright regime is its binary approach to infringement—either an activity is an infringement attracting potentially significant penalties or it is not an infringement, attracting no penalties.<sup>210</sup> This “zero-sum” approach is standing in the way of courts’ abilities to effectively balance First Amendment concerns and the promotion of individual self-expression against intellectual property

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<sup>206</sup> TEHRANIAN, *supra* note 112, at 149 (noting that thousands of actions have been commenced by the RIAA and its members against individual file-sharers).

<sup>207</sup> *Id.* at 135–36.

<sup>208</sup> See *infra* Part III.D.

<sup>209</sup> Portions of Part III.B–C come from Khanna & Tehranian, *supra* note 22.

<sup>210</sup> TEHRANIAN, *supra* note 112, at 155 (“The statutory scheme of the present regime forces courts to choose between two extreme options: infringement or fair use. If courts find infringement, hefty statutory damages often ensue . . . that are often well in excess of actual damages. However, if courts find fair use, an unauthorized user of a copyrighted work is able to exploit (without permission or payment) the work of another with impunity, thereby free riding on the creative success of the original author.”).



protection.<sup>211</sup> This problem could be mitigated by the development of an “intermediate liability” approach under which a transformative or productive use of a copyrighted work that would otherwise be an unauthorized derivative work would be exempt from statutory or actual damages.<sup>212</sup>

We propose a “transformative use” defense that could be argued by a defendant in the alternative to a fair use defense.<sup>213</sup> Whereas the fair use defense would exempt the defendant completely from liability,<sup>214</sup> the transformative use defense would result in an exemption from actual and statutory damages as well as injunctive relief.<sup>215</sup> However, it would require the defendant to evenly divide any profits made from the infringing work with the plaintiff.<sup>216</sup>

The transformative use defense would only be available to defendants who had registered their work with the Copyright Office.<sup>217</sup> The Copyright Office should issue guidelines to provide some ex ante guidance on the kinds of uses likely to qualify as transformative uses.<sup>218</sup> Transformative uses, at a minimum, would include parody, satire, digital sampling, and appropriationist modern art.<sup>219</sup> The kinds of remixes under consideration in this Article, particularly large crowdsourced projects, would fall under the category of appropriationist modern art. Appropriationist modern art makes use of preexisting works, especially those laden with cultural significance or meaning, by recontextualizing them, often with just slight alterations, for expressive purposes.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 155–56.

<sup>213</sup> *Id.* at 156 (“Under the intermediate liability alternative, a court would first determine whether a work is infringing. If the work infringes, a defendant could proffer two defenses—fair use and transformative use.”).

<sup>214</sup> *Id.* (“The fair use defense would continue to function as it currently does, providing immunity from liability for individuals meeting the four-part balancing test delineated in section 107 of the Copyright Act.”).

<sup>215</sup> *Id.* at 157 (“For all such transformative uses . . . intermediate liability would attach. The resulting transformative use would be exempt from actual and statutory damages as well as injunctive relief.”).

<sup>216</sup> *Id.* (“By default . . . the original author of the copyrighted work and the transformative user of that work would evenly divide all profits resulting from the commercial exploitation of the transformative work.”).

<sup>217</sup> *Id.* at 156 (showing that in order to qualify as a transformative use, the defendant “must have properly registered their work as a transformative use with the Copyright Office”).

<sup>218</sup> *Id.* (“[T]he Copyright Office would issue guidelines that define certain categories of use as transformative, thereby providing ex ante guidance on what constitutes transformative use.”).

<sup>219</sup> *Id.* (“Under this new intermediate liability option, transformative uses would include . . . parody, satire, digital sampling, and appropriationist modern art, as each of these activities draws upon copyrighted works to create a new work of art imbued with new expressions that criticize or illuminate our values, assess our social institutions, satirize current events, or comment on our most notorious cultural symbols.”).

