FAIR USE, NOTICE FAILURE, AND THE LIMITS OF COPYRIGHT AS PROPERTY

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If we start with the assumption that copyright law creates a system of property rights, to what extent does this system give adequate notice to third parties regarding the scope of such rights, particularly given the prominent role played by the fair use doctrine? This essay argues that, although the fair use doctrine may provide adequate notice to sophisticated third parties, it fails to provide adequate notice to less sophisticated parties. Specifically, the fair use doctrine imposes nearly insuperable informational burdens upon the general public regarding the scope of the property entitlement and the corresponding duty to avoid infringement. Moreover, these burdens have only increased with changes in technology that enable more, and more varied, uses of copyrighted works. The traditional response to uncertainty in fair use has been to suggest ways of curing the notice failure by providing clearer rules about what is and is not permitted. This essay suggests, however, that these efforts to reinforce the property framework feel increasingly strained and fail to reflect how copyright law is actually experienced by the general public. Indeed, the extent of the notice failure is such that it may be time to stop treating copyright like a property right, at least for certain classes of users. The essay ends by suggesting a number of alternative frameworks that would seek to regulate public behavior regarding copyrighted works without imposing the unrealistic informational burdens required by a system of property rights.

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I. NOTICE FAILURE AND FAIR USE

In *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk*,[1] James Bessen and Michael Meurer take a comprehensive empirical look at how well the U.S. patent system succeeds in rewarding innovators and encouraging investment in innovation. Bessen and Meurer accept that the patent system seeks to further its goals through creating a system of property rights.[2] They then argue that the patent system fails notably in fulfilling one of the most basic functions of a property system, namely providing third-parties clear notice of the existence, validity, ownership, and scope of those property rights.[3] They then document extensively how this "notice failure" has the effect of discouraging innovation in ways that are at odds with the overall purpose of the patent system.[4]

In this essay, I ask whether the concept of notice failure can help us better understand U.S. copyright law and, in particular, the implications of the uncertainty created by the fair use doctrine. One initial question is whether the assumption that Bessen and Meurer make in their book can fairly be applied to copyright, i.e. whether copyright law creates a system of property rights. This is not an uncontroversial proposition, and there may well be reasons to view copyright as something quite different from both patent and real or personal property.[5] I wish to put these concerns aside for now (though I will return to them later) and start with the same assumption—that copyright law creates a system of property rights—and then ask the same set of questions (albeit in a far looser and non-empirical fashion). How well does the copyright system work as a system of property rights? In particular, how well does it provide

[1] JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK (2009).

[2] *See id.* at 29-30.

[3] *See id.* at 46-72.

[4] *See id.* at 147-64.

[5] *See, e.g.*, Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141 (positing that copyright is post-industrial property because copyright "performs a different set of social and economic functions than the property in land to which it is so often compared"); Julie E. Cohen, *What Kind of Property is Intellectual Property?*, 52 HOUS. L. REV. 691, 692 (2014) (explaining that the differences between real property and intellectual property "flow from the fact that intellectual goods manifest complexity and heterogeneity in both their production and in their use"); Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523, 1556 (2011) ("[E]fforts to shoehorn legal protection for [intellectual property] in the tangible property mold have failed and may well hasten the disintegration of the classical liberal conception of private property rights."); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1807-08 (2007) (suggesting that copyright is less of a property system than patent).

notice to third parties of the existence and scope of the property entitlements it creates? And how does the fair use doctrine figure in all of this?

As an initial matter, it is easy to see how the concept of notice failure might have some application to copyright's fair use doctrine. Fair use plays a critical role in defining the scope of copyright, as it serves as an important and significant limitation on the copyright entitlement. At the same time, it is notoriously uncertain in scope, subject to a multi-factor balancing test administered by judges in a case-by-case, fact-specific manner.[6] Complaints about the uncertainty and unpredictability of the fair use doctrine are legion.[7] Much scholarship has focused on how the uncertainty in the fair use doctrine chills creative expression and how various changes to the doctrine might cure this problem. This uncertainty can be understood, in Bessen and Meurer's terms, as a failure to provide third parties with adequate notice of the scope of the property entitlements created by copyright law.[8]

Yet upon further reflection, the concept of notice failure may not shed as much light on fair use as we might hope. Many of the characteristic types of notice failure identified by Bessen and Meurer are simply not implicated by the uncertainty in copyright's fair use doctrine. For example, lack of notice about the existence of the property right is typically not an issue in copyright cases, since copyright liability, unlike patent liability, requires actual copying and thus awareness of the underlying work.[9] Similarly, questions about the validity of the property right are not typically an issue, since the requirements for validity in copyright are so low.[10] It is true that ownership of the copyright can raise significant notice issues, given the lengthy term and complications surrounding transfers, renewal, termination, etc., and these important issues are the subject of other articles in this Symposium.[11] The focus of this essay,

[6] *See* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 140 (1999) ("[T]he copyright statute instructs courts to consider several factors in determining fair use, including the extent of the taking, the type of work involved, the use made, and the effect on the market for the work—a classic 'muddy' balancing test." (footnote omitted)).

[7] *See, e.g.*, Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (calling fair use the "most troublesome" doctrine in copyright). *But see* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (describing an empirical study suggesting fair use is more predictable than is often assumed); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) (arguing that fair use is more predictable than commonly understood because "fair use cases tend to fall into common patterns").

[8] *See* BESSEN & MEURER, *supra* note 1, at 54.

[9] Except in the rare case of unconscious copying. *See, e.g.*, Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976).

[10] *See* 17 U.S.C. § 102(a) (2012).

[11] *See generally* Jessica Litman, *What Notice Did*, 96 B.U. L. REV. 717 (2016); Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 B.U. L. REV. 967 (2016); R. Anthony Reese, *Termination Formalities & Notice*, 96 B.U. L.

however, is the fair use doctrine, and these types of notice failure do not directly implicate that doctrine.[12]

The fair use doctrine does potentially give rise to one form of notice failure identified by Bessen and Meurer, namely the failure to define clear boundaries of the property entitlement. Bessen and Meurer highlight the fact that patent claims, and the interpretive methods adopted by the courts, have largely failed to give third parties adequate notice about the scope of the claimed entitlement.[13] This is a basic requirement of any property system, as clear notice of boundaries enables third parties to know when they might be infringing upon the entitlement, and therefore when they must take steps to avoid infringement or secure permission. Similarly, it could be argued that copyright's fair use doctrine fails to give third parties adequate notice of the scope of the underlying copyright entitlement. By making the boundaries of the right unclear, the doctrine may contribute to a form of notice failure.[14]

Yet even here, there are reasons to question whether notice failure, as a distinct concept, adds anything new to our understanding of fair use. The uncertainty in fair use doctrine is not so much an issue of defining the metes and bounds of the property entitlement, as is the case in patent law where the entitlement must be defined in the claim language.[15] Rather, the uncertainty is

REV. 895 (2016); Pamela Samuelson, *Notice Failures Arising from Copyright Duration Rules*, 96 B.U. L. REV. 667 (2016).

