
Monetizing Infringement

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The deterrence of copyright infringement and the evils of piracy have long been an axiomatic focus of both legislators and scholars. The conventional view is that infringement must be curbed and/or punished in order for copyright to fulfill its purported goals of incentivizing creation and ensuring access to works. This Essay proves this view false by demonstrating that some rightsholders don't merely tolerate, but actually encourage infringement, both explicitly and implicitly, in a variety of different situations and for one common reason: they benefit from it. Rightsholders' ability to monetize infringement destabilizes long-held but problematic assumptions about both rightsholder preferences, and about copyright's optimal infringement policy.

Through a series of case studies, this Essay describes the impetuses and normative implications of this counterintuitive — but not so unusual — phenomenon. Recognition of monetized infringement in copyright is interesting not only for its unexpectedness, but also for the broader point that its existence suggests: we have an impoverished descriptive account of why some laws operate the way that they do. This is particularly unsettling in an area like copyright, where advocates are sharply divided along policy lines. This Essay is an important first step toward a positive theory of copyright — one that recognizes the underappreciated role, both positive and negative, that private parties play in policymaking.

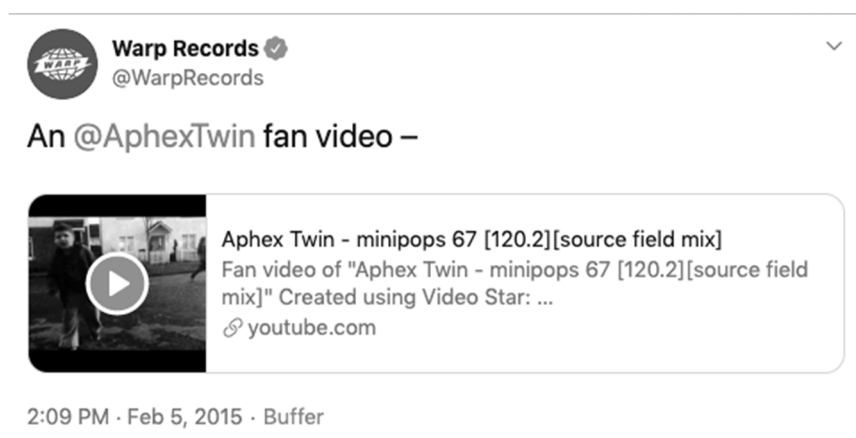
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INTRODUCTION

When Stephanie Lenz filmed her toddler dancing in the kitchen with Prince's hit song "Let's Go Crazy" playing in the background and posted it to YouTube,¹ copyright owner Universal Music issued a takedown notice alleging infringement.² In response, Lenz claimed fair use, and the parties ended up in court for eight years.³ When a fan posted a homemade video of a young boy dancing to an Aphex Twin song to YouTube, copyright owner Warp Records declined to issue a takedown notice, and instead tweeted the video out from its own Twitter account:



As of this writing, the video has over 250,000 views.⁴

Both of these instances involve a user uploading a video that uses a copyrighted work without prior permission. In the former case, rightsholder Universal Music took the (ultimately unsuccessful) position that the upload amounted to infringement, and sought to enforce their copyright under the statute.⁵ In the latter case, rightsholder Warp Records not only declined to enforce its copyright

¹ Stephanie Lenz, "Let's Go Crazy" #1, YOUTUBE (Feb. 7, 2007), <https://www.youtube.com/watch?v=N1KfjHFWlhQ> [<https://perma.cc/G73N-KBEY>].

² See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149 (9th Cir. 2016).

³ See *Copyright Law — Digital Millennium Copyright Act — Ninth Circuit Requires Analysis of Fair Use Before Issuing of Takedown Notices. — Lenz v. Universal Music Corp.*, No. 13-16106, 2016 WL 1056082 (9th Cir. Mar. 17, 2016), reh'g en banc denied, id., 129 HARV. L. REV. 2289, 2289-93 (2016) [hereinafter *Recent Case, Lenz v. Universal Music Corp.*], for a concise and comprehensive summary of the litigation.

⁴ See Ryan Wyer, *Aphex Twin – Minipops 67 [120.2][Source Field Mix]*, YOUTUBE (Nov. 22, 2014), https://www.youtube.com/watch?v=wm1XwkOHxx8&list=PLK3otLXbk_p1EJD0pse0mcqrRNR0eeZ3P&index=3&t=0s [<https://perma.cc/94GQ-WUDN>].

⁵ See *Recent Case, Lenz v. Universal Music Corp.*, *supra* note 3, at 2290-91.

against the YouTube user, but also actively publicized the video, thereby significantly increasing its views (and with it, both the song and the user's popularity).

Warp's response is unexpected not least of all because the conventional view is that infringement — often including fair uses, until shown definitively to be the case — must be curbed and/or punished (often severely) in order for copyright to fulfill its purported goals of incentivizing creation and ensuring access to creative works. This view is so firmly and widely held that all three branches of intellectual property — copyright, patent, and trademark — operate under a strict liability standard for infringement.⁶ In other words, if infringement is found, the infringer is liable regardless of whether they intended to infringe, or even whether they were aware they had. In addition, copyright allows rightsholders whose work is infringed to opt for

⁶ In copyright, see, for example, Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1682 (2012), concluding that in the case of copyright infringement it “makes little difference for liability whether the copying was intentional, negligent, or a genuine mistake;” Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 356 (2002), noting that infringement in copyright does not require “scienter, intent, knowledge, negligence, or similar culpable mental state. On the contrary, liability for civil copyright infringement is strict.” *But cf.* Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 305 (2015) (questioning the conventional view and suggesting that infringement liability acts more like a fault-based tort).

In trademark, see, for example, Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2109 (2004), calling trademark infringement a strict liability tort; Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1310 (2011), finding that courts have long interpreted trademark as a strict liability offense. *But cf.* Alfred C. Yen, *Intent and Trademark Infringement*, 57 ARIZ. L. REV. 713 (2015) (arguing that the conventional view of intent in trademark is flawed).

In patent, see, for example, Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 800-01 (2002), “Patent infringement is a strict liability tort in the sense that a defendant may be liable without having had any notice, prior to the filing of an infringement action, that her conduct was infringing. In other words, innocent (i.e., unintentional or inadvertent) infringement is not a defense to a patent infringement claim, and a court usually will enjoin the defendant from infringing even though she was put on notice only by the filing of the lawsuit.” (citations omitted); Robert P. Merges, *A Few Kind Words for Absolute Infringement in Patent Law*, 31 BERKELEY TECH. L.J. 1, 3 (2016), “It is irrelevant under current law whether the defendant actually copied the patentee's technology, let alone whether it intentionally, recklessly, negligently or inadvertently copied the patentee's technology. Put simply, patent infringement is an absolute liability regime.” *But cf.* Patrick R. Goold, *Patent Accidents: Questioning Strict Liability in Patent Law*, 95 IND. L.J. 1075 (2020) (questioning the propriety of a strict liability standard in the context of accidental patent infringement).

recovery of statutory damages, regardless of actual harm.⁷ In sum, copyright infringement has long been painted as the enemy of cultural production and human flourishing, and its deterrence has long been a primary focus of both popular and scholarly inquiry.⁸

Some copyright infringement is committed innocently — there are only so many musical notes, for example, and it is not uncommon for similar chords to be used in songs of the same genre.⁹ Other instances of infringement might be described as malicious, or at least as recklessly indifferent. For example, self-styled “appropriation artist” Richard Prince was sued for copying photographs from several people’s Instagram feeds, adding a nonsense comment, then selling screenshots of the photos without sharing profits with the photographers, nor even offering them attribution.¹⁰

Predictably, most copyright infringement falls in the gray area between these extremes; for example, George Harrison’s “subconscious

⁷ See 17 U.S.C. § 504(c) (2018). This can lead to steep damage awards, even in cases of innocent infringement. See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) (“Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”).

⁸ See, e.g., Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1065-66 (2016) (defining the principle of equitable allocation as “the risk of copyright infringement should be allocated in a way that is conducive to robust opportunities for cultural creation widely dispersed among all members of society. Self-determination has a stake in such broad distribution of creative opportunities because being able to live creative lives either as professionals or amateurs is likely to be central to the fundamental life path choices of some individuals”) (citations omitted); J. Janewa Osei-Tutu, *Using Intellectual Property Law to Promote Human Flourishing for “Market Women,”* AM. BAR ASS’N (2018), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/march-april/using-intellectual-property-law-promote-human-flourishing-market-women/ [https://perma.cc/5AWA-YM8P] (claiming, in the context of female entrepreneurship, that “IP laws can be used as a tool for promoting human flourishing and human development”).

⁹ See, e.g., Sir Mashalot, *Sir Mashalot: Mind-Blowing SIX Song Country Mashup*, YOUTUBE (Nov. 4, 2014), <https://www.youtube.com/watch?v=FY8SwIvxj8o> [https://perma.cc/J5EX-UQ73] (featuring six different country music songs that are effectively indistinguishable); Mike Shear, *5 Most Popular and Common Guitar Chord Progressions for Song Writers*, UBERCHORD (Oct. 13, 2016), <https://www.uberchord.com/blog/5-popular-common-guitar-chord-progressions-song-writers/> [https://perma.cc/LKJ6-K9VB] (explaining how the chord progression I-iV-V7 is used in many popular songs, from Richie Valens’s *La Bamba* to The Beatles’s *Twist and Shout* to The Ting Ting’s *That’s Not My Name*).

¹⁰ See *Graham v. Prince*, 265 F. Supp. 3d 366, 371-74 (S.D.N.Y. 2017); see also Andrew R. Chow, *Copyright Case over Richard Prince Instagram Show to Go Forward*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/arts/design/richard-prince-instagram-copyright-lawsuit.html> [https://perma.cc/NJ7J-VCYV].

copying” of The Chiffons’ “He’s So Fine” in his song “My Sweet Lord.” The Chiffon’s topped the charts with their song “He’s So Fine” in 1963.¹¹ George Harrison released his album *All Things Must Pass*, containing the lead single “My Sweet Lord” in 1970.¹² Listeners everywhere noticed the similarity, including Harrison himself: “I wasn’t consciously aware of the similarity when I wrote the song . . . But once it started to get a lot of airplay, people started talking about it, and it was then I thought, ‘Why didn’t I realize?’”¹³ Ultimately, Harrison was found guilty of “subconscious copying” — a step down from willful infringement — and ordered to pay copyright owner Bright Tunes \$1.5 million.¹⁴

This Essay destabilizes long-held but problematic assumptions about the interplay between copyright law’s purported goals and its treatment of infringement by challenging the received wisdom that rightsholders are necessarily anti-infringement. Specifically, I argue that some rightsholders don’t just tolerate — but actively *monetize* — infringement,¹⁵ both explicitly and implicitly, in a variety of different situations and for one common reason: it benefits them. By the conventional account, this is an astounding result: Copyright affords rightsholders a powerful statute against infringement, strict liability, high damages, and powerfully consolidated industry interests — and still, some rightsholders explicitly decline the statutory protection in

¹¹ *The Chiffons He’s So Fine*, ALLMUSIC, <https://www.allmusic.com/song/hes-so-fine-mt0003113623> (last visited July 6, 2020) [<https://perma.cc/K6P5-3SEW>].

¹² *George Harrison All Things Must Pass*, ALLMUSIC, <https://www.allmusic.com/album/all-things-must-pass-mw0000194979> (last visited July 6, 2020) [<https://perma.cc/3GYM-VZR8>].

¹³ Lydia Hutchinson, *George Harrison’s “My Sweet Lord” Copyright Case*, PERFORMING SONGWRITER BE HEARD (Feb. 10, 2015), <http://performingsongwriter.com/george-harrison-my-sweet-lord/> [<https://perma.cc/3ZPG-95GK>].

¹⁴ See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976).

¹⁵ While some of the examples described herein might also be described as “unauthorized copying,” I use “infringement” to more accurately describe the positive state of affairs wherein a rightsholder might forego enforcement of their rights today, but enforce them tomorrow, or enforce them selectively against some defendants and not others. It might alternately be suggested that “monetized infringement” effectively amounts to a gratis, *ex-post* license such that its monetization renders it no longer infringing. The *ex-post* nature of this monetization, its uneven application, and its concomitant unpredictability, however, prevent monetized infringement from functioning in any meaningful way like a proper license. Instead, rightsholders who intend to grant gratis licenses for their work can do so *en masse* via means such as Creative Commons. For a list of license types and their descriptions, see *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> (last visited July 6, 2020) [<https://perma.cc/6W6P-BXWX>].

favor of monetization. What does this tell us about the underlying statute?