The intermediate liability proposal is attractive on a number of levels. It provides the *ex ante* guidance on acceptable uses of copyrighted works that is currently missing from the fair use defense. It allows the creators of transformative works to continue to engage in their expressive activities, while requiring them to share any commercial profits made with the original copyright holder. This mitigates any chilling effect that might currently be felt under a regime that potentially imposes significant monetary damages and that gives little upfront guidance to expressive remixers about acceptable uses of others' work. Additionally, if transformative users do not make any commercial profits from the transformative use, they will not be required to pay the copyright holder anything.<sup>220</sup> Although the transformative use defense itself could only be fully determined in the litigation context (as with fair use), the guidelines for transformative use would give a better idea of the likely outcome of litigation than if the defendant had to rely solely on fair use.

Defenders of copyright's status quo might attack this intermediate liability solution as unprecedented. However, there is important prior experience to support its viability. Specifically, the so-called compulsory mechanical license provision of the Copyright Act is similar to the intermediate liability solution and is already in operation. It illustrates the tremendous benefits that both content industries and the public can make with new uses of the copyrighted works of others without permission but with payment. It also has functioned remarkably well for more than a century.

Copyright law generally provides creators of an original work with a series of exclusive rights, including the rights to reproduce, publicly distribute, and create derivatives of the work. However, since 1909, musical compositions (and *only* musical compositions) have enjoyed an exception to this rule. The reason for this exemption relates to a now long-defunct technology—the player piano.<sup>221</sup> But, the exemption remains alive

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<sup>220</sup> *Id.* at 157–58 (“Most importantly, noncommercial users would be free to appropriate copyrighted works for transformative purposes without compensation. Thus, the proposed regime unburdens precisely the type of speech that has historically received the greatest protection under First Amendment jurisprudence—noncommercial expression.”).

<sup>221</sup> In 1908, the Supreme Court determined that perforated rolls of music used with player pianos did not constitute copies subject to the exclusive rights secured under the Copyright Act. *See White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908). Because the rolls were only machine-readable (i.e., they could not be read as musical compositions by even those skilled in the arts and were therefore not intelligible to humans—a requirement of the term “copies”), the Court reasoned that “we cannot think that they are copies within the meaning of the copyright act.” *Id.* In response to the ruling, Congress passed the Copyright Act of 1909, which held that piano rolls created from underlying musical compositions constituted unauthorized reproductions of those compositions. Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075. The Copyright Act of 1909 simultaneously granted those who wished to manufacture and distribute mechanical embodiments of musical compositions a compulsory license (known as the compulsory mechanical license) under certain conditions. *Id.* § 25(e).

today. Under the exemption, anyone can record a “cover” version of a copyrighted, nondramatic musical composition and distribute copies of it without the permission of the original composer.<sup>222</sup> Thus, without any authorization from the original artist, Johnny Cash can record a hauntingly frail acoustic version of Nine Inch Nails’s more muscular and menacing “Hurt”; Luna a dreamy, lo-fi cover of Guns N’ Roses’s “Sweet Child O’ Mine”; William Shatner a loungey take on Pulp’s alternative rock classic “Common People”; and Dynamite Hack an acoustic folk-rock rendition of NWA member Eazy-E’s gangsta rap “Boyz-N-the-Hood.” As the history of modern music has demonstrated, the public, artists, and the industry have thrived as a result of the availability of the compulsory mechanical license.<sup>223</sup> The cover song exemption has spawned innovation and transformation in music, and the intermediate liability proposal would do the same in other areas of the arts.

Admittedly, however, the intermediate liability proposal does have a few potential shortcomings. The codification and potential explanation of the notion of transformative use potentially erodes a copyright holder’s derivative works right.<sup>224</sup> One solution to the inherent conflict between facilitating transformative use and protecting a copyright holder’s derivative works right would be to expressly exempt certain uses of a

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<sup>222</sup> 17 U.S.C. § 115 (2012). Instead, cover artists need only provide notice of their intention to record a cover song and then make payment of a fixed per-album fee to the copyright owner. *Id.* § 115(b)–(c). Although fully transformative uses of musical compositions cannot be made under the statute, cover artists are free to tinker with the composition to adapt it to a particular musical genre: “A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved . . . .” *Id.* § 115(a)(2).