[12] These types of notice failure may figure indirectly into the fair use analysis, when a potential licensing market is considered under the fourth factor in the fair use analysis. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930-31 (2d Cir. 1994) (finding that potential licensing revenues may be taken into account in assessing harm to the market).

[13] *See* BESSEN & MEURER, *supra* note 1, at 54-55.

[14] *See* Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 374-75 (2002) ("Boundaries establishing the limits of property rights provide advance notice when an act will give rise to rights and obligations established by property law . . . . Unfortunately, . . . [c]opyright's boundaries are difficult to discern, in part, because of the complex and evolving nature of intellectual property law." (footnote omitted)).

[15] *See* BESSEN & MEURER, *supra* note 1, at 56 (explaining that "[p]atent claims create property rights" because "the claims determine the scope of the owner's right to exclude—they are the fences that mark the inventor's property"). That said, the basic standard for copyright infringement does give rise to a good deal of uncertainty about the scope of the entitlement. *See, e.g.,* Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 719-20 (2010) (arguing that the tests for proving copyright infringement "make no sense" because the "substantial similarity" test lumps together the idea of bare copying and "improper appropriation"); Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1837 (2013) (describing how certain judges and their attitudes contributed to the "uncertainty about copyright boundaries"); *see also* Jeanne C. Fromer, *Claiming Intellectual*

primarily a direct result of uncertainty in the law itself. As a contextual, multi-factor standard, the fair use defense contains within it, inherently, a degree of uncertainty attributable to the nature of the law itself.[16] In this sense, the uncertainty may be no different from the uncertainty that attends any other area of the law that relies upon a standard rather than a clear rule (whether negligence, nuisance, antitrust, etc.). If we define notice failure so broadly as to encompass a general form of legal uncertainty, then nearly every area of the law would be subject to the same form of failure, and the concept of notice failure would add little to the general concern about legal uncertainty.

That said, I do believe that there is a way in which the concept of notice failure can shed some interesting and distinctive light on the effect of the fair use doctrine on copyright law. As I hope to show in this essay, focusing on notice failure in fair use usefully shifts the focus away from the holder of the property right (the copyright owner) to those bound to respect that right (the potential fair users) and prompts us to ask how well this system of property rights informs third parties of the boundaries of that right.[17] In so doing, notice failure draws attention to the significant informational burdens that copyright law, as a system of property rights, imposes on certain third parties. Indeed, these informational burdens are sufficiently great so as to call into question the appropriateness of applying a property rights framework to such users. I will argue that, given the extent of ambiguity in fair use, it may be time to consider abandoning a property framework for some users and substituting an alternative conceptual framework that more realistically accounts for the informational burdens facing potential fair users.

II. FAIR USE AND BOUNDARY SETTING

An important feature of any property system is clear notice about the boundaries of the underlying entitlement. The delineation of boundaries is an important concern of real property regimes, which have elaborate systems of recordation and doctrines implementing these systems.[18] In addition, real

Property, 76 U. CHI. L. REV. 719, 721-22 (2009) (contrasting ways in which patent and copyright seekers obtain claim entitlements).

[16] *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092 (2007) (explaining that uncertainty from fair use arises because the doctrine "protects a zone of expressive opportunity for criticism, comment, parody, education, and other socially beneficial forms of communication that might not occur if copyright owners were given complete control over how their works were used").

[17] *See also* Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1675 (2012); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1882 (2007).

[18] *See, e.g.*, Molly Shaffer Van Houweling, *Technology and Tracing Costs: Lessons from Real Property*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 385, 397 (Shyamkrishna Balganesh ed., 2013).

property law exhibits a characteristic preference for clear rules (such as trespass), over fuzzier standards (such as negligence). Together, these features of property systems give notice to third parties of the underlying entitlement so that they can either avoid liability or seek permission. Bessen and Meurer extensively document many of the ways in which the patent system fails to adequately define the boundaries of the underlying patent entitlements.[19]

How well does copyright law define the boundaries of the underlying property right? Both well and poorly. The copyright entitlement has a core that is relatively well-defined. If one makes many literal copies of a copyrighted work and sells them to the public, then one is likely liable for infringement. Similarly, if one makes an unauthorized major motion picture based on a copyrighted novel, one is again likely liable. There are certain uses of copyrighted works that are rather clearly defined and widely understood as belonging exclusively to the copyright owner.

Beyond this core, however, there is a periphery where the boundaries of the entitlement are quite uncertain. The ambiguities in the idea/expression dichotomy and in the standard(s) for infringement make even the basic question of infringement uncertain in many cases that do not involve literal wholesale copying.[20] This uncertainty is exacerbated by the fair use doctrine, which covers a wide range of potential uses and is, as noted above, governed by a highly contextual, fact-specific judicial standard.[21] Thus although copyright may have a relatively well-defined core, it is surrounded by a periphery that is highly uncertain.

To push the real property analogy, imagine a sign at the edge of a piece of land, saying "Keep Out," reflecting the clear rule against trespass in real property law. This is the classic, hard-edged property rule with very limited exceptions. It matters not whether or how much harm might be caused by the intrusion, the reasons for the trespass (subject to very limited exceptions), or the general context for the intrusion. Instead, there is a very clear rule: no trespass. Now imagine, by contrast, a sign at the edge of a property that reads, "Keep Out, unless you have a fair reason to come onto this property, based on a contextual balancing of the following four nonexclusive factors . . . ."[22]

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[19] *See* BESSEN & MEURER, *supra* note 1, at 46-72.

[20] *See, e.g.*, Wendy J. Gordon, *The Concept of Harm in Copyright*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW, *supra* note 18, at 452, 456 (highlighting ways in which infringement analysis departs from a trespass rule).

[21] *See supra* note 6 and accompanying text.

[22] *See* David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 143 (2009) (offering a similar example of a sign on a public beach saying "use the public beach but don't go unreasonably close to adjoining private land"); *see also* Ben DePoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1094 (2011) (proposing that just such a doctrine be introduced to trespass law where the court would evaluate trespass based upon "(1) the nature and character of the trespass; (2) the nature of the protected property; (3) the amount

Perhaps this example is unfair. After all, real property law also contains doctrines that make the boundaries of the entitlement somewhat uncertain. The classic example is nuisance law. I have a near absolute right to prevent unauthorized intrusion upon my land. However, my right to use my land as I wish may be circumscribed in various ways, whether by zoning laws, environmental laws, or, most analogously in our case, by the law of nuisance. Nuisance is a case-by-case, highly contextual, judge-made, common law doctrine that considers a wide range of factors in determining whether a particular use of property is permitted. This has the effect of rendering the conceptual boundaries of the entitlement more uncertain. Thus even the law of real property has doctrines that create some degree of uncertainty at the boundaries of the entitlement.[23]

In this sense, perhaps fair use is structurally analogous to nuisance, acting not as a limit on the right to use, but as a limit on the right to exclude.[24] Nuisance law qualifies the core underlying entitlement (the right to use), subjecting it to a contextual cost-benefit assessment. In nuisance cases, courts consider a wide range of factors, including the nature and reasonableness of the use, the extent of the harm, priority of the use, the social value of the use, and the character of the neighborhood.[25] Similarly, fair use qualifies the underlying entitlement (the right to exclude), subjecting it to a contextual consideration of a similar wide range of factors.[26] So in this sense, perhaps the uncertain boundaries of the copyright entitlement are not so unusual or problematic for a system of property rights.