Copyright law's one-size-fits-all statutory licenses are notoriously ill-tailored, such that these licenses often serves as penalty defaults.¹⁶ In the copyright context, a "penalty default license" has been defined as "the use of bounded uncertainty to induce private ordering."¹⁷ By setting a one-size-fits-all statutory rate that fluctuates every five years, copyright has built uncertainty into its statutory licenses.¹⁸ This unpredictability makes copyright an ideal case study in how some rightsholders have improved tailoring by refraining from enforcing their statutory rights. As with other forms of private ordering, the government's role in private enforcement forbearance is to set the statutory default.¹⁹

This Essay is about copyright owners monetizing copyright infringement, and does not make any claims regarding the overall *efficiency* of such infringement. The potential for efficient and/or

¹⁶ For a fuller description of this phenomenon, see *infra* Part III.A.2.

¹⁷ Kristelia García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1122 (2014) [hereinafter *Penalty Default*] (citations omitted).

¹⁸ See, e.g., 17 U.S.C. § 804(b)(1) (2018) (describing the process by which statutory rates are set and changed every five years).

¹⁹ See *infra* Part III.C.

beneficial infringement has been written about extensively, both in the copyright context²⁰ and elsewhere in intellectual property (“IP”).²¹

This Essay recognizes that infringement may or may not be efficient, or socially beneficial, or even desirable. In all of these cases, articulating a theory of monetized infringement is nonetheless valuable for several reasons. First, it brings balance to a popular account of rightsholders as anti-infringement, when in practice they are more of a mixed bag. At the very least, it calls into question the universality of the assumption that copyrights must be enforced or incentives will fail.

Moreover, recognition of monetized infringement in copyright is interesting not only for its unexpectedness, but also for the broader point that its existence suggests: we have an impoverished descriptive account of why some laws operate the way that they do. This is particularly unsettling in an area like copyright, where advocates are sharply divided along policy lines.²² These divisions tend to have a

²⁰ See, e.g., EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 169-82 (Yale Univ. Press 2010) (discussing potentially socially productive “copyright disobedience”). For a detailed account of the potential social value of some copyright infringement, see, for example, David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1794 (2013), “In a nontrivial number of instances, violating copyright law - like violating other laws - can serve socially beneficial ends. The exposure of a company’s fraudulent practices may necessarily entail unauthorized publication of their copyright-protected internal communications. Infringement may also lead to public dissemination of culturally enriching materials kept under wraps by owners who want to suppress their dissemination. Outsider artists may trade on the illegality of their appropriation of others’ works as a constituent feature of their own creation, requiring infringement to create their work. Infringement also creates social welfare where it simply enables beneficial uses that would not have happened otherwise, such as where the mere act of acquiring permission for a use proves prohibitively costly in comparison to its internalized value. And even owners may benefit from unauthorized copying of their works, such as where the copies serve as a powerful advertisement for the owner’s brand.”; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004), suggesting that some infringement may be protected: “Courts should recognize that various kinds of copying . . . promote free speech. . . . The point is not to denigrate fair use, but to recognize that many kinds of uses of copyrighted material may be justified”; see also *infra* Part I.A.3.c.

²¹ See, e.g., Kai Yi Xie, Comment, *Improving the Patent System by Encouraging Intentional Infringement: The Beneficial Use Standard of Patents*, 165 U. PA. L. REV. 1019, 1023 (2017) (arguing that “it is sometimes socially desirable to encourage patent infringement,” and so proposing that “the government should act to encourage it in instances where the benefits of infringement outweigh the costs of enforcement”).

²² Compare, for example, this excerpt on creative innovation from the Electronic Frontier Foundation: “A few media or political interests shouldn’t have unfair technological or legal advantages over the rest of us. Unfortunately, litigious copyright and patent owners can abuse the law to inhibit fair use and stifle competition. Internet

disproportionate, negative impact on less established artists, intermediaries with fewer resources, and traditionally marginalized communities.²³

More broadly, a theory of monetized infringement reveals the underappreciated role that private parties play in policymaking. For example, copyright says that — with the exception of fair use — the upload of a video containing unlicensed music constitutes infringement and is punishable by law. Under the auspices of YouTube’s private fingerprinting technology Content ID, in contrast, many copyright owners effectively say that the unauthorized upload of a video containing unlicensed music will not be removed so long as related ad revenues are relinquished; i.e., so long as they can *monetize* the potential infringement (or fair use, as the case may be). Which view describes the current state of the law? If both — such that the answer is “it depends” — the user’s conundrum is easy to identify.

Monetized infringement shares some features with, yet is notably different from, the sort of “tolerated uses” identified by Tim Wu: “Tolerated use is infringing usage of a copyrighted work of which the owner may be aware, yet does nothing about.”²⁴ The examples in Part I.B *infra* go further than toleration to actively monetize infringement, which begs the question of whether monetized infringement is infringement at all? As explained herein, I believe the answer is yes, since there currently exists no mechanism preventing a rightsholder from selectively and alternately monetizing, and enforcing against, infringement. This is not the case, for example, under a Creative Commons license, which affords an *in rem* — and not an *in personam* — right to use. A rightsholder might tolerate, for example, the unauthorized use of its photograph on a small town church’s fall festival flyer because infringement suits are costly and there is little to be gained

service providers can give established content companies an advantage over startups and veto the choices you make in how to use the Internet.” *Creativity and Innovation*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/innovation> (last visited July 9, 2020) [<https://perma.cc/MD4L-T7SR>], with that of Creative Futures: “Powerful internet platforms have spent millions promoting the message that copyright ‘stifles creativity and innovation.’ They argue that the legal framework that supports *your* work is in *their* way. It has advanced this false claim on social media and blogs, in the mainstream press, in academia, and in testimony before Congress for years.” *Innovation*, CREATIVEFUTURE, <https://creativefuture.org/why-this-matters/whosstifling-innovation/> (last visited July 9, 2020) [<https://perma.cc/73GS-XRL5>].

²³ See Kristelia A. García & Justin McCrary, *A Reconsideration of Copyright’s Term*, 71 ALA. L. REV. 351, 403-04 (discussing disproportionate impacts of copyright policy on these groups).

²⁴ Tim Wu, *Tolerated Use 3* (Columbia Law & Econ., Working Paper No. 333, 2008).

from succeeding in this instance. This is substantively different from encouraging local congregations to make unauthorized use of copyrighted photos because the rightsholders will in turn receive valuable promotion that they could not otherwise access.

Private policymaking via nonenforcement raises a set of questions distinct from those traditionally associated with governmental and administrative forbearance: What role does the government play? Should we be more concerned about private forbearance abuses than we are in the case of governmental forbearance? Can private forbearance amount to unilateral policymaking? To an abdication of Congress' will?

This Essay grapples with these, and other, questions as follows: Through a series of contemporary examples, Part I compares and contrasts the traditional view of infringement with that of monetized infringement. Part II discusses some of the most likely impetuses for the monetization of infringement. Part III details the normative implications of monetizing infringement, and briefly considers the government's role in private policymaking through nonenforcement.

I. COPYRIGHT INFRINGEMENT

The law frequently assumes an exogenous preference for a particular outcome or result. Residential parking restrictions, for example, assume that residents want to park a vehicle in front of their homes. In reality, some residents have an endogenous preference to rent or sell their parking space, and/or prefer to ride their bike or to take public transportation instead.²⁵ Similarly, copyright law assumes a preference on the part of rightsholders that their work not be infringed. This Part uses copyright law as a case study to demonstrate that this preference does not hold across all rightsholders, some of whom instead monetize infringement, or permission-less use, in varying circumstances and for various reasons.

A. *The Infringement Problem*

The conventional view of copyright infringement is as something to be deterred wherever possible, and punished (often harshly) otherwise. Indeed, with the exception of fair use — determined in *Lenz v. Universal* to be a complete (and not an affirmative) defense to copyright

²⁵ See, e.g., Mary Meisenzahl, *A Parking Space in a Garage in San Francisco is Selling for \$100,000*, BUSINESS INSIDER (Feb. 9, 2020, 6:14 AM), <https://www.businessinsider.com/san-francisco-parking-space-on-sale-for-100000-2020-2> [<https://perma.cc/5AS8-Z2ZM>].

infringement²⁶ — copyright advocates are generally in agreement that “protection of [artists’] copyrights is crucial to their ability to earn a living,” and that infringement “threatens to destroy the ability of [artists] to sustain themselves economically through the creation and authorized exploitation of their [] works, and does irreparable, nationwide harm to the ability of creators to protect the quality and artistic integrity of their works.”²⁷

The U.S. Constitution empowers Congress with the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁸ This is presumed to be the impetus behind the enactment and enforcement of U.S. copyright law. Copyright’s purported policy goals of both incentivizing creation, and ensuring access to copyrighted works, is often referred to as the “incentive-access paradigm.”²⁹

The incentive theory of copyright holds that if artists are denied the fruit of their labor, they will eventually cease to produce new works and society will thereby be impoverished.³⁰ There has been some debate in the literature as to the strength and veracity of this idea in practice. On the one hand, James Madison makes the case that “[t]he public good fully coincides . . . with the claims of individuals.”³¹ On the other hand, some commentators have observed that creators may be motivated by factors other than financial incentives, including personal satisfaction and self-expression.³²

²⁶ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1162 (9th Cir. 2016).

²⁷ Brief for Nat’l Acad. of Recording Arts & Scis., et. al. as Amici Curiae Supporting Petitioners at *5, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 218022.

²⁸ U.S. CONST. art. I, § 8, cl. 8.

²⁹ See, e.g., Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996) (describing the paradigm by asserting that “[b]roadening the scope of copyright increases the incentive to produce works of authorship and results in a greater variety of such works. Broadening copyright’s scope, however, also limits access to such works both generally, by increasing their price, and specifically, by limiting the material that others can use to create additional works. Given these competing considerations, defining copyright’s proper scope has become a matter of balancing the benefits of broader protection, in the form of increased incentive to produce such works, against its costs, in the form of lost access to such works”).

³⁰ See *id.*

³¹ THE FEDERALIST NO. 43 (James Madison).

³² See, e.g., Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2434-35 (2016) (observing that “[t]he past decade has seen a flood of legal scholarship . . . challeng[ing] the assumption that money plays much of a role at all in motivating artistic production, suggesting instead

In any event, this Essay does not take issue with the incentive theory, which it takes at face value, but rather with its extension — namely, that infringement disincentivizes creators *by denying them the ability to extract value from their works*. Instead, I argue that it may, or it may not. I do not aim herein to determine whether infringement is “good” or “bad” (nor for whom), but rather whether — as the law assumes — rightsholders are necessarily harmed by infringement. I argue that sometimes they are, but sometimes they aren’t. In other words, it’s not just that some rightsholders forbear from enforcing their rights (some do), but rather that some actually *monetize* the trespass as a means of creating value. Before turning to specific examples of this in Part I.B., the following sections describe the current state of the statutory law, the case law, and the scholarly literature, as they relate to copyright infringement.

1. Statutory & Legislative Background

Section 501 of the Copyright Act defines an infringer as “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602[.]”³³ Where the owner of a valid copyright believes they have been infringed, they are “entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.”³⁴

that the desire for subcultural status or the intrinsic enjoyment of the creative process are stronger drivers of creative production. Other research has shown that factors foreign to U.S. law, like the desire for attribution, play a persistent role in authors’ incentives”) (citations omitted); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 82 (1998) (describing “three identifiably separate personhood interests in an intellectual property *res*: (1) creativity; (2) intentionality; and (3) identification as the source of the *res*”) (citations omitted); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 *NOTRE DAME L. REV.* 1945, 1947 (2006) (highlighting the “spiritual or inspirational motivations that are inherent in the creative task itself as opposed to motivation resulting from the possibility of economic reward”).

³³ 17 U.S.C. § 501(a) (2018).

³⁴ *Id.* § 501(b).

Remedies available to rightsholders include injunction,³⁵ impounding,³⁶ monetary damages,³⁷ attorneys costs,³⁸ and, in some cases, criminal penalties.³⁹ Monetary damages may be awarded as actual damages or as statutory damages.⁴⁰ Statutory damages range from \$750 to \$30,000 per work infringed, increasing to as much as \$150,000 in cases of willful infringement.⁴¹

Copyright infringement is generally understood to be a strict liability tort: ⁴² “Copyright infringement is a strict liability wrong in the sense that a plaintiff need not prove wrongful intent or culpability in order to prevail.”⁴³ The Supreme Court has affirmed this view: “[i]ntention to infringe is not essential under the [Copyright] Act.”⁴⁴ As Tony Reese explains:

[E]arlier statutes expressly made sales of unauthorized copies infringing only if made with knowledge that the copies were unauthorized; also, for many kinds of works, infringement by imitation was penalized only if the defendant had intended to evade the law. By contrast, the 1909 Act merely enumerated the exclusive rights to which a copyright owner was entitled but never expressly defined infringement and articulated no knowledge or mental-state requirement for any violations. The express limitations of earlier U.S. copyright statutes as to sales and derivative works thus disappeared from U.S. copyright law upon the enactment of the 1909 Act . . . The 1976 Act [under which we currently operate] maintained the same approach, including essentially no mental-state limits on liability for direct infringement.⁴⁵

Some scholars have been critical of this standard — for example, Ben Depoorter and Robert Kirk Walker have noted that “[e]ven for affluent defendants, overcoming the Copyright Act’s strict liability standard is

³⁵ *Id.* § 502.