<sup>223</sup> See, e.g., Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 209–11 (2004) (noting the benefit of the cover song right to the music industry and upstart and established artists alike). For example, although Bob Dylan is a remarkable songwriter and musician, there are few who would consider his rendition of “All Along the Watchtower”—a song he both composed and recorded—superior to the cover of this song by Jimi Hendrix. Hendrix’s version of “All Along the Watchtower” helped launch him into rock’s pantheon, but it also secured the place of Dylan’s composition in rock history. The availability of the compulsory mechanical license therefore enabled Hendrix to expand his popularity and introduced a whole new audience to the works of both Dylan and Hendrix. Without this exemption from liability, however, the world would have never enjoyed these cherished contributions to rock history. This “free” (rather than “permission”) culture has allowed the creation of over 500 different covers of the song, all paying Bob Dylan royalties.

<sup>224</sup> TEHRANIAN, *supra* note 112, at 159 (“Adoption of an intermediate liability scheme would inextricably necessitate a reexamination of the derivative rights doctrine. . . . [T]he creation and dissemination of transformative works advances the constitutional goal of progress in the arts. However, the broad exclusive right of copyright owners to prepare derivative works has swallowed up the ability of transformative users to escape infringement liability, thereby undermining the key goal of the federal copyright regime.” (footnote omitted)).

copyright work from the derivative works right.<sup>225</sup> Certain noncommercial and largely expressive works could be allowed to exist outside the derivative works doctrine, despite drawing on original works to create something new.

Although creating exemptions from the derivative works rights sounds like simply creating the intermediate liability regime in practice, the difference is that exempting certain works from the exclusive right would avoid infringement in the first place. The intermediate liability solution, on the other hand, is a defense to an infringement. The option of reworking the notion of a derivative work to exempt noncommercial remixing is taken up in more detail below.<sup>226</sup>

Another potential shortcoming with the intermediate liability proposal as applied to expressive remixing relates to the requirement that transformative works should be registered with the Copyright Office as a prerequisite to raising the transformative use defense.<sup>227</sup> Many remixers will not have the time, knowledge, or ability to register their works with the Copyright Office. In most cases, remixing is a hobby with which people engage during their spare time. Hobby remixers are unlikely to want to take the time and effort of registering every single creative remix they make with the Copyright Office. This would be an extremely time-consuming enterprise, and would be ultimately unrewarding in many cases given that there is often no way of knowing upfront which copyright holders are likely to bring infringement actions against remixers.

Additionally, in cases where remixes are crowdsourced and many people have grouped together to create the transformative work, it may be unclear who is most appropriately regarded as the author or owner of the work. This confusion would also make registration difficult in practice, particularly if more than one participant in a crowdsourced remix sought to assert ownership rights. The registration requirement would work most effectively in cases such as the *Star Wars: Uncut* scenario, where a large-scale crowdsourced transformative work is effectively organized and ultimately created by one central “author.” In this scenario, the identity of the author is relatively clear despite the contributions by multiple filmmakers.

There are clearly situations in which the intermediate liability approach would promote creative innovation both in terms of the creation of original works and in the subsequent creation of transformative derivative works. However, we recognize that there would still be many situations in which transformative works would not be registered and

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<sup>225</sup> See *infra* Part III.E.

<sup>226</sup> See *infra* Part III.E.

<sup>227</sup> TEHRANIAN, *supra* note 112, at 156.

where any infringement litigation could result in damages that would not be commensurate with the harm actually suffered by the copyright holder.

Another challenge for intermediate liability would arise in cases in which a remixer borrowed from a number of different copyright sources. Where the remix is based on one original work, it would be a fairly simple matter to arrange a profit-sharing mechanism between the plaintiff and defendant. For example, *Star Wars: Uncut* would be a good candidate for this kind of arrangement if it were commercialized. The profits might be shared between Pugh and Disney, and Pugh could also share profits with individual contributors to his project. The adoption of an intermediate liability scheme would encourage organizers of creative crowdsourcing projects to negotiate upfront with contributors for their appropriate share of any resulting profits.