Yet there are important differences between nuisance and fair use, differences that suggest that the uncertainty at the boundaries of copyright is far more significant and perhaps different not just in scope but in kind. Nuisance generally governs a relatively limited set of potential uses of the property. Although in theory the scope of potential uses subject to nuisance is

and substantiality of the trespass; and (4) the impact of the trespass on the owner's property interest"); Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. FORUM 62, 80 (2009) (explaining that the "harm-benefit distinction will have differing behavioral implications for tangible as compared with intangible ownership").

[23] *See* Burk, *supra* note 6, at 137; Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 42 (1985).

[24] *See* Smith, *supra* note 5, at 1795-97 (mentioning the analogy between fair use and nuisance); *see also* Steven Hetcher, *The Fault Liability Standard in Copyright*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW, *supra* note 18, at 431, 431 ("[A]s a result of the emergence of the fair use doctrine, the liability standard for infringement in copyright is now a fault standard.").

[25] *See* RESTATEMENT (SECOND) OF TORTS §§ 822-828 (AM. LAW INST. 1979) (detailing the factors to be considered in assessing whether a nuisance has occurred).

[26] *See* Smith, *supra* note 5, at 1771 ("[F]air use involves much ex post evaluation and balancing and so is much like the law of nuisance in being a governance regime.").

very broad, in practice courts have tended to focus on certain categories of uses, such as pollution, particles, smells, noise, etc., and have generally been more reluctant to deem other kinds of uses nuisances.[27] By contrast, although fair uses do in many cases fall into a set number of categories,[28] the potential fair uses of copyrighted works are nearly limitless and not as constrained.[29] The balance between clear core and uncertain periphery is different.

In addition, the universe of potential counterparties in copyright is far greater. Nuisance claims typically involve nearby landowners, who are most likely to be affected by the use. Even for certain public nuisances, the universe of potential counterparties is constrained by geography. Thus, the set of parties charged with knowledge of the scope of the entitlement is relatively limited. By contrast, the universe of potential fair users is far greater, encompassing anyone who might have reason to use a particular copyrighted work. In this sense, the problem in copyright is worse than in patent, where the potential universe of infringers may, for certain types of patents, be far more limited (e.g., the universe of pharmaceutical companies).[30] Thus, the universe of individuals who need to have adequate notice of the entitlement boundaries is far broader in copyright.[31]

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[27] *See* Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 1 (2002) (explaining that courts will often recognize four types of land uses as nuisances: "noise, such as that generated from blasting; odor, such as that generated by farm animals or polluting factories; physical invasion of particles, such as dust from a factory; and safety or environmental hazards, such as an unsanitary or dangerous condition on a defendant's land" (footnotes omitted)).

[28] *See* Samuelson, *supra* note 7, at 2619 (arguing that fair use claims fall within a set of relatively predictable categories); *see also* Justin Hughes, *Fair Use and Its Politics—At Home and Abroad*, *in* COPYRIGHT LAW IN THE AGE OF EXCEPTIONS AND LIMITATIONS (Ruth Okediji ed., forthcoming Apr. 2017) (manuscript at 3), http://ssrn.com/abstract=2595717 [https://perma.cc/6WE4-W36S] (suggesting that fair use should be "understood as a *mechanism* for establishing specific exceptions and limitations rather than as a specific copyright exception in its own right").

[29] *See* Note, *A Justification for Allowing Fragmentation in Copyright*, 124 HARV. L. REV. 1751, 1762 (2011).

[30] *See* Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 488 (2004) ("When the class of potential infringers is large and unwitting infringement is easy, rules that impose strict liability for infringement with no exceptions (as in patent law) impose information costs on individuals past the point of diminishing marginal returns.").

[31] Note that the informational burden is also different insofar as, in fair use, the larger population consists of the holders of the uncertain privilege, whereas in nuisance the larger population consists of those subject to the privilege. *Compare* Smith, *supra* note 5, at 1752 (discussing the privileges arising from intellectual property rights), *with* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1016 (2004) ("The presumption [in nuisance law] is that people get to exclude unwanted objects, odors, and so on from the column of space around the land as defined by the *ad coelom* rule, and

The net impact of this is that the copyright system, as a system of property rights, imposes significant informational burdens on a large number of unknown third parties. As Henry Smith and others have noted, a significant advantage of a clear property rule is that it reduces the information costs imposed on third parties.[32] A clear "no-trespass" rule is easy for third parties to understand and to comply with.[33] And although a more contextual nuisance rule raises the information costs for real property rights, it does so in a relatively limited fashion in an area where such costs may be outweighed by the benefits of a more fine-grained system of governance.[34] In the copyright context, by contrast, the fair use doctrine imposes significant information costs on a far wider range of individuals.

As mentioned above, these costs stem from the structure of the fair use doctrine itself, as a highly contextual standard.[35] Moreover, courts have generally been reluctant to modify that standard in ways that might reduce the informational burden. To take a recent example, in *Cambridge University Press v. Patton*,[36] Georgia State University attempted to establish a rough rule of thumb permitting instructors to post excerpts of copyrighted books and articles on their "e-reserves," so long as the excerpts amounted to less than ten percent of the total work.[37] Although the district court generally accepted this rule of thumb in assessing the University's fair use argument, the court of appeals rejected it and directed the trial court to go back and examine each excerpt individually to decide whether too much of that excerpt had been posted.[38]

Consider the information costs that such an approach imposes on a potential fair user such as Georgia State University. In order to avoid infringement (and understand the boundaries of each property claim), each excerpt must be individually assessed with respect to the four fair use factors. Moreover, this inquiry must be undertaken for dozens of excerpts in a given course and across hundreds of courses every year with no recourse to a rule of thumb. The

that this implicitly protects a privilege—but not a right—to engage in activities such as lighting fires and polluting.").

[32] *See* Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2095-96 (2009).

[33] *See id.* at 2096 ("In trespass to land, the unauthorized crossing of a boundary serves as a (very) rough proxy for harmful use; any voluntary entry into the column of space defined by the ad coelom rule counts as a trespass.").