³⁶ *Id.* § 503.

³⁷ *Id.* § 504.

³⁸ *Id.* § 505.

³⁹ *Id.* § 506.

⁴⁰ *Id.* § 504(a).

⁴¹ *Id.* § 504(c).

⁴² *See supra* note 6.

⁴³ *Faulkner v. Nat’l Geographic Soc’y*, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008).

⁴⁴ *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931).

⁴⁵ R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 179 (2007).

highly burdensome.”⁴⁶ Nonetheless, liability for “innocent infringers” appears to be an intentional feature — and not a bug — of the current system. According to a 1958 report of the Copyright Office:

The general features of the law of innocent infringement were shaped prior to 1909. Except for the innocent vendor, innocence or lack of intent to infringe was not generally a defense to an action for infringement. There is considerable evidence that this situation was realized by those participating in the drafting and enactment of the 1909 act; although the problem of the innocent infringer was considered at some length in the hearings, the 1909 statute contained no broad provisions excusing innocent infringers. Moreover, the act eliminated the provision in earlier statutes expressly protecting the innocent seller.⁴⁷

Of course, the threat of high statutory damages serves not only to punish, but also to deter, copyright infringement — and sometimes to deter potential fair uses. The problem, as described by Pamela Samuelson and Tara Wheatland, is that “[a]wards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”⁴⁸ This is especially true in the digital age: “There is a growing understanding that statutory damage awards . . . are a poor fit for the digital age. Because a statutory damage award is set for each individual infringed work, the total damages can add up significantly for online infringements that involve multiple works.”⁴⁹ The takeaway: copyright infringement is sufficiently harmful that it merits severe punishment and harsh deterrence.

2. Judicial Consensus

The case law on copyright infringement treats it primarily as a matter of either (i) wrongful appropriation, or (ii) disincentivization. In the

⁴⁶ Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 343 (2013); see also Kelly Cassey Mullally, *Blocking Copyrights Revisited*, 37 COLUM. J.L. & ARTS 57, 83 (2013) (criticizing copyright’s “harsh strict liability standard”).

⁴⁷ STUDIES PREPARED FOR THE S. COMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 25: LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS 141 (Alan Latman & William S. Tager) (Comm. Print 1958) (citations omitted).

⁴⁸ Samuelson & Wheatland, *supra* note 7, at 441.

⁴⁹ Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 UCLA L. REV. 400, 404 (2019) (citations omitted).

seminal case of *Arnstein v. Porter*, the Second Circuit considered an allegation of copying by a songwriter, and determined that “The question . . . is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant *wrongfully appropriated* something which belongs to the plaintiff.”⁵⁰

In *Harper & Row*, the Supreme Court concluded that “it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”⁵¹ This view confirms a long line of cases describing infringement as something to be deterred and/or punished, lest it lead to less creation, and an impoverished collective: “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.”⁵² Again, the clear message is that copyright infringement is bad — not just for creators, but also for society in general.

3. Scholarly Discord

There are several distinct schools of thought in the literature on copyright infringement: One — pecuniary infringement — is concerned with potential instances of pecuniary harm resulting from infringement. Another — non-pecuniary infringement — considers various non-pecuniary harms that may stem from infringement. Finally, some infringement can be viewed as potentially socially beneficial. Each of these types are discussed in turn below.

a. *Pecuniary Infringement*

Copyright infringement is unlawful. The conventional scholarly account explains this by maintaining that “[c]opyright infringement hurts artists financially, and it also discourages further creativity and

⁵⁰ *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (emphasis added) (citations omitted).

⁵¹ *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985).

⁵² *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

innovation.”⁵³ This is arguably bad for both artists and consumers: “As musicians are less able to rely on royalties to make a living, they spend less time on their craft and more time searching for alternative sources of income — much to the detriment of audiences.”⁵⁴

There is a similar line of comparative scholarship comparing the experience of artists in countries with less copyright protection to that enjoyed by U.S. artists, and finding the foreign systems wanting. For example, in an article analyzing the Chinese market, Jiarui Liu observes that “copyright incentives . . . preserve[] market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs and maximum artistic autonomy during the creative process.”⁵⁵ That body of literature describes copyright as an economic driver. For example, Sandra Aistars and her co-authors note that, “WIPO found that there are strong and positive relationships between the contributions of the copyright industries to GDP and many indicators of socio-economic performance.”⁵⁶

b. Non-pecuniary Infringement

While the harm resulting from copyright infringement is often framed in terms of decreased financial incentives and diminished economic benefit, it may alternately (or additionally) be based on moral, or reputational, concerns. For example, in a recent lawsuit filed by renowned romance author Nora Roberts against a Brazilian writer she says copied whole passages from her novels, the concern is less about money and incentives — Roberts is one of the most successful novelists in the world, after all — and more about moral and reputational harm. To borrow Roberts’s own words, the alleged plagiarizer is a “blood leech sucking on the body of the writing profession.”⁵⁷

⁵³ Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 195 (2006).

⁵⁴ Sandra Aistars, Devlin Hartline & Mark Schultz, *Copyright Principles and Priorities to Foster a Creative Digital Marketplace*, 23 GEO. MASON L. REV. 769, 778 (2016).

⁵⁵ Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM. J.L. & ARTS 467, 473 (2015).

⁵⁶ Aistars et al., *supra* note 54, at 777 (citing WORLD INTELLECTUAL PROP. ORG., WIPO STUDIES ON THE ECONOMIC CONTRIBUTION OF THE COPYRIGHT INDUSTRIES 2-3 (2014), https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf [<https://perma.cc/V2C9-LD9P>]).

⁵⁷ Michael Schaub, *Romance Author Nora Roberts Sues Brazilian Writer, Claiming Plagiarism*, L.A. TIMES (Apr. 25, 2019), <https://www.latimes.com/books/la-et-jc-nora-roberts-sues-cristiane-serruya-20190425-story.html> [<https://perma.cc/2ZGZ-QXSD>].

In an article considering why and how copyright owners decide to sue, Christopher Buccafusco and David Fagundes note a variety of copyright infringement suits “rooted in non-pecuniary motivations . . . [, including] a pro-choice group suing a pro-life group for its criticism of the former’s videos; Michael Savage suing the Council on American-Islamic Relations to facilitate his anti-Muslim rants; a widow suing a documentarian whose film painted an unflattering portrait of her deceased husband; and songwriters Don Henley and Jackson Browne suing politicians whose views they dislike for using their works at campaign rallies.”⁵⁸ Ultimately, Buccafusco and Fagundes determine that while copyright law “assumes that owners will sue only to redress monetary losses, [] [they] actually sue for a variety of reasons, including under circumstances that appear unrelated to that concern.”⁵⁹ In his work on IP in non-traditional contexts, Andrew Gilden likewise observes the emergence of “a diverse new generation of IP owners,” whose interests are “markedly different than the traditional beneficiaries of IP laws,” leading them to “often pursue IP disputes for reasons having little to do with revenue streams, creativity, or intellectual labor.”⁶⁰

c. Socially Beneficial Infringement

Not all commentators, however, view infringement as necessarily bad. There exists a small but well-developed body of work that focuses on infringement resulting in an arguable social benefit. This literature does not necessarily allege a benefit enjoyed equally (or at all) by all parties.

For example, in his work on efficient copyright infringement, David Fagundes describes how “[t]he exposure of a company’s fraudulent practices may necessarily entail unauthorized publication of their copyright-protected internal communications.”⁶¹ This, he suggests, might be described as societally beneficial infringement. Similarly, Rebecca Tushnet has described a potential conflict between the rule against copyright infringement and first amendment rights that might suggest an opening for socially beneficial infringement. She notes, for example, the import of some copyrighted works for social participation:

⁵⁸ Buccafusco & Fagundes, *supra* note 32, at 2453.

⁵⁹ *Id.* at 2478-79.

⁶⁰ Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 73 (2018).

⁶¹ Fagundes, *supra* note 20, at 1794.

If *The Sopranos* or *Queer as Folk* have a significant impact on our culture, then access to those programs improves a person's ability to participate in making and interpreting that culture. There could be a problem for democracy when copyright owners set prices so high that some people can't read or watch what many others do. Letting people who have HBO write *Sopranos* fan fiction without fear of the copyright police is well and good, but they still need access to HBO in the first place; without access, there can be no derivative works and no water cooler conversation.⁶²

Eduardo Peñalver and Sonia Katyal describe the unauthorized screening of the acclaimed documentary *Eyes on the Prize* by anticopyright activist group Downhill Battle as another example of socially beneficial infringement. By 2005, many of the licenses originally obtained for the 1987 film had expired, leading it to become "for all practical purposes, unavailable to the general public."⁶³ In protest, Downhill Battle "digitized the first three episodes of the documentary and posted them online, where the episodes could be downloaded for free using peer-to-peer software, like BitTorrent. Then, Downhill Battle encouraged people to copy and distribute the files in order to raise awareness of copyright's effect on the circulation of information."⁶⁴

In the fair use context, Jeanne Fromer has written that "some courts have begun to recognize that market benefits ought to count in favor of finding that a defendant's use is fair . . . Similarly, copyright holders – including those that have been litigiously protective of their copyrighted material in the past . . . are increasingly acting in ways that suggest they realize that certain unauthorized third-party uses of their copyrighted works can redound to their financial benefit."⁶⁵ She cites notorious copyright enforcer Disney as an example.⁶⁶ The company's megahit franchise *Frozen* has spawned everything from fan cover videos to makeup tutorials for how to look like Princesses Elsa and Anna.⁶⁷ In

⁶² Tushnet, *supra* note 20, at 545-46.

⁶³ PEÑALVER & KATYAL, *supra* note 20, at 3.

⁶⁴ *Id.* at 5.

⁶⁵ Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 617-18 (2015). By way of example, Fromer offers *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), in which the court "reason[ed] that Google Book Search's service can drive book sales and increased attention to long-forgotten books." *Id.* at 618 n.14.

⁶⁶ *Id.* at 634.

⁶⁷ *See id.* at 634 n.107.

contrast with its heavy-handed enforcement strategy of the past, some commentators have observed that Disney appears to have “learned to stop worrying and love copyright infringement,” or at least, in the (in)famous (almost-)words of Princess Elsa, “how to let copyright go.”⁶⁸

As the foregoing discussion suggests, much of the scholarship on copyright infringement has focused on whether or not it is (or can be) societally harmful, or beneficial, and when. All of the examples in this subsection involve infringement that is not beneficial to the rightsholder. Despite the fact that copyright enforcement lies primarily with rightsholders,⁶⁹ the literature has paid little attention to whether or when infringement might not only be tolerated, but actually monetized, by rightsholders themselves, regardless of its social merit.⁷⁰ The next subpart will consider this question as a matter of first impression.

B. The Infringement Solution

Notwithstanding the long-held view of infringement as anti-rightsholder, some rightsholders not only tolerate — but actively *monetize* — infringement, in a variety of different situations and for a variety of different reasons. This subpart introduces the concept of “monetized infringement” through a series of case studies from the music, television, film, publishing, and video game industries. The examples are presented in accordance with the following taxonomy: (1) profitable infringement, in which infringement (or potential infringement) results in income for the rightsholder; (2) remedial infringement, in which infringement (or potential infringement) mitigates a worse outcome for the rightsholder; and (3) promotional infringement, in which infringement (or potential infringement) amounts to valuable and cost-efficient promotion for the rightsholder’s content. There is, of course, some overlap between these categories. For example, a valuable promotional infringement might also be classified

⁶⁸ Andrew Leonard, *How Disney Learned to Stop Worrying and Love Copyright Infringement*, SALON (May 23, 2014, 8:43 PM), https://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement/ [https://perma.cc/NG44-B2TN].

⁶⁹ The exception to this is in the case of criminal copyright infringement, which is enforced by the federal government. See 17 U.S.C. § 506 (2018).

⁷⁰ The closest work along these lines is a symposium piece by Tim Wu in which he writes about *ex post* notice rights. There, he defines “tolerated uses” as “technically infringing, but nonetheless tolerated.” Wu, *supra* note 24, at 1. This Essay moves beyond mere tolerance to explore situations in which infringement is actively encouraged because of an explicit benefit (or expected benefit) to the right holder.

as a profitable infringement. A profitable infringement, such as Content ID, might also be a form of remedial infringement: a suboptimal arrangement that is nonetheless more efficient than Section 512's notice and takedown procedure. Nonetheless, these categories serve as helpful buckets for the exploration of this phenomenon.

An important exception bears mention here: "entrapment" of infringers is not monetized infringement. For example, in 2013, it came to light that notorious copyright troll Prenda Law had uploaded its own videos to various torrent sites, then turned around and sued users who downloaded them.⁷¹ While these hapless downloaders' actions were ultimately monetized, this Essay explicitly excludes this manner of "business model," not least of all because the benefit to the rightsholder is taken at the expense of the user. In other words, copyright trolling is explicitly excluded from this Essay's definition of "monetized infringement."