However, in situations involving more collage-style remixes that draw from multiple different sources, courts would have more trouble in determining how profit-sharing arrangements should work. Should all potential plaintiffs be required to participate in the same litigation so that one court could create a profit-sharing order that covers all interested parties? If not, a second copyright holder who sues a remixer after the first copyright holder has already secured half the profits may be relegated to only a quarter of the profits made by the transformative user. To be effective in these circumstances, an intermediate liability proposal may need to include a mechanism for second copyright holders to obtain a fairer share.

None of these profit-sharing problems arise in situations in which the remixer has not made any commercial use of the transformative work,<sup>228</sup> and this will probably be the case in many situations of expressive remixing. In sum, the intermediate liability proposal has promise, and could be developed in a way that promotes expressive use of protected works. However, at least in the context of expressive remixing, lawmakers would have to deal with issues of multiple defendants and multiple plaintiffs to make the option truly workable. Additionally, lawmakers should consider the necessity of the registration requirement for transformative works. At the very least, any intermediate liability scheme ultimately adopted might allow defendants to register their transformative works after the commencement of infringement proceedings against them.

The intermediate liability proposal recognizes the cost of copyright infringement to the creative industries and the need to combat its pernicious effects. As a result, it does nothing to undermine the ability of content creators to enforce their legitimate rights against those who make

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<sup>228</sup> *Id.* at 157 (noting that in the cases of noncommercial transformative uses, no compensation would be payable to a copyright holder under the intermediate liability regime).

wholesale copies of their works without permission. Under the plan, copyright holders can still vigorously pursue pirates with hefty statutory damages and the possibility of criminal sanctions. But enterprising artists would be protected from the same blunt weapons wielded against pirate enterprises.

The impact of the intermediate liability solution upon transformative users and the licensing market for copyrighted content would be quite profound. The proposal would advance the constitutionally mandated goals of the copyright system by stimulating more artistic creation and wealth generation for new content and sampled content alike. Specifically, small and emerging DJ's, rappers, and hip-hop artists could sample from major recordings without the threat of litigation. More established artists like U2, Beck, and Eminem would see the costs of sampling for their future works driven down in a competitive marketplace. Rights holders could no longer refuse to allow any uses of their content or to hold out for obscenely high licensing rates. The gains would be felt throughout the arts, from documentary directors (who would no longer face exorbitant rates in order to sample a few seconds of a film clip), to appropriationist artists and their exhibiting galleries (who would no longer fear massive liability for creating and exhibiting art that borrows cultural symbols or other preexisting works), to crowdsourcers who may currently fear the threat of an infringement action.

Under our proposal, negotiations between artists would be informed by the fact that transformative users can always make use of underlying materials, even if they do not reach a deal with rights holders—so long as they account for those rights holders through a payment of a portion of their realized profits. Beyond the world of music, artists of all stripes would enjoy the right to create using underlying source materials without fear that they will face millions of dollars in legal liability or, worse yet, find the FBI raiding their house in the middle of the night.<sup>229</sup>

Parties would be free to contract around default damages rules for transformative uses. But the proposed intermediate liability scheme helps set a reasonable starting point for negotiations between the original copyright owner(s) and the transformative user and it prevents the ambiguity of the fair use defense and the *in terrorem* effect of copyright's statutory damages regime from deterring valuable artistic activity. It also prevents original copyright owners from discriminating between favorable and unfavorable transformative uses of their copyrighted works. In short, in

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<sup>229</sup> See 17 U.S.C. § 506(a)(1) (2012) (providing criminal penalties for willful copyright infringement for, inter alia, "purposes of commercial advantage or private financial gain"); 18 U.S.C. § 2319(b) (2012) (providing for up to five years imprisonment for a first offense and up to ten years imprisonment for a second offense for criminal infringement of works with a retail value of more than \$2500).

practice, the intermediate liability proposal would ensure that parties negotiate for more reasonable rates on royalties.