[34] Smith, *supra* note 31, at 1047 ("[W]here courts face high information costs of delineating use rights, we expect a tendency towards exclusion even where stakes and private-party transaction costs are also high.").

[35] *See supra* note 6 and accompanying text.

[36] 769 F.3d 1232 (11th Cir. 2014).

[37] *Id.* at 1272.

[38] *See id.* at 1271-72.

university (and many other similarly-situated colleges and universities) is thus potentially subject to thousands of individualized property claims, each with significant uncertainty about the precise boundaries of the entitlement.

It is important to note that the information costs imposed by the fair use doctrine are experienced very differently depending on the potential third party. Larger and more sophisticated third parties have ways of mitigating the information costs. They can hire counsel to provide legal guidance. They can also seek to eliminate the uncertainty via licensing, as they can more easily bear the transactions costs. Thus a major research university like Georgia State, though confronted with significant levels of uncertainty, has the means to reduce that uncertainty. Similarly, a major motion picture studio, newspaper, or publishing company can deal with the uncertainty of fair use in various ways. Indeed, some have argued that the ambiguity at the boundaries of copyright law may have the effect of facilitating transactions by reducing barriers to contracting, such as holdout or strategic behavior.[39]

Unsophisticated parties or individuals, by contrast, do not have the means to easily reduce the information burden.[40] They typically do not have the resources to hire lawyers to provide custom legal advice regarding whether a particular use may be fair.[41] Moreover, reducing the uncertainty via bargaining may not be a realistic option, given transactions costs and the lack of an effective licensing market for many individual uses.[42] Thus, less sophisticated parties are unable to mitigate the significant information costs and are left without clear or adequate notice about the boundaries of the property right that they are bound by law to respect.[43]

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[39] *See, e.g.*, Burk, *supra* note 6, at 140 ("More often, the uncertainty created by the muddy standard tends to channel buyers and sellers into less costly informal structures.").

[40] *See* Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1897 (2014) (discussing the chilling effect of fair use analysis where only the "presumably rich" can afford to bring a claim because it is "notoriously open-ended and hard to predict, with its case-specific nature frequently requiring full, costly litigation" (quoting LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 107 (2004))).

[41] LESSIG, *supra* note 40, at 187 (characterizing fair use as "the right to hire a lawyer").

[42] Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1613 (1982).

[43] Less sophisticated parties are also less able to generate guidance via case law, due to the high costs of legal counsel, at least without pro bono support. *See, e.g.*, Lenz v. Universal Music Corp., 801 F.3d 1126, 1130 (9th Cir. 2015) (explaining that once plaintiffs obtained pro bono counsel, they were able to argue fair use resulting in reinstatement of their video to YouTube); *see* Litman, *supra* note 17, at 1902 ("Fair use is a poor tool for assessing the lawfulness of particular personal uses for another reason: it is not realistically available to the people who most need to use it.").

Finally, it is important to note how changes in technology have drastically exacerbated the practical impact and scope of the notice failure. Several decades ago, the universe of potential fair users was far more limited. Before the advent of inexpensive copying technology, individuals and consumers had limited ability to engage in fair use, and the fair use doctrine was therefore of limited relevance to the vast majority of individuals.[44] Fair use was an issue for newspapers, publishing companies, movie studios, and the like. And as noted above, these parties had the means and ability to deal with any uncertainty caused by fair use.[45]

Today, of course, things are very different. New technologies have vastly expanded the ability of individuals to engage in uses of copyrighted works—whether through photocopying, tape recording, video recording, making digital copies, or transforming preexisting works via digital technology.[46] Fair use, as a doctrine, is relevant to a far greater universe of individuals.[47] While in the past, individuals were bound to respect the relatively clear core of the entitlement, today individuals are more subject to the fuzzy periphery.[48] Correspondingly, uncertainty about the boundaries of copyright now has a greater impact on many more individuals, and many more people are now required to respect the "Keep Out" sign established by the copyright system. The potential audience for the fair use doctrine has greatly expanded.[49]

Overall, then, there has been a significant shift in the balance between the core of the copyright entitlement and the periphery. The uncertain periphery has been expanding and getting ever more uncertain, affecting a larger universe of third-parties and implicating a greater range of potential uses. The boundaries have become more porous. Many individuals bound to respect the

[44] *See* Litman, *supra* note 17, at 1902 (explaining that historically, fair use cases "overwhelmingly concerned uses that were public, commercial, or both").

[45] *See supra* note 39 and accompanying text.

[46] *See* Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 553 (2010); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1564 (2005) [hereinafter Van Houweling, *Distributive Values*].

[47] *See* Litman, *supra* note 17, at 1902 (explaining that the fair use doctrine was "not devised to evaluate the legitimacy of personal uses").

[48] *See id.* at 1903 ("If . . . all of the personal uses must be fair use, though, then that is possible only by construing fair use to cover any use that is nominally but not enforceably infringing, regardless of its purpose, the work's nature, the amount taken, and the effect on the market.").

[49] *Compare* Mark D. Janis & Timothy R. Holbrook, *Patent Law's Audience*, 97 MINN. L. REV. 72, 86-89 (2012) (discussing the evolution of the audiences in the modern patent system), *with* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1151-53 (2003) (exploring the relationship between information rates and audience sizes because "[d]ifferent assets call for different levels of information overall and for different mixes of information intensiveness and extensiveness").

underlying entitlements have inadequate notice of the boundaries of the property claim and no easy way of mitigating this uncertainty. One of the main advantages of a property system—clear notice of the boundaries of the entitlement—has been greatly weakened over time by both changes in technology and corresponding changes in the doctrine of fair use itself.[50]

III. REINFORCING BOUNDARIES

So what, if anything, should be done about this? Perhaps nothing at all. After all, the lack of notice at the boundary of copyright could simply be the cost of the valuable flexibility that we obtain from a legal standard. This flexibility allows courts both to consider a wide range of contextual factors and also to adapt the doctrine to new circumstances. These are the classic benefits of a standard as opposed to a rule, and this has been the classic justification (or at least the offsetting benefit) for the uncertainty in fair use doctrine.

Although the flexibility of the fair use standard undeniably provides significant benefits, I hope to have shown above that this flexibility comes at a significant cost, and we need to take seriously the extent of the informational burden that this flexibility imposes upon unsophisticated third parties.[51] These costs are extensive enough that we may need to rethink our attachment to flexible standards in preference for at least some clearer rules. To take one example, in the Georgia State case, the appellate court could have taken more seriously the informational burden that fair use doctrine imposes on third parties before so quickly rejecting the district court's ten percent rule of thumb.[52]

Rules are, of course, often both overinclusive and underinclusive—this is their nature. And the tradeoff between rules and standards is a very old and long-standing issue.[53] But the main takeaway from the analysis above is that the audience for fair use doctrine has changed. It is no longer just the publisher, the movie studio, or other sophisticated parties—it is everyone.[54] There is a reason we do not generally subject the public at large to broad standards, such as "don't drive too fast" or "vote if you are sufficiently responsible." Given the above changes, fair use doctrine may need to

[50] *See* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 133 (2005) (considering the development in fair use standards where fair use is "notoriously fuzzy in application"); Smith, *supra* note 49, at 1116.