1. Profitable Infringement

Some private rightsholders leverage infringement (or potential infringement) because it is better for business. Subsection (a) *infra* discusses an example in which the rightsholders' business model itself explicitly *relies upon* (potential and actual) infringement in order to be profitable. Subsection (b) *infra* describes a business model that has adapted to substitute one form of revenue for another — in this case, one that is not only unharmed by, but also potentially improved upon, by infringement.

a. Ad-Supported Content

By early 2007, online video streaming service YouTube boasted nearly seventy million users, collectively watching billions of videos per day.⁷² Many of these videos were user-uploaded, and contained content that did not belong to the user, and for which the user had not obtained a license nor authorization to use. Some of these videos — dancing

⁷¹ See Joe Mullin, *Comcast Letter Said to Confirm That Prenda, Steele Planted Porn Torrents*, ARS TECHNICA (Aug. 16, 2013, 9:53 AM), <https://arstechnica.com/tech-policy/2013/08/comcast-letter-said-to-confirm-that-prenda-steele-planted-porn-torrents/> [https://perma.cc/D2TA-ALRX].

⁷² *YouTube Continues to Lead U.S. Online Video Market with 28 Percent Market Share, According to Comscore Video Matrix*, COMSCORE (Nov. 30, 2007), <https://www.comscore.com/Insights/Press-Releases/2007/11/YouTube-Leads-US-Online-Video-Market#:~:text=Other%20notable%20findings%20from%20September,viewers%20and%201.1%20million%20videos> [https://perma.cc/CA4E-6GAD].

toddlers, crazy cats and the like — most likely qualify as fair use. Others — including the infamous lyric videos, or still shots with audio⁷³ — are most likely infringing. Monetizing user uploads necessarily loops in both types of content, with only the latter qualifying as monetized infringement. Historically, YouTube (and similarly situated services) have enjoyed an exemption from secondary copyright liability for infringing “user-generated content” (“UGC”) under the Section 512 safe harbor.⁷⁴ Section 512(c) of the Digital Millennium Copyright Act (“DMCA”) provides that “[a] service provider shall not be liable for . . . infringement of copyright by reason of the storage at the direction of a user . . . if the service provider . . . does not have actual knowledge . . . is not aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge . . . acts expeditiously to remove, or disable access to, the material[.]”⁷⁵

Despite the existence of this safe harbor, the sheer quantity of infringing UGC led YouTube to find itself potentially secondarily liable for a massive amount of copyright infringement. This is because Section 512’s protection extends only to online service providers (“OSPs”) *without knowledge* of the alleged infringement.⁷⁶ The thrust of most content owners’ argument against YouTube was that the company was not only aware of rampant infringement — after all, Viacom demanded they remove over 100,000 videos containing the company’s content in 2007 alone⁷⁷ — but was also arguably encouraging it by failing to implement any meaningful deterrent against, or punishment for, users

⁷³ For domestic and international users without the financial means and/or technical ability to access music streaming services, “lyric videos” — streaming audio with the words scrolling across the screen — fill the gap. The overwhelming majority of videos viewed on YouTube are music videos, and a significant number of those are user-uploaded lyric videos (i.e., infringing). *See, e.g.*, Joan E. Solsman, *The Surprising Rise of YouTube Lyrics Videos*, CNET (Aug. 31, 2014, 4:00 AM PT), <https://www.cnet.com/news/the-rise-and-rise-of-youtube-lyrics-videos/> [<https://perma.cc/5C6C-ZU5H>]. Despite their illegality, there even appears to exist some sort of pyramid scheme (falsely) promising lyric videos as a substantial source of income for fans. *See, e.g.*, rob_level, *How to Make \$400 a Day Making Lyric Videos (NO JOKE!)*, SMARTRAPPER, <https://www.smartrapper.com/make-400-day-making-lyric-videos-no-joke/> (last visited Jan. 10, 2020) [<https://perma.cc/U5MB-YZGJ>].

⁷⁴ *See, e.g.*, *Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 122-23 (S.D.N.Y. Apr. 18, 2013) (confirming YouTube’s protection under 512(c)).

⁷⁵ 17 U.S.C. § 512(c)(1)(A) (2018).

⁷⁶ *Id.*

⁷⁷ Geraldine Fabrikant & Saul Hansell, *Viacom Asks YouTube to Remove Clips*, N.Y. TIMES (Feb. 2, 2007), <https://www.nytimes.com/2007/02/02/technology/02cnd-tube.html> [<https://perma.cc/MCW4-3QFD>].

found to be in violation of the law (and, indeed, YouTube's own terms of service).⁷⁸

And so YouTube found itself in a pickle: With the looming threat of crippling copyright infringement litigation from content owners on one side, and the promise of massive advertising revenues tied to user-generated content on the other, what's a multibillion dollar company to do? In YouTube's case, then-CEO Eric Schmidt decided to invest in what was then a relatively new technology: "audio fingerprinting."⁷⁹ Initially, YouTube utilized technology belonging to Audible Magic, a pioneer in the field.⁸⁰ Eventually, YouTube teamed up with content owners to develop a proprietary system — initially called "Video Identification,"⁸¹ and later renamed "Content ID."⁸² Content ID works by ingesting files provided by content owners, and then doing two things: (1) scouring existing content to identify any potentially infringing uploads; and (2) comparing newly uploaded files to the owner-provided files to halt upload of potentially infringing uploads.⁸³

In either case, where a potential match is identified, the content owner is presented with several options: (i) They can report the user in accordance with Section 512's notice-and-takedown procedure;

⁷⁸ See *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?gl=CA&template=terms#2ec77765bd> (last visited July 9, 2020) [<https://perma.cc/DN9V-SF7C>]. YouTube's Community Guidelines state that "the Content you submit must not include third-party intellectual property (such as copyrighted material) unless you have permission from that party or are otherwise legally entitled to do so. You are legally responsible for the Content you submit to the Service. We may use automated systems that analyze your Content to help detect infringement and abuse, such as spam, malware, and illegal content." *Id.*

⁷⁹ See Kevin J. Delaney, *YouTube to Test Software to Ease Licensing Fights*, WALL ST. J. (June 12, 2007, 11:59 PM ET), <https://www.wsj.com/articles/SB118161295626932114> [<https://perma.cc/4LAQ-K7UG>]. "Audio fingerprinting" refers to technology that enables the automatic detection and identification of copyrighted work on a platform. *Id.*

⁸⁰ Andy Maxwell, *Audible Magic Accuses YouTube of Fraud over Content ID Trademark*, TORRENTFREAK (Jan. 11, 2017), <https://torrentfreak.com/audible-magic-accuses-youtube-of-fraud-over-content-id-trademark-170111/> [<https://perma.cc/TD64-6HBY>].

⁸¹ YouTube Advertisers, *Video Identification*, YOUTUBE (Feb. 4, 2008), <https://www.youtube.com/watch?v=xWizsV5Le7s> [<https://perma.cc/WAW6-BU8T>].

⁸² See YouTube Creators, *YouTube Content ID*, YOUTUBE (Sept. 28, 2010), <https://www.youtube.com/watch?v=9g2U12SsRns> [<https://perma.cc/7LDN-E2AH>].

⁸³ See *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en#:~:text=How%20Content%20ID%20works,to%20us%20by%20content%20owners.&text=When%20this%20happens%2C%20the%20video%20gets%20a%20Content%20ID%20claim> (last visited July 6, 2020) [<https://perma.cc/5GFV-VCPE>].

(ii) they can block the infringing video on the upload, thereby keeping it off of the site altogether; or (iii) they can elect to allow the allegedly infringing video to upload, and then claim the ad revenues earned against it.⁸⁴ This last option effectively monetizes what might otherwise amount to infringement (along with some fair use). It also amounts to a real-time license, and is by far the most popular option among rightsholders.⁸⁵ Preferred partners (e.g., major record labels) also have access to a manual claiming tool that allows them to search the site for very minor (or inconsequential) uses of their content (such that Content ID's bot is unlikely to catch them) and to then claim revenues from those videos on a one-off basis. Unsurprisingly, alleged abuses of the manual claiming tool have led YouTube to reevaluate its policy with regard to manual monetization.⁸⁶ The tool's popularity, however, confirms rightsholders' affinity for infringing (or potentially infringing) UGC that they can convert to income via Content ID.⁸⁷

With Content ID in place, YouTube continues to dominate the global video streaming industry.⁸⁸ Between them, the three major record labels — Universal, Sony, and Warner — reported \$3.24 billion in streaming revenues for the first half of 2018.⁸⁹ That's up 36.4% from the same time

⁸⁴ See Paul Resnikoff, *99.5% of All Infringing Music Videos Are Resolved by Content ID, YouTube Claims*, DIGITAL MUSIC NEWS (Aug. 8, 2016), <https://www.digitalmusicnews.com/2016/08/08/copyright-problems-resolved-content-id/> [<https://perma.cc/4APS-JRAK>].

⁸⁵ See *id.* (“Content ID accounts for roughly 50% of the music industry's revenue from YouTube.”).

⁸⁶ Sarah Perez, *YouTube Shuts Down Music Companies' Use of Manual Copyright Claims to Steal Creator Revenue*, TECHCRUNCH (Aug. 16, 2019, 6:56 AM PDT), <https://techcrunch.com/2019/08/16/youtube-shuts-down-music-companies-use-of-manual-copyright-claims-to-steal-creator-revenue/> [<https://perma.cc/TJ9S-68W6>].

⁸⁷ NB: The mere existence of Content ID and participation of the content partners does not automatically “license” the latter's content to YouTube. The only thing automatic about Content ID is its initial hold on UGC; it then falls to the content owner to decide whether to allow (i.e., encourage) or disallow (i.e., enforce against) the potential infringement.

⁸⁸ See INT'L FED'N OF THE PHONOGRAPHIC INDUS., *MUSIC CONSUMER INSIGHT REPORT 13* (2018), <https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf> [<https://perma.cc/S4P3-KETZ>] (“47% of time spent listening to on-demand music [worldwide] is on YouTube.”). One commentator has suggested that Article 17 of the European Union's new Digital Single Market (“DSM”) Directive effectively codifies YouTube's business model, paving the way for more encouraged infringement worldwide. See Annemarie Bridy, *The Price of Closing the “Value Gap”: How the Music Industry Hacked EU Copyright Reform*, 22 VAND. J. ENT. & TECH. L. 323, 357 (2020) (“In Content ID, YouTube has a prebuilt compliance infrastructure for Article 17. That's because Article 17 was designed for Content ID and not vice versa.”).

⁸⁹ Tim Ingham, *The Major Labels Now Turn Over More Than \$1BN a Month. But Who's Ruling 2018?*, MUSIC BUS. WORLDWIDE (Aug. 22, 2018), <https://www.>

period in 2017.⁹⁰ From a user perspective, far fewer are startled to find their uploaded video “disappeared” from the site, thereby leaving more content available for the public to consume. A real win-win-win, right? Not necessarily.

Content ID is not available to all content owners, only to select (i.e., major — both in terms of financials and in terms of star power) partners.⁹¹ Smaller content owners are left to the (relatively inefficient) notice-and-takedown regime of Section 512(c). Likewise, users may not find their uploads missing, but — if the upload contained any content picked up by Content ID and monetized by a content partner — they won’t earn any ad share revenue on them either. That money goes instead to the content partner who has opted to monetize a piece of allegedly infringing UGC under the terms of Content ID. The more infringing (or even potentially infringing) content is uploaded by users, the more a content owner can claim, and the more money can be made.

Importantly, this is true even where a claimed UGC video may be fair use. While the law post-*Lenz* technically requires a fair use analysis before a video is taken down under Section 512,⁹² it says nothing about leaving a video up and claiming the revenue around it. This is something YouTube and its Content ID partners have accomplished via contract and terms of service. For example, a Content ID FAQ helpfully titled “Am I in trouble?” assures the worried recipient of a claim notice:

Probably not. . . . It’s up to the copyright owners to decide whether or not others can reuse their original material.⁹³ Copyright owners often allow their content to be used in YouTube videos in exchange for having ads run on those

musicbusinessworldwide.com/the-major-labels-now-turn-over-more-than-1bn-a-month-but-whos-ruling-2018/ [https://perma.cc/HU4M-E56E].

⁹⁰ *Id.*

⁹¹ For an account of the small creator’s experience vis-à-vis Content ID, see The Music Business Made Easy, *How to Apply for YouTube Content ID*, YOUTUBE (Sept. 19, 2019), <https://www.youtube.com/watch?v=dC15sdHa2DA> [https://perma.cc/LQ72-AQVQ] (noting that “most times, applications that come from individuals . . . are rejected”).

⁹² See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148 (9th Cir. 2016) (“We hold that the statute requires copyright holders to consider fair use before sending a takedown notification[.]”).