Existing content owners whose works are sampled will also reap economic benefits by sharing in the profits stemming from transformative works, many of which would never have existed otherwise. New listeners may also be attracted to older content when they find out that it has been sampled. As an example, DJ Danger Mouse's *The Grey Album*, mashing up The Beatles' *The White Album* and Jay-Z's *The Black Album*, likely served as a music discovery tool for those who may not have been Beatles or Jay-Z fans before.<sup>230</sup> Admittedly, it is possible that some artists who receive windfall benefits under the current regime would receive less money under this proposed system. But for policymakers, concerns about promotion of progress in the useful arts—rather than enrichment of a very few in perpetuity—should drive the framing of copyright law. And the intermediate liability solution recognizes that law should enable the unfettered functioning of the creative marketplace, not inhibit it.

#### D. Clarifying Fair Use

A corollary to the intermediate liability regime described above<sup>231</sup> would be simply to streamline the contours of the fair use defense. As discussed above, fair use is notoriously unpredictable, which significantly hinders its putative purpose of protecting the rights of consumers and users to access copyrighted works.<sup>232</sup> Consider a few high-profile examples from the past few decades. Whereas Biz Markie was hit with liability (and a referral to the district attorney's office for potential jail time) for sampling several bars of a piano line from Gilbert O'Sullivan's "Alone Again (Naturally),"<sup>233</sup> the Beastie Boys escaped liability when they sampled a six-second riff from jazz flutist James Newton.<sup>234</sup> The writer of an unauthorized take on *Gone with the Wind* (told from the perspective of the slaves) won

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<sup>230</sup> See, e.g., Renee Graham, *Jay-Z Meets the Beatles on 'The Grey Album' Mix*, CHI. TRIB., Feb. 12, 2004, [http://articles.chicagotribune.com/2004-02-12/features/0402120058\\_1\\_grey-album-jay-z-black-album](http://articles.chicagotribune.com/2004-02-12/features/0402120058_1_grey-album-jay-z-black-album) [<http://perma.cc/HK4E-2YA3>] ("Danger Mouse has brought the Beatles into the hip-hop generation while giving props to the timeless innovation of the band, which through its boundary-breaking musical philosophy may have helped pave the way for the free-flowing deconstructionism of rap music.").

<sup>231</sup> See *supra* Part III.C.

<sup>232</sup> This is not the only problematic aspect of the fair use doctrine. As Professor Tehranian has argued, far from protecting public access to copyrighted works, the fair use doctrine reintroduced natural-law elements into the copyright infringement calculus that have, paradoxically, led to a decline in user rights. See John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005).

<sup>233</sup> *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

<sup>234</sup> *Newton v. Diamond*, 388 F.3d 1189, 1196–97 (9th Cir. 2004).

the right—under the fair use doctrine—to publish her work over the objections of the Margaret Mitchell Estate,<sup>235</sup> whereas the writer of an unauthorized send-up of *Catcher in the Rye* (in which an elderly Holden Caulfield confronts author J.D. Salinger) was deemed to be infringing and had his book effectively banned in the United States.<sup>236</sup> Appropriationist artist Jeff Koons has experienced the fair use doctrine’s inexplicable vacillation first hand. He has had federal appellate courts weigh in on two infringement suits for his unauthorized use of source materials in his art. In the first case, a court denied his fair use defense and found him liable.<sup>237</sup> The court even ordered him to pay fees to the plaintiff.<sup>238</sup> In the second case, a court found his work transformative and, therefore, excused him from liability under the fair use doctrine (though the court declined to award him his fees).<sup>239</sup> All told, there is little consistency in the way courts weigh the various factors dictated by statute.

Wildly disparate outcomes on similar fact patterns have resulted, making copyright cases difficult to decipher. For example, as Rebecca Tushnet has pointed out, “After decades of litigation, it is still difficult to tell when and whether one can photocopy copyrighted materials, even for scientific research.”<sup>240</sup> As we have seen with musicians, nebulous fair use standards have prompted self-censorship in the creative process. Potential “infringers” are, understandably, unwilling and unable to bear the substantial costs of litigation and liability even where it does not or should not exist.