[51] *See supra* notes 40-43 and accompanying text.

[52] *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1271-72 (11th Cir. 2014).

[53] *See, e,g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568-88 (1992); Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 609-10 (1988).

[54] *See supra* notes 46-49 and accompanying text.

recalibrate the balance between standard and rule to reflect the fact that it now regulates a wide range of individual behavior.[55]

Another reason perhaps not to worry about the potential notice failure is that we have in practice addressed the costs of uncertainty largely through underenforcement.[56] That is, under this view, the notice failure for many unsophisticated fair users is not a problem because copyright is so rarely enforced against them. Thus, practically speaking, individuals have a broad ability to engage in fair uses of copyrighted works and even many uses that cross the line into infringement. For this reason, we do not need to worry too much about the uncertainty at the boundaries of copyright and any resulting notice failure, at least with respect to unsophisticated parties, because that uncertainty is not chilling any otherwise desirable behavior.[57]

Although this may be a practical response to the notice failure problem, it is not a complete solution. First, it is decidedly a second- or third-best solution, relying upon one failing in the system (lack of enforcement) to cure another (lack of notice). If there is a way to get closer to a first-best solution, perhaps we should seek that outcome. Second, there may well be mismatches between the areas where copyright is not enforced and where the need for clear rules is greater.[58] Third and finally, the divide between what the law says and how it is enforced may only increase as technologies continue to change and shift the balance.[59] Thus, there is no guarantee that any offsetting balance will not be disrupted sometime in the future. For all of these reasons, it may be worth seeing if we can do better.

Many commentators have, in fact, proposed changes to the fair use doctrine that would have the effect of helping to cure the notice failure at the boundaries of copyright. Just as the complaints about fair use's uncertainty have been legion so have the proposed solutions. Some have proposed creating

[55] *But see* Burk, *supra* note 6, at 163-78 (arguing for flexible rules and standards in regulating copyright in cyberspace); Fagundes, *supra* note 22, at 162-63 ("Most cases indicate that muddy entitlements tend to systematically advantage owners over users.").

[56] *See, e.g.*, Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (observing that an author may tolerate infringement because of "simple laziness or enforcement costs, a desire to create goodwill, or a calculation that the infringement creates an economic complement to the copyrighted work").

[57] *Cf.* Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 353-64 (2012) (arguing that users are often risk-seeking, rather than risk-averse, and will therefore be willing to cross uncertain boundaries; and therefore, asymmetric uncertainty in copyright may promote copyright policy but be in tension with rule of law values by imposing costs of uncertainty primarily on users).

[58] *See* Wu, *supra* note 56, at 620 ("Many of the uses that fall into the category of tolerated use might also arguably fall close to, if not within, the category of fair use . . . . [but] we don't, in fact, know how many of the mass infringements a court would find to be fair use.").

[59] *See, e.g.*, *id.* at 619-20.

more rule-like exceptions or safe harbors via statute or regulation.[60] Others have proposed using administrative agencies to provide more guidance.[61] Yet another option would be to ask courts to be more willing to set forth rough "rules of thumb" in their fair use opinions, thus recognizing the informational burdens that rest upon less sophisticated parties.[62] All of these efforts would seek to cure the notice failure by changing the law of fair use itself to make the legal boundaries clearer.[63]

Another approach would be to promote private ways of reducing or mitigating the notice failure. In some areas, industry participants have reached what are effectively negotiated understandings about what fair use consists of in particular contexts.[64] This has the effect of providing more guidance to parties who operate in those contexts. This kind of resolution is, however, difficult for unsophisticated parties to achieve.[65] Another possibility would be for the law to somehow encourage copyright owners to provide more guidance about what uses are considered fair. It is hard to see, however, how copyright owners would have any incentive to do anything other than claim the maximal scope of their rights as they often currently do.[66]

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[60] *See* Liu, *supra* note 50, at 122 (explaining that safe harbor provisions "are consistent with the regulatory trend in copyright law, insofar as they supplement judge-made doctrines of third party liability"); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 434-35 (2009) (stating that some "commentators urge that Congress should adopt statutory safe harbors that would specify an amount of copying that is *per se* fair use"); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1511-18 (2007) (arguing for safe harbor provisions, which "would not unduly undermine the incentive effect of copyright law").

[61] *See* Carroll, *supra* note 16, at 1091.

[62] *But see* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1271-72 (11th Cir. 2014) (rejecting the ten percent rule of thumb).

[63] *But see* Burk, *supra* note 6, at 163-78 (suggesting "muddy" entitlements may better facilitate transactions in some circumstances).

[64] *See, e.g.*, CTR. FOR SOC. MEDIA, AM. UNIV., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 1, 3 (2005) ("This statement recognizes that documentary filmmakers must choose whether or not to rely on fair use when their projects involve the use of copyrighted material."); *see also* Michael J. Madison, *Some Optimism About Fair Use and Copyright Law,* 57 J. COPYRIGHT SOC'Y U.S.A. 351, 360-66 (2010) (analyzing the adoption of "best practices" for fair use).

[65] *See* Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 371, 372, 376-86 (2010) (discussing drawbacks to best practices agreements); Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act,"* 29 BERKELEY TECH. L.J. 1595, 1617-25 (2014) (explaining some limitations on custom and private ordering as a guide to fair use).

[66] *See, e.g.*, Lenz v. Universal Music Corp., 801 F.3d 1126, 1129, 1134-35 (9th Cir. 2015) (holding that the Digital Millennium Copyright Act ("DMCA") requires "a copyright

Yet another possibility is to hope that technology and/or the market will help solve the notice issue on its own. For example, there is always the hope that new technology will so reduce the cost of individual licensing that any uncertainty at the boundary of copyright can be mitigated by the availability of an easy, low-cost license that clearly spells out what individuals can and cannot do with the copyrighted work.[67] Similarly, the use of technological protection measures could mitigate some of the notice failure issues, since the technology itself prevents individuals from engaging in unauthorized uses. The technology acts as a fence, serving clear notice.[68] Although these solutions certainly ease notice issues by clearly marking a boundary, they raise concerns that such boundaries, set largely by copyright owners, may encompass actions that would ordinarily constitute fair use.[69]

All of the above solutions to the problem of uncertainty in fair use rest, at bottom, on the fundamental property right paradigm. They seek to solve the notice failure problem by making the boundaries of the entitlement clearer and communicating such boundaries to potential third parties. With a clearer entitlement, individuals can then better avoid infringement and/or seek a license, thereby ensuring that the market functions more efficiently. The basic

holder" to "consider fair use before sending a takedown notification" unless "a copyright holder forms a subjective *good faith* belief the allegedly infringing material does not constitute fair use"); *see also* Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 46 (explaining how clarity created by public interest litigation helps further define fair use in these contexts).