⁹³ This, of course, is only legally accurate where the reuse is not fair, but the FAQ does not get into that, presumably because Content ID operates under its own set of rules separate and apart from copyright. For more on this possibility, see Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 522 (2017) [hereinafter *Safe Harbors*], discussing the potential displacement of copyright law by “DMCA plus” agreements such as Content ID.

videos. . . . Sometimes, you can't monetize a video that has a Content ID claim. Instead, the copyright owners can choose to monetize your video.⁹⁴

And herein lies the rub: under Content ID, more potentially infringing UGC (along with some fair use that may nonetheless be claimed) equals more money for rightsholders. Record labels no longer have to spend millions of dollars creating a promotional music video and hoping it goes viral; instead, they can sit back and let fans create them, share them, and popularize them, with every click amounting to more ad revenues for the rightsholder. Importantly, participation in Content ID also does not amount to a de facto license, since a content owner can claim one video while blocking another. This Essay intends no normative evaluation of whether this arrangement is “better” or “worse” than any other; rather, it aims only to emphasize that the rightsholders in this example are often benefited — and not harmed — by (potential and actual) infringement.

b. Downloadable Content

In 2018, video game revenue in the U.S. topped \$43.8 billion, making it more lucrative than the entire American film industry.⁹⁵ One of the most successful video game developers — a company called Electronic Arts (“EA”) — is behind such blockbuster series as *The Sims*, *FIFA*, *Madden NFL*, and *Battlefield*.⁹⁶ With total net revenue topping \$5 billion in 2018,⁹⁷ EA is a popular target for game pirates. To put video game piracy in perspective, “[t]he music industry loses \$12.5 billion to pirates annually. Current trends project the film and television industry will hit

⁹⁴ *What is a Content ID Claim?*, *YouTube Help*, GOOGLE, <https://support.google.com/youtube/answer/6013276?hl=en> (last visited Jan. 10, 2020) [<https://perma.cc/C442-DW3P>].

⁹⁵ Jonathan Shieber, *Video Game Revenue Tops \$43 Billion in 2018, an 18% Jump from 2017*, TECHCRUNCH (Jan. 22, 2019), <https://techcrunch.com/2019/01/22/video-game-revenue-tops-43-billion-in-2018-an-18-jump-from-2017/> [<https://perma.cc/T8Y4-C6DV>].

⁹⁶ For a comprehensive list of Electronic Arts' game library, see generally ELECTRONIC ARTS, <https://www.ea.com/games/library> (last visited June 30, 2020) [<https://perma.cc/R79W-MZLB>].

⁹⁷ *Electronic Arts Reports, Q4 FY18 and Full Year FY18 Financial Results*, ELECTRONIC ARTS (Mar. 31, 2018), <https://www.ea.com/news/electronic-arts-reports-q4-fy18-financial-results> [<https://perma.cc/DHM4-4QQ5>].

\$52 billion in losses to pirates by 2022. And in 2014, [it is] estimated the video game industry lost \$74 billion to pirates.”⁹⁸

These statistics should suggest that piracy is particularly bad for video games.⁹⁹ Indeed, over the years, the video game industry has tried a variety of different approaches — many of them highly creative — to thwart piracy of their games. Before digital downloading of games, game developers could check piracy by requiring players to enter, for example, a code printed on the physical box in which the game was packaged. If the player didn’t have a code, or if the code had already been used (presumably by the original, lawful owner) the game wouldn’t play, or might throw the player in video game “jail” where they’d have to listen to a lecture on piracy.¹⁰⁰

Of course, the evolution of digital gaming reduced the effectiveness of this approach, leading some companies to rely on other mechanisms, ranging from user shaming to game degradation. For example, game developer Remedy shames pirates of its popular game *Quantum Break* by slapping a skull-and-bones eye patch over the main character, Jack Joyce, whenever a pirated copy is detected.¹⁰¹ One of the most popular games of all time, *The Sims*, has discouraged pirates of *The Sims 4* via programming that makes pirated copies increasingly pixelated and blurry over time.¹⁰² Pirates of *Crysis Warhead* find their bullets and grenades replaced by hapless (and harmless) chickens.¹⁰³ One of the more vengeful approaches, and this author’s personal favorite, was devised by the creators of Super Nintendo’s *Earthbound*. Pirates face a much tougher game than legal players, only to be “rewarded” at the very end by the game freezing and wiping all saved copies.¹⁰⁴

⁹⁸ Kirk Kaczmarek, *The Unwinnable War on Video Game Piracy*, RICH. J.L. & TECH. BLOG (Feb. 9, 2019), <https://jolt.richmond.edu/2019/02/09/the-unwinnable-war-on-video-game-piracy/> [<https://perma.cc/86LB-3754>].

⁹⁹ Alternately, they might suggest an ill-founded assumption that every pirated copy would have otherwise been purchased at full retail price.

¹⁰⁰ Brad Chacos, *12 Hilarious, Brutally Devious Ways Game Developers Punish Pirates*, PC WORLD (Apr. 9, 2016, 7:07 AM PDT), <https://www.pcworld.com/article/2602876/10-hilarious-brutally-devious-ways-pc-game-developers-punish-pirates.html#slide11> [<https://perma.cc/V4TU-6BTK>].

¹⁰¹ *Id.* Developers use a host of different methods to detect pirated copies; one of the most popular methods is to “leak” a modified version of the game to torrent sites (which modification identifies a pirated copy). These versions generally contain an “easter egg” which results in corruption, an altered gaming experience (e.g., extra hard levels), and even memory deletion. *See id.*

¹⁰² *Id.*

¹⁰³ *See* D. P., *Crysis Warhead Chicken Bullets*, YOUTUBE (Sept. 30, 2008), <https://www.youtube.com/watch?v=gemaltF85oQ> [<https://perma.cc/RS2V-QN5E>].

¹⁰⁴ Chacos, *supra* note 100.

More recently, however, the industry generally — and EA in particular — has had a change of heart. In an interview with a popular gamer blog, EA’s then-CEO John Riccitiello quipped: “By the way, if there are any pirates you’re writing for, please encourage them to pirate *FIFA Online*, *NBA Street Online*, *Battleforge*, *Battlefield Heroes* . . . If they would just pirate lots of it I’d love them. [laughs] Because what’s in the middle of the game is an opportunity to buy stuff.”¹⁰⁵ Similarly, Gabe Newell, Founder and Managing Director of software developer Valve, recently called pirates “underserved customers,” and added, “[I can] make some interesting money off of it.”¹⁰⁶

This sentiment is a far cry from the doomsday scenarios predicted by execs of years past. So what gives? Why are the creators and copyright owners of popular video games courting the very people who infringe those copyrights? The explanation is fairly straightforward: In the new video game business model, they aren’t selling the copyrighted work — in this case, the video game — rather, they are selling downloadable content (or “DLC” in industry-speak) that operates from inside of the game.

Originally devised as a means of generating long-term (as opposed to one-shot) revenue on a sold game, DLC is additional content that can be downloaded within a video game. Common types of DLC include extra levels, new characters, additional weapons/vehicles, and custom outfits.¹⁰⁷ While a single DLC purchase tends to cost far less than the price of a game, multiple DLC purchases — for example, developer Activision offers players of *Modern Warfare* a new level every few months¹⁰⁸ — can add up to far more spending over time than the one-time purchase of a game. While you can pirate a copy of *Modern Warfare*, you won’t be able to customize your characters nor play the newly released levels without shelling out money for in-game DLC. In other words, pirates can “steal the disc[/game], but they can’t steal the DLC.”¹⁰⁹ This is because the DLC is purchased through connection

¹⁰⁵ Ben Kuchera, *EA’s New Motto: Please Pirate Our Games...er, Storefronts*, ARS TECHNICA (June 23, 2009, 8:07 PM), <https://arstechnica.com/gaming/2009/06/eas-new-motto-please-pirate-our-games-er-storefronts/> [https://perma.cc/YK5B-PXF7].

¹⁰⁶ Mike Masnick, *Valve Exec Explains How to Compete with Privacy*, TECHDIRT (Feb. 19, 2009, 11:47 AM), <https://www.techdirt.com/articles/20090219/1124433835.shtml> [https://perma.cc/L5E6-57N9].

¹⁰⁷ *DLC Definition*, TECHTERMS, <https://techterms.com/definition/dlc> (last visited Jan. 10, 2020) [https://perma.cc/V7V6-SQPM].

¹⁰⁸ *Id.*

¹⁰⁹ *General Discussion - EA’s Stance on Piracy*, GIANT BOMB, <https://www.giantbomb.com/forums/general-discussion-30/eas-stance-on-piracy-377362/> (last visited Jan. 10, 2020) [https://perma.cc/Y78G-5DY8].

between a legitimate copy of the game and the developer's store server.¹¹⁰ Without access to purchase DLC, the pirated game is rendered largely worthless. Infringement, then, becomes just another way of getting the game developers' *real* product — DLC — in front of more potential customers.

The potential network effects from an enhanced user base — one facilitated, in part, by monetized infringement — is hard to overstate. The entire business model behind “software as a service” (“SaaS”), for example, depends on lots of installations at low- to no-cost, followed by the sale of upgrades and premium versions once a user (and a user's network) has become dependent upon the product.¹¹¹ The file-hosting service Dropbox, for example, is free up to two gigabytes. Once users exceed the free allotment, they can upgrade to Dropbox Plus (two terabytes for \$9.99/month) or Dropbox Professional (three terabytes for \$16.58/month).¹¹²

Before SaaS, there was piracy as a means of competition suppression: At first, Microsoft tolerated rampant piracy of its operating system (“OS”) in China because, as then-CEO Bill Gates famously said, “As long as they're going to steal [software], we want them to steal ours.”¹¹³ Today, the company actively rewards pirates by offering upgrades of all outdated Microsoft operating systems — legitimate and pirated — to the latest version for free. Why? Because “Microsoft is making a strategic play to get as many users hooked on the Windows 10 platform as possible. . . . The more users Microsoft gets now, the more services it can sell downstream — and it's hoping even pirates can be flipped into paying customers.”¹¹⁴

¹¹⁰ See, e.g., Robert Earl Wells III, *What is DLC in Gaming and How Does it Work?*, LIFEWIRE (Jan. 22, 2020), <https://www.lifewire.com/what-is-dlc-in-gaming-how-does-it-work-4707377#:~:text=The%20inside%20scoop%20on%20downloadable%20content&text=Downloadable%20content%2C%20or%20DLC%2C%20is,DLC%20to%20make%20a%20profit> [<https://perma.cc/FS2L-6RSF>] (explaining the process of purchasing DLC).

¹¹¹ See, e.g., Claire Brenner, *What is SaaS? A Software-as-a-Service Guide*, LEARNING HUB (Apr. 16, 2018), <https://learn.g2.com/what-is-saas#what-is-saas> [<https://perma.cc/5GRG-TX2Z>] (describing Business to Consumer SaaS business model).

¹¹² *Choose Your Dropbox Personal Plan*, DROPBOX, <https://www.dropbox.com/individual> (last visited Jul. 6, 2020) [<https://perma.cc/75Q9-H4R3>].

¹¹³ Gates, *Buffett a Bit Bearish*, CNET (July 2, 1998, 5:00 AM PT), <https://www.cnet.com/news/gates-buffett-a-bit-bearish/> [<https://perma.cc/8U87-AH3Q>].

¹¹⁴ Dan Kedney, *Here's Why Microsoft Is Giving Pirates the Next Windows for Free*, TIME (Mar. 20, 2015, 1:06 PM EDT), <https://time.com/3749434/microsoft-windows-10-pirates-free/> [<https://perma.cc/PZ4X-US9Z>].

2. Remedial Infringement

This section presents an example of cost savings accomplished by affirmatively encouraging infringement as the lesser of two evils. In other words, I would rather not have a bunch of noisy birds squawking on the tree outside my bedroom window every morning, but since I've come to accept that they will be there no matter what I do, I can at least entice them to the side of the tree farthest from where I park my car (and so avoid a barrage of bird droppings) by placing a bird feeder there. This Essay refers to this as encouraging "remedial infringement."

The remedial approach is taken by some video game developers for whom piracy is not the only — nor, importantly, the worst — problem. For these rightsholders, so-called "gray market resellers" present the greatest challenge. Gray market resellers resell "keys" used for downloading video games on platforms such as Steam,¹¹⁵ an online video game store where users can also play with other gamers, and even create their own games. Gray market resellers typically resell keys sent promotionally (for example, to "influencers" in hopes of social media promotion), or purchased from regions where the game is sold cheaper.¹¹⁶

One of the most notorious gray market resellers is a company called G2A. G2A calls itself "the world's largest marketplace for digital products."¹¹⁷ Video game developers call them a pain in the neck. In addition to not making any money on the resale of game keys, developers say that fake and broken keys cost them tons of money in customer service efforts — so much so, that they've begun encouraging prospective reseller clients to pirate their games instead. Rami Ismail, co-founder of independent game developer Vlambeer, recently urged, "If you can't afford or don't want to buy our games full-price, please pirate them rather than buying them from a key reseller. These sites cost

¹¹⁵ *Store*, STEAM, <https://store.steampowered.com/> (last visited Jan. 10, 2020) [<https://perma.cc/LH2R-DCER>].