Commentators in recent years have made several proposals about reworking the operation of the fair use defense to give users of copyright works clearer ex ante guidance about whether their uses may be found to be infringing.<sup>241</sup> Creating executive guidelines, via the Copyright Office, regarding what uses are the most likely to be considered fair use would be helpful and would serve much the same purpose as the guidelines contemplated in the intermediate liability proposal.<sup>242</sup> In fact, in recent years, some public interest groups have attempted to create best practice

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<sup>235</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>236</sup> *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

<sup>237</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

<sup>238</sup> *Id.* at 313.

<sup>239</sup> *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006).

<sup>240</sup> Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 24 (2000).

<sup>241</sup> Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA’s Anti-Device Provisions*, 19 HARV. J. L. & TECH. 111 (2005).

<sup>242</sup> See *supra* Part III.C.



guidelines for fair use in particular contexts such as for the documentary film industry.<sup>243</sup>

Increased awareness of the nature of fair use and more presumptions in favor of regarding particular classes of uses as fair use would go a long way towards striking a more appropriate balance between free speech and proprietary copyrights. An advantage of this approach over the intermediate liability approach is that it would not necessarily require legislative reform, but rather the development of executive guidelines more clearly explaining fair use. Legislative clarification of § 107 of the Copyright Act is another possible solution. Some countries have more clearly delineated legislative notions of fair dealing, which are exempted from copyright infringement liability.<sup>244</sup> There is no reason why American legislation could not also be more specific in this regard.

Another advantage of this approach is that asserting a fair use would not require registration of a work as a fair use. Of course, the intermediate liability proposal could also be revised to remove the registration requirement for transformative works, or to allow more flexibility in terms of when a transformative work is required to be registered.<sup>245</sup>

The most significant difference between clarifying the contours of fair use and adopting an intermediate liability regime would be that fair use is a complete defense to infringement, whereas the intermediate liability regime requires profit sharing between a plaintiff and a defendant.<sup>246</sup> In this regard, the intermediate liability proposal may result in fairer outcomes than a clarified fair use doctrine, and could serve as a basis for legislative compromise with content holders, who will understandably be loath to give up existing rights without getting anything in return. The problem with the current situation is that courts have to choose between two extreme options: infringement that can result in exorbitant damages or fair use that results in none.<sup>247</sup> Clarifying the contours of fair use does not create the potential middle ground that the intermediate liability approach could provide.

Creating greater guidance about the contours of fair use in the digital age is an important goal and one that should be pursued in any event, given the strict liability basis of copyright and the fact that digital technologies rely on copying as the basis of all functionality. However, reformulating the contours of fair use may not in and of itself provide appropriately

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<sup>243</sup> See, e.g., AM. UNIV. CTR. FOR SOC. MEDIA, DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), available at [http://www.cmsimpact.org/sites/default/files/fair\\_use\\_final.pdf](http://www.cmsimpact.org/sites/default/files/fair_use_final.pdf) [<http://perma.cc/6F9G-9ZFZ>].

<sup>244</sup> See Lipton, *supra* note 108, at 960.

<sup>245</sup> See *supra* Part III.C.

<sup>246</sup> See *supra* Part III.C.

<sup>247</sup> TEHRANIAN, *supra* note 112, at 155.

tailored solutions to all of the challenges to copyright law posed by expressive remixing.