[67] *See, e.g.*, Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 618 (1998) ("In the place of fair use, a reciprocal quasi-compulsory license will likely come to define rights to expressive works in the digital intermedia.").

[68] Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1202 (2012) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

[69] *See* Derek E. Bambauer, *Pangloss's Copyright*, 30 CARDOZO ARTS & ENT. L.J. 265, 271 (2012) ("[C]onsumer and user interests have been almost entirely absent from deliberations over legislation . . . ."). Imposing liability on Internet Service Providers ("ISPs") also exhibits the same characteristics. *See id.* ("With private ordering, negotiations over enforcement mechanisms . . . [take] place without consumer input."). On the one hand, the notice and takedown procedure can provide some level of certainty, insofar as ISPs will develop clear policies about when material will be taken down. *See* H.R. REP. NO. 105-551, pt. 2, at 49-50 (1998) (explaining that the DMCA would "provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities"). However, ISPs will have the incentive to err on the side of removing material, so without some oversight, we can expect foreclosure of some uses that might otherwise be fair.

model is still one of a property right underlying a market for licensing and transactions.[70]

IV. LETTING GO OF BOUNDARIES

In this final Section, I want to explore the possibility that viewing long-standing concerns about the uncertainty of fair use as a potential notice failure issue leads us to a potentially more radical solution, namely adopting an alternative, non-property based framework for thinking about how copyright operates with respect to unsophisticated parties.[71] Asking whether copyright functions, in this sense, like a property rights system reveals, in many ways, just how far from such a system copyright law has come, at least for many of those who encounter copyrighted works today.

For many, copyright looks less and less like the idealized vision of a property right with clearly delineated boundaries, known to all, underlying a robust market for transactions. It is possible that it may have looked like such a system many decades ago, with more limited market participants and a more constrained set of potential fair uses. But for some time now it has been moving away from that model.[72] Today, the property right is extremely uncertain at the boundaries, applies to a large universe of potential third parties, and encompasses a nearly unlimited number of potential uses.

It is perhaps not surprising that efforts to restore a property-rights view, and to hold onto that vision by reinforcing the boundaries, seem increasingly strained. Although technology has increased the availability of lower-cost licensing, it has not come close to serving the full range of potential uses. An individual considering engaging in a particular non-traditional use of a copyrighted work is still left with substantial uncertainty about what his or her rights are and with no easy ability to reduce such uncertainty or to secure a license. This does not look like a recognizable market or property system. And insisting that copyright creates strong and robust property rights, when both the law and common experience suggest otherwise, serves only to increase the cognitive dissonance.

This dissonance sits on top of the already-suspect nature of the property analogy, even for rights that are clearly at the core of copyright. The physical boundaries of the copyright entitlement are extremely porous, as the public generally is physically able to breach that boundary by copying and adapting

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[70] *See* Fagundes, *supra* note 22, at 143.

[71] *See* Balganesh, *supra* note 17, at 1670 (reframing copyright as less a property right and more a "duty not to copy").

[72] *See, e.g.*, Gordon, *supra* note 42, at 1605 (arguing that fair use is "a mode of judicial response to market failure in the copyright context, and that the presence or absence of the indicia of market failure provides a previously missing rationale for predicting the outcome of fair use cases").

works freely.[73] Enforcement of that boundary is weak, as copyright owners rarely pursue individuals who breach it.[74] Individuals have a hard time seeing how breach of the boundary causes harm, since the non-rival nature of copyrighted works means that the harm is more abstract and less direct (as compared to physical property).[75] And beyond the buying and selling of copies of the work, the public generally does not participate in a market for licensing more fine-grained uses of copyrighted works.[76]

So what is the alternative? I'm not sure I have the answer, but perhaps the place to start would be to directly confront the notice failure issue and the significant information burden that copyright's fair use doctrine currently imposes on individuals and unsophisticated parties. How can copyright law best regulate the behavior of unsophisticated parties and accurately convey to them what they can and cannot do with respect to copyrighted works?[77] Although perhaps adequate for more sophisticated parties, a property-rights view has significant limits on this front with respect to less sophisticated parties and the general public.[78]

A. *Fair Use as Tort*

One possibility would be to make peace with the uncertainty in the fair use standard but try to reduce the information costs by changing the content of that standard to better track custom or individual instincts about reasonable behavior. Call this the negligence strategy.[79] Under this approach, the problem

[73] *See supra* note 50 and accompanying text.

[74] *See supra* notes 56-59 and accompanying text.

[75] *See* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 984-85 (2007) (discussing the difficulty in assessing harm from breaching a copyright because "'harm' is an abstract legal construct").

[76] In Michael Meurer's terms, this is not just a "bargaining failure" due to high transactions costs, but a "failure to bargain" because it simply would not occur to many to bargain. *See* Michael Meurer, Keynote Address at the Boston University Law Review Symposium: Notice and Notice Failure in Intellectual Property Law (Sept. 25, 2015), *in* 96 B.U. L. REV. 655 (2016); *see also* BESSEN & MEURER, *supra* note 1, at 21 ("Unclear property rights increase bargaining costs and the probability of bargaining breakdown.").

[77] *See* Litman, *supra* note 17, at 1911 ("Just as technology spurs evolution in the creation and marketing of work and authorship, it causes parallel evolution in the modes of interaction with those works.").

[78] *See supra* notes 39-43 and accompanying text.

[79] A number of scholars have written on the analogy between copyright law and tort. *See, e.g.*, Bracha & Syed, *supra* note 40, at 1900; *see also* Balganesh, *supra* note 17, at 1675 ("[C]opyright's core normative structure map[s] onto that of tort law, the law of civil wrongs, through its creation of a *wrong of copying*."); Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59, 84-85 (2011) (analogizing copyright to negligence); Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533, 537-38 (2003); Wendy J. Gordon,

is not the fact of the legal standard but its content. After all, there are areas of law that subject unsophisticated individuals to uncertain judicial standards (e.g. negligence), but the law typically tracks some standard that individuals may have some instinctive knowledge about or access to (e.g. the reasonable person). Although it may not be a perfect fit, this is one way to reduce the informational burden while keeping the form of the law unchanged.