¹¹⁶ See, e.g., Wes Fenlon & Tyler Wilde, *PC Game Storefronts Compared: What You Need to Know About Retailers and Resellers*, PC GAMER (July 12, 2019), <https://www.pcgamer.com/pc-game-storefronts-compared-what-you-need-to-know-about-retailers-and-resellers/> [<https://perma.cc/AA4N-C2V2>] (describing various methods of obtaining keys).

¹¹⁷ *Marketplace*, G2A, <https://www.g2a.co/what-is-g2a/marketplace/> (last visited Jan. 10, 2020) [<https://perma.cc/5VAT-SEDF>].

us so much potential dev time in customer service, investigating fake key requests, figuring out credit card chargebacks, and more.”¹¹⁸



Rami Ismail ✓
@tha_rami



If you can't afford or don't want to buy our games full-price, please pirate them rather than buying them from a key reseller. These sites cost us so much potential dev time in customer service, investigating fake key requests, figuring out credit card chargebacks, and more. [twitter.com/RaveofRavendale...](https://twitter.com/RaveofRavendale)

Mike Rose @RaveofRavendale

In the latest episode of Fuck G2A:

G2A has taken out sponsored ads on Google, which mean that when you search for our games, you get G2A popping up above our own links — and we make zero money on our games if people buy through the ads.

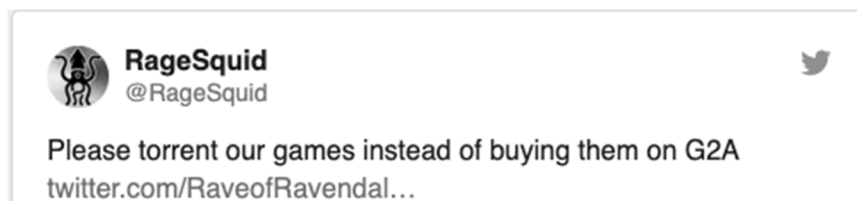
And when you try to turn their ads off...

Ismail is far from the only game developer to express this sentiment. Joining him in encouraging infringement of their copyrighted games are the likes of Mike Rose, founder of game developer No More Robots, who similarly pleaded, “Please, if you’re going to buy a game from G2A, just pirate it instead! Genuinely! Devs don’t see a penny either way, so we’d much rather G2A didn’t see money either.”¹¹⁹ Game developer Squid Games has likewise stated, “Please torrent our games instead of buying them on G2A.”¹²⁰

¹¹⁸ Fraser Brown, *Developers Tell People to Pirate Their Games Instead of Using G2A*, PC GAMER (July 1, 2019), <https://www.pcgamer.com/developers-tell-people-to-pirate-their-games-instead-of-using-g2a/> [<https://perma.cc/SE2Q-H6R7>].

¹¹⁹ *Id.*

¹²⁰ *Id.*



In other words, if they're not going to see any money anyway, these rightsholders would prefer to at least not incur additional customer service expenses. The best way to minimize those expenses, they've found, is to shut down the key resellers by encouraging prospective secondary key buyers to simply infringe instead. After all, a consumer who thinks they've purchased a legitimate game key is likely to feel entitled to complain when something goes wrong. Pirates, on the other hand, are notoriously low maintenance.

3. Promotional Infringement

Finally, some private rightsholders utilize (actual and prospective) infringement as a form of valuable promotional benefit. The subsections that follow describe examples of what is herein called “promotional infringement” in each of the music, film/television, and publishing industries. Interestingly, this type of infringement is most likely to be monetized by either rightsholders with few resources (such that they cannot otherwise afford the marketing this promotion brings), or rightsholders with abundant resources (but for whom this brand of promotion is not something that can be bought).

a. Music

Streaming services like YouTube and Vimeo are flooded with so-called “fan vids” — DIY music videos (of both the fair use and non-fair use varieties) that sometimes surpass official videos in popularity. In some cases, these videos are taken down by rightsholders. In other cases, rightsholders allow, and sometimes even promote, these infringing fan vids. When Polish film student Ivan Grbin made a fan vid for Crystal Castles' song “Plague” using footage from Andrzej Zulawski's 1981 psychological thriller *Possession*,¹²¹ the group's manager reached out to Grbin asking if he'd be willing to cut the footage so they could use it as their official music video for the song. The artists then posted the fan vid to their Facebook page, and sent the link to

¹²¹ Ivan Grbin, *Crystal Castles “PLAGUE” Video*, VIMEO (2014), <https://vimeo.com/89492388> [<https://perma.cc/QPJ5-X8NZ>].

publicists. Ironically, a bot eventually took the video down for copyright infringement. The artists have since reinstated it.¹²² Interestingly, director Andrzej Zulawski has been similarly copacetic about the unlicensed use of his footage.¹²³

Rapper Danny Brown had a similar reaction when Brooklyn-based graphic designer Steven Menegozzi posted a video for Brown's hit song "Grown Up" using Fisher Price toy sets.¹²⁴ According to Menegozzi, "[b]efore I started making anything, I spent a lot of time blocking out shots and relating them to the song's lyrics. And since 3D takes so long, I had a lot of time to improve and add things to the video. Danny Brown actually tweeted the video. I'm glad he saw it and liked it."¹²⁵

Likewise, when two members of Chinese boy group WayV released a choreographed video of recording artist Khalid's track with Billie Eilish, "lovely," Khalid praised and retweeted it:

¹²² Luis Muñoz, *Introducing the Amateur Director Behind Fan-Made Videos for Danny Brown, Flying Lotus and More*, FACT MAGAZINE (May 15, 2015), <https://www.factmag.com/2015/05/15/the-webs-best-fan-made-music-videos-flying-lotus-danny-brown-aphex-twin/> [<https://perma.cc/Z7EM-SXNU>].

¹²³ *Id.*

¹²⁴ Steven Menegozzi, *Danny Brown – Grown Up*, VIMEO (2015), <https://vimeo.com/104376798> [<https://perma.cc/2R62-QU2Y>].

¹²⁵ Muñoz, *supra* note 122.



These fans used the music without a license, and posted it online without permission.¹²⁶ They credit Khalid and Eilish in the video's title, such that their infringement (if it is) is likely willful. Under extant copyright law, Khalid and his label could have the video taken down, and Ten and Winwin could be liable for up to \$150,000 in statutory damages.¹²⁷ Instead, the artist gifted them nearly 100,000 likes and 50,000 retweets,¹²⁸ inarguably encouraging their efforts, and those of fans like them.

Why would a rightsholder not only refrain from enforcing their statutory rights, but also potentially encourage further infringement in this way? The answer is simple: free and effective promotion for the

¹²⁶ The original post to YouTube may well have been covered by Content ID's real-time license, but all subsequent downloads and reposts of the video to various platforms and social media networks, group texts and subreddits, would not be.

¹²⁷ See 17 U.S.C. § 504(c)(2) (2018).

¹²⁸ See WayV, *[Rainbow V] TEN X WINWIN Choreography : Lovely (Billie Eilish, Khalid) (Ring and Portrait Remix)*, YOUTUBE (Apr. 8, 2019), <https://www.youtube.com/watch?v=8ovHSQwp1n0> [<https://perma.cc/QZM7-BK52>].

underlying work. Khalid and his label did not have to spend any money making, producing, or editing the fan video. They pay nothing to YouTube to host the video (and indeed, under Content ID, can even collect advertising revenue from it). The video has over twelve million views.¹²⁹ While professionally produced music videos can cost anywhere from hundreds of thousands to seven digits to produce, Ten and Winwin's video cost Khalid and his label nothing beyond foregoing a potential maximum payout of only \$150,000, less attorneys' fees and bad press for suing fans over an indisputably creative and successful video.¹³⁰

b. Film & Television

In 2005, television studio Home Box Office ("HBO") sought to fight back against torrent sites by uploading *en masse* bogus and/or malfunctioning files of its hit show *Rome*.¹³¹ Even a user with a download client capable of detecting the junk files could be significantly stalled — and often thwarted — in their attempt to illegally download episodes of the show. In some cases, corrupt torrent files were known to destroy a downloader's hard drive; in other cases, the inability to tell a good from a corrupt file resulted in a longer, more complicated search-and-download process. If nothing else, HBO's "torrent poisoning" made piracy of its show more onerous, and so less attractive.¹³²

Seven years later, in 2012, HBO's hit show *Game of Thrones* was named the most pirated show of the year,¹³³ with somewhere between 3.7 and 4.2 million torrents.¹³⁴ On an investors' call in 2013, Jeff

¹²⁹ *Id.*

¹³⁰ It's worth noting that, despite the arguable cost savings and promotional advantages accorded to both Khalid and his record label in this example, the label is most likely the rightsholder, not Khalid (who most likely has assigned his rights to the label under a recording contract). This is important because the interests of creators and intermediary rightsholders can — and often do — diverge. In such a case, the encouragement of infringement by a creator who is not a rightsholder might be viewed as a means for the artist to control downstream uses despite copyright law's assumption that rightsholders' interests should dominate.

¹³¹ Nat Torkington, *HBO Attacking BitTorrent*, RADAR (Oct. 4, 2005), <http://radar.oreilly.com/2005/10/hbo-attacking-bittorrent.html> [<https://perma.cc/UKE2-FP2J>].

¹³² *See id.*

¹³³ Adi Robertson, *High 'Game of Thrones' Piracy is 'Better Than an Emmy,' Says Time Warner CEO*, VERGE (Aug. 8, 2013, 3:44 PM EDT), <https://www.theverge.com/2013/8/8/4602764/game-of-thrones-piracy-better-than-an-emmy-says-time-warner-ceo> [<https://perma.cc/C6T4-73HY>].

¹³⁴ Ernesto Van der Sar, *Game of Thrones Most Pirated TV-Show of 2012*, TORRENT FREAK (Dec. 23, 2012), <https://torrentfreak.com/game-of-thrones-most-pirated-tv->

Bewkes, then-CEO of HBO's parent company Time Warner, bragged about the show's illegal downloads: "If you go around the world, I think you're right, that 'Game of Thrones' is the most pirated show in the world. . . . Now that's better than an Emmy."¹³⁵ Why the change of heart? According to Bewkes, much of the show's popularity is owed to immense Internet buzz, something that illegal downloads are very good at generating.¹³⁶

HBO isn't the only Hollywood player to embrace infringement. The sudden and complete shutdown of Megaupload — the hugely popular, global torrent site — by the U.S. Justice Department in 2012¹³⁷ offers a neat natural experiment for observing the effects, both good and bad, of mass infringement. Many content owners were quick to highlight the increased traffic enjoyed by legal download sites following the shutdown.¹³⁸ But there was another, unexpected and remarkable effect that has received far less attention: worldwide box office receipts for medium-budget films went down, suggesting that for films without a huge marketing budget, "file sharing might be the most economical method of advertising and market research available."¹³⁹ After all, "[t]he word-of-mouth effect that particularly helps a smaller-budget film can't begin until someone sees it, and that often happens through an illegitimate download from a 'torrent' site."¹⁴⁰

Despite being the most frequently and widely discussed, torrenting is far from the only form of infringement facing film and television owners. At least as common is the practice of sharing subscriber logins

show-of-2012-121223/ [https://perma.cc/R99P-G7BB]; Ernesto Van der Sar, *Game of Thrones Crowned Most Pirated TV-Show of the Season*, TORRENT FREAK (June 8, 2012), https://torrentfreak.com/game-of-thrones-most-pirated-tv-show-of-the-season-120608/ [https://perma.cc/K5NR-G6ZR].

¹³⁵ Caitlin Dewey, 'Game of Thrones' Exec Says Piracy is 'Better Than an Emmy.' *He Has a Point*, WASH. POST (Aug. 9, 2013, 8:54 AM PDT), https://www.washingtonpost.com/news/the-switch/wp/2013/08/09/game-of-thrones-exec-says-piracy-is-better-than-an-emma-he-has-a-point/ [https://perma.cc/JQ7X-S4N5].

¹³⁶ See *id.*

¹³⁷ See, e.g., Eriq Gardner, *U.S. Authorities Shut Down Megaupload for Piracy*, HOLLYWOOD REPORTER (Jan. 19, 2012, 2:49 PM PT), https://www.hollywoodreporter.com/thr-esq/megaupload-shut-down-piracy-283397 [https://perma.cc/B6YG-KT6Z].

¹³⁸ See, e.g., Brett Danaher & Michael D. Smith, *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales*, 33 INT'L J. INDUST. ORG. 1, 1 (2014) ("[T]he shutdown of Megaupload and its associated sites caused digital revenues for three major motion picture studios to increase by 6.5–8.5%.").

¹³⁹ Jake Rossen, *How Hollywood Can Capitalize on Piracy*, MIT TECH. REV. (Oct. 17, 2013), https://www.technologyreview.com/s/520336/how-hollywood-can-capitalize-on-piracy/ [https://perma.cc/7MXK-3RR9].