*E. Tempering the Derivative Works Right*

Many of the proposals described in the previous sections are, to a greater or lesser extent, arguably inconsistent with the derivative works right currently reserved to copyright holders. This is nothing new. As we explained in the Introduction, the existing statutory language of the derivative rights doctrine has always existed in tension with the modern fair use balancing test. Under §§ 101 and 106(2) of the Copyright Act, copyright holders enjoy the exclusive right to create and disseminate works based on their original works, including prequels and sequels, translations, and adaptations. Moreover, unless the new work is deemed to be a fair use, the creator of an unlawful derivative work is not entitled to assert any copyright in that work to the degree that it makes impermissible use of another's copyrighted work.<sup>248</sup>

To the extent that our proposals would grant the creators of derivative works greater leeway to create and use those works without fear of infringement liability, or at least without fear of significant penalties, these proposals are inconsistent with the derivative works right. But that is the point: it is time to reexamine the contours of the derivative works right. Just as the vague contours of the fair use defense have stifled free speech,<sup>249</sup> the expansive notion of derivative works has also squelched expressive activities.<sup>250</sup>

Commentators have suggested that the derivative works right (and the transformative use aspect of the first fair use factor with which it is in tension) should be reworked in order to further the important goals of artistic innovation and personal expression.<sup>251</sup> It would certainly be possible for Congress to more clearly delineate and streamline the definition of derivative works to effectively exempt certain classes of works from infringing the derivative works right. While we here suggest that expressive

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<sup>248</sup> 17 U.S.C. § 103(a) (2012) (“The subject matter of copyright . . . includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

<sup>249</sup> See *supra* Part II.C.

<sup>250</sup> TEHRANIAN, *supra* note 112, at 160 (“As copyright law historically evolved from the narrow right to forbid duplication of one’s original work to a broader right to interdict . . . any borrowing of the elusive intellectual essence of one’s original work, an artificial hierarchy of works emerged to rationalize the expansion of an author’s property right. . . . This unchallenged hierarchy . . . begs reconsideration on two important grounds: the important role of transformative use in the advancement of the arts, and the value of transformative use on expressive grounds.”).

<sup>251</sup> See, e.g., *id.*, at 160–61; Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1267–68 (1997).

remixes could be exempted from the definition of derivative works, others have suggested a broader approach.<sup>252</sup>

Naomi Voegtli, for example, has suggested that the definition of derivative works could be fine-tuned to contemplate only: (1) works that exhibit little originality in their own right; (2) works that unduly encroach on the economic prospects of the source work(s); and (3) basic translations, recordings, art reproductions, abridgements, and condensations of source work(s).<sup>253</sup> In other words, her approach would exempt transformative works from the notion of derivative works, thus reducing any potential conflict between the intermediate liability proposal suggested above and the derivative works right.<sup>254</sup> Such an approach to derivative works would also lessen any tension between the derivative works right and a streamlined notion of fair use as suggested above.<sup>255</sup>

Voegtli's approach would effectively reserve to copyright holders limited markets we might deem them exclusively entitled to exploit, including perhaps markets for translations, recordings, and art reproductions.<sup>256</sup> But, by the same token, it would open new expressive opportunities for those who wanted to engage in expressive uses of existing works in a manner that would not clearly impact the basic market for those existing works and would not otherwise diminish a copyright holder's reasonable right to exploit her work commercially. This approach would work well in the case of expressive remixes like *Star Wars: Uncut*. Even if Pugh were to commercialize his work, it would not likely encroach on any realistic market that Disney may want to exploit. In fact, it may help Disney in light of Disney's plans to release new sequels to the original *Star Wars* films by creating a buzz around the storylines that immediately precede those in the new films.<sup>257</sup>

In any event, a more streamlined definition of derivative works might exempt such a project from liability as an infringing derivative work. The

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<sup>252</sup> Voegtli, *supra* note 251, at 1267.

<sup>253</sup> *Id.*

<sup>254</sup> TEHRANIAN, *supra* note 112, at 160.

<sup>255</sup> *See supra* Part III.D.

<sup>256</sup> It is worth noting that the expansive notion of derivative rights is a product of the past century and, in former times, we (as a society) did not believe that copyright holders had the legitimate exclusive right to such derivatives as translations. *See* Tehranian, *supra* note 232, at 470–80.