Applying this to fair use would entail changes to the law that would make it more closely track what reasonable individuals understand should constitute fair use. In looking at what reasonable individuals think would be fair or unfair, certain aspects of the current analysis might well carry over unchanged, e.g. the amount used, the purpose of the use, whether the use is noncommercial, etc. But there might be a greater focus on the harm caused by the use—requiring a more concrete and direct harm to the copyright owner (e.g. depriving of a sale), rather than a more indirect or abstract harm (e.g. preempting a potential licensing market).[80] Also considerations of custom[81]

Fair Use Markets: On Weighing Potential License Fees, 79 GEO. WASH. L. REV. 1814, 1819-20 (2011); Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 62 (2009) (drawing an analogy between patent infringement and nuisance). Note that I am using "negligence" here very loosely to refer to reliance on some kind of standard ostensibly grounded in common experience and not in a more literal sense involving regulation of the risk of causing harm to third parties.

[80] *See* Bohannan, *supra* note 75, at 984-85 (explaining that "the harm-based approach to fair use gives copyright protection against harmful uses that are likely to affect the copyright owner's incentives to create or distribute the work"); Gordon, *supra* note 20, at 472-73 (using John Stuart Mill's harm principle, which prohibits the state from acting except to avoid harm, to argue that it does not matter how the harm arises as long as there is harm interfering with autonomy); Wendy J. Gordon, *Harmless Use: Gleaning From Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411, 2426-30 (2009) (explaining that "copyright owners in most contexts would be under a duty to allow gleaning" unless "harm is done").

[81] *See, e.g.*, Jennifer E. Rothman, *Copyright, Custom, and Lessons from the Common Law*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW, *supra* note 18, at 230, 232 ("There are numerous examples of the public obtaining access and use rights to private property on the basis of custom."); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1909 (2007) (explaining how influential "customary practices and norms" are in IP law); *see also* JESSICA SIBLEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 282-83 (2015) ("Best practices may clarify the parameters of the lawful breathing space . . . without formal rule making."); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1645 (2004) (explaining that the pattern-oriented approach "would recharacterize . . . [fair use] as a matter of pattern and thus a question of potentially broader scope than custom"); *cf.* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 897 (2007) (highlighting potential negative impacts from relying upon custom in some circumstances).

and notions of intent and fairness might play a greater role.[82] Thus, for example, if a particular individual use were widespread and generally tolerated by copyright owners, this would weigh in favor of a finding of fair use. Although such an approach would not do away with the uncertainty of a legal standard, it could provide more information indirectly to third parties by having the content of the legal standard more directly reflect what such parties do or do not know.

It is certainly possible that such a change would entail some cost, in the form of moving copyright away from what might be optimal from a pure policy perspective. After all, general understandings of what constitutes a fair use may not perfectly track the result that best balances authorial incentives and public access. Indeed, there may well be areas of significant divergence. For example, a widespread belief that large-scale music file-sharing is permissible could, if incorporated into the law, work substantial harm on copyright owner incentives. So some limits would need to be placed on this approach. Yet the overall point is that any system should take into account the informational burdens it imposes, and the modification suggested here could at least reduce the extent of the notice failure without too greatly harming underlying copyright policy interests.

B. *Fair Use as Consumer Protection*

Yet another approach would be to directly take into account the limited ability of third parties to accurately know their copyright obligations and craft policies to account for these limitations more directly. Call this the consumer protection model. Just as in other areas of the law (e.g. contracts, securities law, etc.), copyright would recognize a distinction between sophisticated and unsophisticated parties.[83] Sophisticated parties would be charged with full knowledge of the copyright entitlement and required to bargain for permission or avoid infringement. For these parties, the copyright system would continue to operate like a system of property rights. Unsophisticated parties, however, would be treated differently to account for their lack of information and inability to adequately mitigate uncertainty.

Recasting the boundary question as a question of consumer protection or consumer regulation could have the benefit of more accurately reflecting how the public experiences fair use. Such an approach would discard unrealistic

[82] *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, *1978-2005*, 156 U. PA. L. REV. 549, 608 (2008) (finding that courts generally do not weigh bad faith in fair use determinations); Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 975-80 (2014) (arguing in favor of a limited role for subjective intent in assessing fair use).

[83] *Cf.* Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 932-33 (2008) (distinguishing between sophisticated and unsophisticated parties in the licensing context).

assumptions about the sophistication and knowledge of individuals, their ability to reduce legal uncertainty and engage in transactions, in favor of more realistic assumptions about limited sophistication and knowledge. Under such a view, individuals need to be provided with clear notice of what they can and cannot do with the copyrighted works to which they have purchased access.

Viewing copyright from a consumer protection perspective serves to highlight the striking divergence between copyrighted works and other goods typically purchased by consumers.[84] In what other market are consumers subject to such fundamental uncertainty about what they can or cannot do with the goods that they purchase?[85] If I purchase a DVD of a movie, can I make a backup copy? If I purchase a digital copy of a sound recording, can I upload onto the internet a video of my baby dancing to that sound recording? Indeed, in some cases, copyright owners actively mislead consumers about what they are entitled to do with the works to which they have access. Take, for example, the routine statement during many live television sports broadcasts that any unauthorized use of the broadcast without express written permission is "strictly prohibited," a statement that is flatly false as a matter of copyright law.[86] Looking at copyright from a consumer protection framework would more realistically account for the information burdens the fair use doctrine imposes upon unsophisticated individuals.

What would follow from such an approach? Here are some tentative thoughts: (1) greater sympathy in general for unsophisticated parties that engage in fair uses;[87] (2) increased use of liability rules in cases where a mistake of law is reasonable;[88] (3) taking greater account of the lack of an

[84] *Cf. id.* (considering how the notice and information costs in land and personal property servitudes differ from the costs in the licensing context).

[85] *See* Litman, *supra* note 17, at 1872 ("Every time a study of copyright law queries the scope of lawful personal use, it concludes that the answer to the question whether any particular personal use is lawful is indeterminate.").

[86] Thanks to Orly Lobel for this example.

[87] *Cf.* Van Houweling, *Distributive Values*, *supra* note 46, at 1535 (proposing more sympathetic fair use treatment for authors who do not rely upon the incentive function of copyright).

[88] *See, e.g.*, Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1299 (2008) (explaining that "the use of the word 'reasonably' suggests some sort of objective good-faith standard . . . though in theory one could apply a subjective standard . . . or some combination of the two"); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 785, 792 (2007) ("Even if we think the copyright owner is losing revenue to a transformative use and deserves compensation, it may be reasonable to believe that the defendant's additional expression is also valuable and that the copyright owner should not be entitled to control the defendant's use."); *cf.* Bracha & Syed, *supra* note 40, at 1885 ("Similarly, the fair use doctrine should be applied liberally, allowing many secondary uses of copyrighted works to

easily-available license when deciding whether a use is fair, thereby imposing greater obligations on copyright owners to make such licenses available; (4) shifting the burden of proving fair use;[89] (5) sanctioning misleading statements by sophisticated copyright owners about what uses are or are not permitted by copyright law;[90] (6) policing the substantive terms of un-negotiated licenses by using doctrines such as preemption to ensure that fair uses are not eliminated by contract;[91] (7) limiting the use of technology to restrict fair uses;[92] (8) protecting the reasonable expectations of purchasers regarding what they can

escape liability, especially if certain fair use factors can be calibrated to capture cases in which demand diversion is likely to be high." (footnote omitted)).