¹⁴⁰ *Id.*

in contravention of subscription terms. For example, HBO's streaming service, HBO NOW, allows different people in the same household to log on simultaneously to watch different programming.¹⁴¹ Ostensibly, this might allow Mom to watch the news upstairs, Dad to watch a thriller in the basement, and little Sue to watch Sesame Street in the living room, all at the same time. In the real world, subscribers frequently share logins with friends outside of their immediate families/physical households. The practice appears to be a well-known secret:



Even if we argue that the subscriber sharing their password is not infringing, but rather breaching their contract with the platform, the non-subscribing user of the password is inarguably infringing as they lack any license with the platform to be breached. If HBO and Netflix wanted to stop this infringement, they could restrict accounts to a single IP address, but they don't. Why not? Because "[p]eople sharing [cable TV] subscriptions, running wires down the backs of apartment buildings. Our experience is that it leads to more paying subscribers."¹⁴² And when reports surface that platforms are going to begin "cracking down," spokespersons are quick to point out that the companies are

¹⁴¹ *Help Center*, HBO NOW, <http://help.hbonow.com/Answer/Detail/27> (last visited Jan. 10, 2020) [<https://perma.cc/7D8A-2G8L>] ("[I]n most cases, members of your household can sign in to HBO NOW on different devices, and watch different shows at the same time. Your HBO NOW email and password should not be shared with anyone outside your household. For security reasons, the number of simultaneous streams is limited.")

¹⁴² Rossen, *supra* note 139.

“not involved in any enforcement relating to casual password sharing among friends and relatives’ . . . [but instead are focused] on ‘theft of creative works on a massive scale,’ mostly [by] those who operate piracy sites or apps.”¹⁴³ Again, the idea is that a potential customer has to try a service out in order to get hooked and, hopefully, converted to a paid subscription.

Another example of monetizing infringement in the film and television context bears mention, as it forms the basis for how most such content is consumed today. In 2018, Netflix produced and released eighty films. That is two films *per week*, in addition to 700 original television series.¹⁴⁴ By way of comparison, in the same year, two of the world’s largest movie studios, Disney and Warner Bros., released twelve and twenty films, respectively.¹⁴⁵ NBC launched thirteen new television series, five of which were canceled.¹⁴⁶

In addition to original programming, Netflix also attracts viewers by purchasing rights to shows that it believes will be popular with its subscribers. And how do they decide which shows to buy? According to Netflix VP of Content Acquisition, Kelly Merryman, “we look at what does well on piracy sites.”¹⁴⁷ It follows, then, that creators of shows want their pirate numbers to be high when Netflix goes poking around, in hopes that they will get picked up by the country’s largest subscription streaming service.¹⁴⁸ In exchange, Netflix suggests that once it enters a market, piracy decreases: “Netflix is so much easier than

¹⁴³ Antonio Villas-Boas, *Big Streaming Companies like Netflix and HBO Are Looking to Crack Down on Freeloaders Who Use Other People’s Passwords and Accounts*, BUSINESS INSIDER (Nov. 11, 2019, 8:19 AM), <https://www.businessinsider.com/netflix-hbo-streaming-companies-look-to-prevent-account-password-sharing-2019-11> [<https://perma.cc/9HMM-8X4D>]. Even the title of this article is misleading, as the text itself makes clear.

¹⁴⁴ Todd Spangler, *Netflix Eyeing Total of About 700 Original Series in 2018*, VARIETY (Feb. 27, 2018, 10:48 AM PT), <https://variety.com/2018/digital/news/netflix-700-original-series-2018-1202711940/> [<https://perma.cc/DC7Y-TZ47>].

¹⁴⁵ Graeme Virtue, *Bigger Than the Big Screen: Can Netflix Conquer Cinema?*, GUARDIAN (Dec. 20, 2017, 6:00 AM EST), <https://www.theguardian.com/film/filmblog/2017/dec/20/netflix-streaming-films-cinema-hollywood-bright-will-smith> [<https://perma.cc/8MKH-44YL>].

¹⁴⁶ See Jason Dietz, *2018–19 TV Season Scorecard*, METACRITIC (June 1, 2018), <https://www.metacritic.com/feature/tv-renewal-scorecard-2018-2019-season> [<https://perma.cc/VG7B-7RD7>].

¹⁴⁷ Todd Spangler, *How Netflix Uses Piracy to Pick Its Programming*, VARIETY (Sept. 14, 2013, 9:54 AM PT), <https://variety.com/2013/digital/news/how-netflix-uses-piracy-to-pick-its-programming-1200611539/> [<https://perma.cc/C8UR-WCM6>].

¹⁴⁸ As of 2018, Netflix held a 51% market share. See Mansoor Iqbal, *Netflix Revenue and Usage Statistics*, BUSINESS APPS (June 23, 2020), <https://www.businessofapps.com/data/netflix-statistics/> [<https://perma.cc/FQQ7-ZC6Y>].

torrenting. You don't have to deal with files, you don't have to download them and move them around. You just click and watch."¹⁴⁹ When Netflix first entered Canada, for example, BitTorrent traffic dropped 50%.¹⁵⁰ Even with this information, some shows, like Showtime's *Dexter*, refuse to license to Netflix at any price. This is because they are interested in driving demand and increasing subscriber rates — in this example, for Showtime's proprietary streaming service — *not* in curbing infringement.¹⁵¹

c. *Publishing*

E-book marketplaces like Amazon have taken a similar “let-them-infringe-and-they-will-come” approach. As with music, many e-book sellers have dropped, or effectively dropped, digital rights management (“DRM”) as an anti-piracy tool, purportedly because they'd rather get the books out there than not. After all, word-of-mouth leads to sales. According to publisher Tim O'Reilly, “Amazon is effectively doing that [ignoring their own DRM restrictions] now with the Kindle. They're not counting. I've switched between three different Android phones. I'm on my second Kindle, my second iPad. I have ten devices registered. It would be trivial for me to give my Kindle account credentials to other people in my family or good friends and have everything I buy on Kindle sent to one of them. . . . If people wanted 10,000 pirated copies of a book, the publisher and the author would be very, very well off. If 10,000 people are willing to pirate it, there's a very large number willing to pay for it.”¹⁵² Again, even if we argue that an individual privately copying an e-book from one of their devices onto another of their devices is either a breach of contract,¹⁵³ or permitted under *Sony v.*

¹⁴⁹ Ernesto Van der Sar, *Netflix Uses Pirate Sites to Determine What Shows to Buy*, TORRENT FREAK (Sept. 14, 2013), <https://torrentfreak.com/netflix-uses-pirate-sites-to-determine-what-shows-to-buy-130914/> [https://perma.cc/W6GS-LVAB].

¹⁵⁰ *Id.*

¹⁵¹ See Michael Liedtke, *Gaps in Netflix Streaming Service Options Likely to Persist*, MERCURY NEWS (Apr. 9, 2012, 7:13 AM), <https://www.mercurynews.com/2012/04/09/gaps-in-netflix-streaming-service-options-likely-to-persist/> [https://perma.cc/GA38-GSES].

¹⁵² Jon Bruner, *Tim O'Reilly on Piracy, Tinkering, and the Future of the Book*, FORBES (Mar. 25, 2011, 11:30 AM EDT), <https://www.forbes.com/sites/jonbruner/2011/03/25/tim-oreilly-on-piracy-tinkering-and-the-future-of-the-book/#1d3e277c3b33> [https://perma.cc/QP49-WT85].

¹⁵³ Indeed, many of these platforms' contracts do not convey actual ownership to the “purchaser” of the content, but rather merely convey a license. See AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 2* (MIT Press 2016).

Universal,¹⁵⁴ the same cannot be said of an individual privately copying an e-book from one of their devices onto the device of a friend or co-worker.

As journalist and author Cory Doctorow puts it: “it’s hard to turn fame into money in the arts, [but] it’s impossible to turn obscurity into money in the arts . . . It doesn’t matter how you plan on making your money . . . you won’t get the chance unless people have heard of your stuff.”¹⁵⁵ Infringement, it turns out, is a powerful promotional tool. In other words, infringement can be monetized, a possibility that is not recognized under the current statute.

II. THE CASE FOR INFRINGEMENT IN COPYRIGHT

Part I described a series of examples in which rightsholders monetize infringement of their copyrighted works. In so doing, these rightsholders forego the possibility of equitable and/or monetary remedies that might be earned through an infringement suit. This Part considers several reasons why rightsholders might act in a manner that appears, at least by the conventional statutory account, to run counter to their best interests.

A. Statutory Fit and Price Discrimination

One explanation for the monetization of infringement might have to do with the nature of copyright law itself. As is characteristic of statutory licenses generally, copyright’s compulsory licenses are one-size-fits-all. This means they are only differentiated, when at all, by licensee type,¹⁵⁶ but not by market valuation (as held by user, or by product/platform) — i.e., product differentiation — nor by nature or type of use — price differentiation. For example, Amazon Music pays the same streaming rate under Section 115 as Spotify does, despite the fact that Spotify relies entirely upon music streaming as its business model, while Amazon uses its music service primarily as a loss leader to

¹⁵⁴ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (holding non-commercial uses of copyrighted works to a higher standard of harm in order to show infringement).

¹⁵⁵ Cory Doctorow, *The Good, the Bad, and the Ugly: Piracy, DRM, and the E-book Issue*, SIMON FRASER UNIV. PUB. (Jan. 18, 2013), <https://publishing.sfu.ca/2013/01/the-good-the-bad-and-the-ugly-piracy-drm-and-the-e-book-issue/> [https://perma.cc/9SGS-N5PV].

¹⁵⁶ For example, Section 114 differentiates between interactive and noninteractive services. See 17 U.S.C. § 114(d)(2)(A)(i) (2018).

sell Amazon Prime memberships.¹⁵⁷ Likewise, Spotify pays the same royalty to a composer when a song is streamed by a paying user as it does when a song is streamed by a “freemium” (or, ad-sponsored) user.¹⁵⁸

The lack of both price and product differentiation under a statutory license can lead to pricing that neither reflects, nor responds to, the market or consumer preferences. As a result, some consumers might be willing to pay more, or could negotiate to pay less, for a particular piece, or use, of content. This inefficiency may reduce incentives for the creation and production of content that satisfies consumer demand.¹⁵⁹ For example, the developers monetizing piracy of their video games by selling pirates DLC have (at least) two price tiers: one for full-paying customers (who buy both the game and the DLC) and one for pirates (who don’t buy the game, but do buy the DLC). Notably, these developers would prefer a user pirate a game than buy it new.¹⁶⁰ To understand why, consider a user with an endowment of \$100 to spend on video games: They can buy a used game for \$30 (money the developer never sees), leaving them \$70 to spend on DLC (money that goes to the developer). Alternately, they can pirate the game for \$0, leaving them \$100 to spend on the DLC (money that goes to the developer). In this way, piracy (and its subsequent monetization) of their games is better business for the developer. It may also lead to higher overall utility for the user, who gets to play more levels, buy more lives, etc.¹⁶¹ Likewise, Netflix has two types of customers: paying and soon-to-be-paying. The former pays more than the latter, of course, but this needn’t always be the case. With plans to continue releasing original content, Netflix allows password-sharing as part of its plan to monetize that infringement.¹⁶²

¹⁵⁷ See *id.* § 115. The measure of intensity, or import, of use is often referred to as “percent of revenue” in industry parlance.

¹⁵⁸ See *id.*

¹⁵⁹ For more on the impact of price and product differentiation (and the lack thereof) on content and markets, see García, *Penalty Default*, *supra* note 17, at 1142-45.

¹⁶⁰ See, e.g., Jon Devine, *Pre-Owned Games Are Costing the Industry More Than Piracy*, BUSINESS INSIDER (June 29, 2012, 10:54 AM), <https://www.businessinsider.com/pre-owned-games-are-costing-the-industry-more-than-piracy-2012-6> [<https://perma.cc/SZ4C-87CQ>] (“Developers, such as Lionhead, have been claiming that second hand sales have actually cost them more than piracy.”).

¹⁶¹ Indeed, some game franchises — including the very successful Fortnite — don’t sell the game at all. Instead, they rely entirely on the DLC model described, and eliminate “used competition” by eliminating used copies altogether.

¹⁶² See Jessica Bursztynsky, *Netflix Price Hike May Spur Growth in Illegal Password Sharing*, CNBC (Jan. 31, 2019, 8:30 AM EST), <https://www.cnbc.com/2019/01/30/>

In their work on government waiver of statutory requirements, David Barron and Todd Rakoff suggest that an increase in professional lobbying has, in some cases, led to oddly specific and narrow statutes: “It is [] neither new nor news that even general federal statutes have often contained particularistic provisions that seem, in terms of scale, out of place. These have often been explained as the results of a yielding by Congress to special interests whose cases have been pushed by particular legislators. We suspect . . . that the increased specificity of many modern statutes can be in part explained in the same way.”¹⁶³

Unfortunately, the narrower and more specific a statute is, the less likely it is to apply evenly and well to differently situated parties. Writing about the drafting of the current Copyright Act, Jessica Litman notes that “most of the statutory language [of the 1976 Copyright Act] was not drafted by members of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines. In some cases, affected parties agreed upon language, which was then adopted by Congress, while disagreeing about what the language meant.”¹⁶⁴ In other work, she describes “the political power of copyright lobbies, aided by members of Congress eager to be glamoured by famous entertainers and willing to be persuaded that the only fundamental problem with the United States economy is widespread piracy of American creations,”¹⁶⁵ as leading to legislative capture.