<sup>257</sup> Eric Eisenberg, *Star Wars: Episode 7 – What We Know So Far*, CINEMABLEND, <http://www.cinemablend.com/new/Star-Wars-Episode-7-What-We-Know-So-Far-36488.html> [<http://perma.cc/E3NU-LACN>] (“In 2005 it looked like the *Star Wars* saga was officially over. Lucasfilm and Twentieth Century Fox released *Star Wars Episode III: Revenge of the Sith*, which completed the prequels trilogy and tied the story back to the first film in the series. It was done, finished, kaput, and ended. But then along came Disney. In October 2012 the studio brokered a \$4.05 billion deal to buy Lucasfilm, and with the deal came the announcement that they would be starting production on a whole new trilogy of *Star Wars* films that would keep the epic story going for years and years to come.”).

same result would be achieved under a narrower approach that would simply exempt expressive remixing from the scope of the derivative works right. Whether one prefers a general reworking of the definition of derivative works, such as that suggested by Voegtli, or a sector-specific exemption for particular classes of works, the resulting balance between proprietary copyrights and free expression would represent a significant improvement over the current situation.

Either form of reworking the derivative works definition could take place as a stand-alone reform effort or as part of a package that includes streamlining fair use or adopting an intermediate liability regime. Now is a particularly good time to consider these proposals in light of the House Judiciary Committee's ongoing review of American copyright law.<sup>258</sup> In this vein, it is important to understand that the proposals suggested in this Part are not necessarily mutually exclusive. One could explore all of them at the same time or focus on one or more of them. We suggest that even outside the context of expressive remixing, there is merit to rethinking copyright damages and strict liability, and to refining fair use and the definition of derivative works. We also advocate the development of compromise regimes such as the intermediate liability proposal described above to avoid the "all or nothing" basis for copyright infringement that exists under current law.

#### CONCLUSION

The advent of the digital age, and particularly the exponential development of interactive Web 2.0 technologies, has created dramatic new challenges for copyright law. Because all online activities involve copying to some degree, the strict liability basis of copyright law raises a potential clash between technological innovation and free expression on the one hand, and proprietary copyrights on the other. Digital consumer service providers such as Apple and Sony may encourage us to use their technologies to explore digital creation, but content industries reserve the right to sue if we use the fabric of popular culture for our own creative purposes. Litigation against private individuals is a reality, and penalties for infringement can be extreme.<sup>259</sup>

We have focused our discussion on the particular expressive outlet of digital remixing that borrows from the copyrighted works of others. We have used creative crowdsourcing as a case study to emphasize the ways in which current laws fall short of striking an appropriate balance between fostering innovation in original works and enabling subsequent expression employing those works as building blocks. However, the implications of

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<sup>258</sup> See *supra* note 7 and accompanying text.

<sup>259</sup> See *supra* Part III.B.

our concerns resonate further, applying to a wide range of activities from fan fiction and expressionist art to various musical genres such as hip-hop and electronica.

Our goal has been to identify current imbalances in the law between the rights of copyright holders and the rights of users of copyright works, and to suggest ways in which a more appropriate balance could be developed. To this end, we have put forward a number of proposals, namely: revisiting the strict liability basis of copyright, rethinking the current statutory damages regime, creating a workable intermediate liability proposal to provide a middle ground between liability and fair use, streamlining fair use, and fine-tuning the derivative works doctrine.

Each of our suggestions raises challenges for lawmakers, and each comes with inherent advantages and disadvantages. Some of these proposals may work particularly well together, such as reworking the definition of derivative works and adopting an intermediate liability regime for transformative works. Others may operate well on their own, such as revisiting the nature of copyright damages.

Our aim in making these suggestions for reform is not to assert that one or more of them would necessarily be preferable to the others. Instead, we believe that any of them has the potential to strike a better balance than the current copyright regime. Presumably, one of the tasks of those reviewing American copyright law under the House Judiciary Committee's plan will be to consider the balance between existing copyrights and downstream creative efforts in today's interactive digital world. It is our hope that the suggestions made in this Article will assist lawmakers in thinking seriously about reforms to copyright law that will better promote artistic innovation in transformative works and free expression more generally. Otherwise, the law will continue to preserve and perpetuate a system of artistic and expressive "haves" and "have-nots" that chills too much valuable speech and innovation.