[89] *See, e.g.*, Hetcher, *supra* note 24, at 431, 447 ("Shifting the burden of proof would indeed be a step in the development of the fair use doctrine, and there is no reason courts cannot mandate this shift by requiring plaintiffs to allege the lack of fair use in their prima facie case.").

[90] *See, e.g.*, JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 169-70 (2011) ("Many reprints, compilations, and digitized versions of public domain works are not copyrightable because nothing original has been added to them: they should therefore carry no copyright notice."); Lenz v. Universal Music Corp., 801 F.3d 1126, 1135 (9th Cir. 2015) (imposing liability under the DMCA on a copyright holder who merely "pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary").

[91] This strategy would enlist private markets (through incentives) to provide certainty (via licenses and technology) and then police the substantive terms to make sure they conform with copyright policy. *See* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 158 (1999) ("[F]ederal law generally relies on state contract doctrine to support the myriad [of] contracts that revolve around federal intellectual property rights."); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1235-38 (2010) (advancing factors to be considered when a court decides if certain contract provisions are "preempted because they would frustrate copyright purposes").

[92] *See, e.g.*, Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004) (concluding "that [the DMCA] prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners"); Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119, 1127 (2007) ("What actually disables consumer choice is the anti-circumvention regime under the Digital Millennium Copyright Act . . ."); Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 983 (2007) ("[C]ontrary to its . . . intention, Congress failed to achieve a . . . balance of interests when establishing new rules forbidding circumvention of technical protection measures (TPMs) used by copyright owners to control access to their works in regulating the manufacture and distribution of technologies. . . .").

and cannot do with a copy of the work;[93] and (9) defining a set of affirmative uses to which individuals should generally be entitled.[94]

The Copyright Office could well play an important role in public education by recognizing the existence of an important audience for copyright law and responding more directly to that audience (rather than focusing, as it has historically done, on the interests of authors).[95] Public education would focus on both the need to comply with copyright law (and the core injunctions against certain forms of unauthorized copying) and the set of rights that the public has with respect to copyrighted works. Having the Copyright Office publish opinions (even if nonbinding) about what types of activities are and are not fair use might well serve to help ease the informational burdens faced by potential fair users.[96]

All of these steps would be designed to provide clear notice to individuals regarding what they can and cannot do with the copyrighted works they encounter. Moreover, the notice would be justified not simply as a matter of clear property rights, where parties are largely responsible for acquiring information about rights, but consumer rights, where parties are assumed to lack easy access to such information.[97] Consumers of copyrighted works would be placed in the same position as if they had purchased any other consumer good.

Many of the above proposals have been suggested before, and many of them echo the proposals in the previous Section, which were designed to make fair use less uncertain. Nonetheless, I do think that there is value in re-framing the analysis and moving it away from the property rights model because that model ignores the significant information burdens the general public operates under, burdens that are a function of the structure of the law itself. The consumer protection model, by contrast, takes seriously the extent of notice

[93] Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067, 2128 (2012).

[94] *See, e.g.*, L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 140 (1991) ("The primary beneficiary of copyright, in short, is intended to be the public."); Parchomovsky & Goldman, *supra* note 60, at 1510-18 (suggesting a list of safe harbors to eliminate uncertainty in fair use); *see also* Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 627 (suggesting the need for statutory amendments "to make clear that fair use is an affirmative right"); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 136-37 (2010) (proposing a system of user privileges to supplement fair use).

[95] *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 49 (2010).

[96] *See id.*; Fagundes, *supra* note 22, at 183-85 (proposing an administrative body to issue advisory opinions).

[97] *See* Van Houweling, *supra* note 83, at 932-33 (comparing the information costs implicit in both property rights and consumer rights).

failure and the informational limits to which the general public is subject. It thus expands the universe of potential responses.

Such an approach is, of course, not without costs or risks. One risk is that, in defining the scope of the entitlement more clearly, the law may shift the balance too far one way or the other (depending upon one's view of where the balance is struck currently). For example, some attempts to provide more certainty in copyright have resulted in a reduced scope of fair uses.[98] However, framing the fair use analysis in terms of consumer protection may provide some counterweight by focusing more affirmatively on the interests of potential fair users (rather than the interests of the entitlement holder). More broadly, even if the scope of fair use rights were more limited, the law would at least be clarified, and we could have a real discussion about whether the law is set at the proper point (rather than relying on uncertainty and lack of enforcement).

Another objection is that thinking in terms of consumer protection too narrowly constrains the interests of potential individual fair users. That is, the potential exists that a consumer protection approach will privilege fair uses that are more passive in nature (e.g. making backup copies) and disfavor uses that are more transformative (e.g. using a copyrighted work to create a new work). This may be particularly problematic as digital technologies are giving consumers even more ability to engage in transformative uses. This is a serious concern and care would need to be taken to understand the scope of consumer or user interests far more broadly and to encompass these kinds of uses.[99]

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[98] *See, e.g.*, Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1205 (2012) (establishing specific, narrow exemptions to the DMCA); *cf.* Liu, *supra* note 50, at 150 ("[A]lthough Congress replaced case-by-case judicial exemptions (such as would be found under the fair use defense) with a regulatory strategy for dealing with unanticipated changes, it failed to provide enough discretion."). More generally, the wide-open (though vaguer) nature of the fair use doctrine in U.S. law is often compared to the relatively narrower (though more specific) fair dealing doctrine in other jurisdictions. *See, e.g.,* Daniel Gervais, *Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright*, 57 J. COPYRIGHT SOC'Y U.S.A. 499, 504-10 (2010) (comparing varying approaches to reforming exceptions and limitations to copyright in different jurisdictions); Carroll, *supra* note 16, at 1147 (suggesting adoption of more "fair use rules" analogous to fair dealing); *see also* WILLIAM F. PATRY, PATRY ON FAIR USE § 8:15 (concluding that differences between fair dealing and fair use are sometimes exaggerated).

[99] *See, e.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 117 (2012) (proposing legal principles that ensure individuals have full opportunity to engage in cultural participation); Julie E. Cohen, *The Place of the User in Copyright*, 74 FORDHAM L. REV. 347, 372 (2005); Litman, *supra* note 17, at 1873; Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 422 (2003).

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In the end, then, the concept of notice failure has the effect of highlighting the way in which our copyright system fails to function for many third-parties like a property rights system. It fails to give many third parties adequate notice about the boundaries of the property entitlement. This in turn suggests the possibility for new alternative frameworks, and although I have suggested a few, there may well be more. But whatever approach is eventually adopted should acknowledge and take into account how the system is in fact experienced by many third parties today.