For example, after the passage of the Copyright Term Extension Act, which extended copyright’s term by twenty years, Herbert Hovenkamp suggested that:

[I]t is hard to come up with any serious argument that retroactive extensions of old copyrights serve the constitutional purpose of promoting the progress of the useful arts. Those inventions and ideas have already been created. The Copyright Term Extension Act shows us Congress at its worst, passing

[netflix-price-hike-may-spur-growth-in-illegal-password-sharing.html \[https://perma.cc/V3SP-TFE4\]](https://perma.cc/V3SP-TFE4) (“[A]s content producers . . . companies benefit from maximum consumer awareness of (and demand for) their original programming . . . Those original programs are what is driving uptake of consumer subscriptions.”).

¹⁶³ David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 304-05 (2013) (citations omitted).

¹⁶⁴ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860-61 (1987) [hereinafter *Compromise*].

¹⁶⁵ Jessica D. Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 39 (2010).

legislation at the behest of power interest groups at society's expense.¹⁶⁶

William Patry, former counsel to the Subcommittee on Intellectual Property, described his congressional experience similarly:

Copyright interest groups hold fundraisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report. In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report. With the 104th Congress we have, I believe, reached a point where legislative history must be ignored because not even the hands of congressional staff have touched committee reports.¹⁶⁷

The degree of specificity resulting from a heavily lobbied process can lead to a body of law — like copyright — that is ripe for defection by those unable to participate in the legislative process (i.e., consumers and independent creators). In his work on user-generated content, Ed Lee describes the resulting informal copyright practices as gap fillers: “While formal licenses allow the parties themselves to fill the gaps left open by formal copyright law by private ordering, often the transaction costs associated with formal licenses are far too high for any negotiation to occur[.]”¹⁶⁸ This defection, *en masse* and over time, has led even well-connected industry interests to respond in kind. After all, copyright law affords certain rights, but it does not guarantee income from those rights.

B. Preference Endogeneity

Defection from a regime of statutory protection — in this case, protection against copyright infringement — suggests a divergence in either ideology or goals on the part of the protected parties — in this

¹⁶⁶ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 250 (Harvard Univ. Press 2008).

¹⁶⁷ William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 *CARDOZO ARTS & ENT. L.J.* 139, 141 (1996).

¹⁶⁸ Edward Lee, *Warming Up to User-Generated Content*, 2008 *U. ILL. L. REV.* 1459, 1460-61 (2008).

case, rightsholders. The same homogenous perspective adopted by copyright's statutory licenses is reflected in copyright policy's assumption of uniform, exogenous preferences on the part of rightsholders; namely, the assumption that all rightsholders view unauthorized copying as bad, and so don't want to be infringed.

As the case studies in Part I.B *supra* showed, however, rightsholders' preferences around infringement are actually both heterogeneous and endogenous: Universal Music sought to take down user Lenz's allegedly unauthorized YouTube video, while Warp Records promoted a user's unauthorized fan vid.¹⁶⁹ In some cases, a rightsholder's private preference may fluctuate over time: Electronic Arts spent many years and lots of money fighting game pirates before eventually flipping to a DLC business model that embraces infringement of their games.¹⁷⁰ Rightsholder preferences may even change from copyrighted work to copyrighted work. HBO flooded torrent sites with corrupted copies of *Rome*, but bragged to stockholders about *Game of Thrones*' popularity on those same sites.¹⁷¹

Reliance on a standard of uniform, exogenous preferences results in a statutory regime ill-suited to parties who differ from the assumed preference. I argue this is exactly what has happened in the copyright context, and helps to explain not only monetized infringement, but other tensions in copyright policy as well. For example, the first sale doctrine in copyright assumes that consumers don't want to be held to paying the rights owner a royalty upon resale of a work, and so allows a copyrighted work to be resold without permission or payment to the rightsholder.¹⁷² New ventures like UppstArt, which track art upon resale and automatically kick a royalty back to the rights owner, challenge this notion as they continue to attract buyers who like the idea of supporting art and artists.¹⁷³

Similarly, Section 115¹⁷⁴ — the section of the statute that requires terrestrial radio stations to pay a royalty to songwriters, but not to owners of sound recordings — purports to understand that owners of sound recordings view radio play as valuable promotion such that no

¹⁶⁹ See *supra* notes 1–3 and accompanying text.

¹⁷⁰ See *supra* Part I.B.1.b.

¹⁷¹ See *supra* Part I.B.3.b.

¹⁷² 17 U.S.C. § 109 (2018).

¹⁷³ UPPSTART, <https://uppstart.io/> (last visited Jan. 11, 2020) [<https://perma.cc/HUD8-8ZD5>]. For more on the potential impact of UppstArt's business model and its interaction with statutory law, see Kristelia A. Garcia, *Technological Rights Accretion*, 36 YALE J. ON REG.: NOTICE & COMMENT (2018).

¹⁷⁴ 17 U.S.C. § 115 (2018).

payment is required, or perhaps that these owners will “make up the difference” with higher royalties on the digital streaming side.¹⁷⁵ Private deals like the one entered into between Clear Channel Media and Big Machine Records, in which the media conglomerate agrees to pay the record label a terrestrial performance royalty anytime it plays a Taylor Swift song, challenge this notion.¹⁷⁶ So too do recent proposals like the Ask Musicians For Music (“AM-FM”) Act, which proposes a terrestrial performance right for sound recordings, and which has the backing of powerful rightsholders groups like the Recording Industry Association of America (“RIAA”) and the National Music Publishers Association (“NMPA”).¹⁷⁷

It’s worth noting, too, that in the same way enforcement can be performative, so too can nonenforcement be.¹⁷⁸ An artist, like Danny Brown, who reaches out to compliment a fan on his DIY video, is

¹⁷⁵ Statutory performance royalties are higher for sound recordings than for musical compositions. For a fuller discussion of this phenomenon, see, for example, Kristelia A. García, *Facilitating Competition By Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 201-02 (2016) (“A digital music service like Spotify currently pays \$0.0052 per play to SoundExchange for the public performance rights to a sound recording, while paying only \$0.00052 per play — or one tenth of the rate paid to SoundExchange — to ASCAP for the same public performance rights to the underlying musical compositions. This disparity reflects a determination by Congress that the nature of the industries for sound recordings and musical compositions vary in material and substantial ways. For example, the overhead required to commission and record an album has traditionally outpaced the cost of signing a songwriter.”)

In a further effort to differentiate between the two rights, Congress included in the Digital Performance Right in Sound Recordings Act (DPSRA) a clause prohibiting the rate court from taking sound recording license rates into account when setting the rates for musical compositions. This congressional prohibition on the rate court, however, did not keep the major publishers from taking note. At the Pandora-ASCAP proceeding, Sony’s EVP of Business & Legal Affairs, Peter Brodsky, cited the ‘massive unfair disparity’ between what Pandora pays for sound recordings and what it pays for musical compositions as the principal reason for the company’s withdrawal from ASCAP: ‘It was the “differential” between the rates paid to the labels and the publishers that was the problem[.]’” (citations omitted).

¹⁷⁶ For more detail on this deal, see García, *Penalty Default*, *supra* note 17, at 1136-56.

¹⁷⁷ Claudia Rosenbaum & Ed Christman, *Congress Introduces AM-FM Act to Get Artists & Labels Paid for Radio Play*, BILLBOARD (Nov. 21, 2019), <https://www.billboard.com/articles/business/legal-and-management/8544466/am-fm-act-congress-artists-labels-paid-radio> [https://perma.cc/ZR78-4DN8]. The bills’ backers, Senator Marsha Blackburn (R-TN) Congressman Jerrold Nadler (D-NY), previously supported the (ultimately unsuccessful) Fair Play for Fair Pay Act in both 2015 and 2017.

¹⁷⁸ For more on how acts and words can be “performative,” see generally J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 6-7 (Oxford Univ. Press 1962), (explaining how words are performative in that they perform a “speech act”).

communicating that he values the fan (perhaps as much as he values the promotion). A video game developer who tweets out a plea that users pirate a game rather than buy a gray market key is communicating a compromise, a prioritization of cost savings over expenditure (especially since neither results in revenue). The failure to recognize preference endogeneity can lead rightsholders to act incongruously to statutory expectations, including by monetizing the very infringement they are assumed to disfavor.

C. Changed Circumstances

The speed and frequency with which technological innovations impact the distribution and consumption of copyrighted works make it very difficult for copyright law to keep up. Section 114's¹⁷⁹ rate-setting procedure is a good example of the intractability of the process. Under Section 804(b), rate-setting under Section 114 entails an extensive notice-and-comment period causing the process to begin two years prior to implementation.¹⁸⁰ Such timing makes it difficult, when not impossible, for the statute to respond efficiently to changes in the market. Indeed, the current Copyright Act was just over twenty years in the making, including countless negotiations between industry representatives, “repeated, lengthy subcommittee hearings,” “numerous executive sessions,” and “a flood of committee reports.”¹⁸¹

Technology isn't the only variable affecting copyright's ability to stay current. Ever-evolving business models (sometimes in response to technological change, sometimes not) are also a factor. The evolution of digital business models, for example, has had a profound impact on who and what the law is supposed to be acting upon. In the case of digital music, the shift from a business model focused on selling a *product* — namely, digital downloads (e.g., Apple's iTunes music service) — to selling a *service* — namely, curated streaming (e.g., Spotify) — took place over a remarkably short period of time,¹⁸² and

¹⁷⁹ 17 U.S.C. § 114 (2018).

¹⁸⁰ See *id.* § 804(b) (detailing how and when royalty rates are set).

¹⁸¹ Litman, *Compromise*, *supra* note 164, at 871.

¹⁸² Apple's iTunes launched in 2001. See, e.g., Kirk McElhearn, *15 Years of iTunes: A Look at Apple's Media App and its Influence on an Industry*, MACWORLD (Jan. 9, 2016, 3:00 AM PST), <https://www.macworld.com/article/3019878/15-years-of-itunes-a-look-at-apples-media-app-and-its-influence-on-an-industry.html> [<https://perma.cc/43AL-7H76>]. A mere seven years later, in 2008, Spotify launched in Sweden. *Company Info*, SPOTIFY, <https://newsroom.spotify.com/company-info/> (last visited Jul. 7, 2020) [<https://perma.cc/78XL-6DHD>].

enjoys a remarkably large share of the music-consuming market.¹⁸³ The same shift can be seen in the film and television industries — in which the focus moved from selling DVDs to selling streaming subscriptions (to Hulu, to Netflix, to HBOGo, to Disney+, etc.) — and in video games — in which many developers are no longer selling physical or digital games, but instead are selling a storefront of in-game purchases.¹⁸⁴

Changes in, or clarification of, copyright law is another explanation for changes in rightsholders' attitude toward prospective infringement. This is especially true for uses that might qualify as fair uses. A possible explanation, then, for Warp's differential treatment of the Aphex Twin fan video is that Warp's counsel read the Ninth Circuit's 2015 decision in *Lenz v. Universal*, which held that the Section 512 Safe Harbor "requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown notification."¹⁸⁵

In all of these instances, the rightsholders are no longer conferring *ownership* over a piece of content, but rather a *license to access* that content. Unlike the sale of a single CD, or a single MP3, the sale of a streaming subscription is a revenue source that keeps on giving. It also largely obviates the practical import (and consumer protections) of the first sale doctrine, as exemplified by the recent ReDigi litigation, in which the rightsholder argued, among other things, that the first sale doctrine didn't apply to MP3s, but only to physical goods.¹⁸⁶ Unfortunately, the law is not the only Johnny-come-lately in this scenario. Consumers have also occasionally found themselves ill-informed regarding the ramifications of the replacement of physical (or

¹⁸³ According to the RIAA's Mid-Year 2019 Revenue Report, streaming revenues made up 80% of total revenues from recorded music. RECORDING INDUS. ASS'N AM., MID-YEAR 2019 RIAA MUSIC REVENUES REPORT (2019), <https://www.riaa.com/wp-content/uploads/2019/09/Mid-Year-2019-RIAA-Music-Revenues-Report.pdf> [<https://perma.cc/BJ5P-LLQV>].

¹⁸⁴ See Kuchera, *supra* note 105.

¹⁸⁵ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016).

¹⁸⁶ While the district court agreed, the Second Circuit punted on this issue, finding "[t]he district court found that resales through ReDigi were infringing for two reasons. The first reason was that, in the course of ReDigi's transfer, the phonorecord has been reproduced in a manner that violates the Plaintiffs' exclusive control of reproduction under § 106(1); the second was that the digital files sold through ReDigi, being unlawful reproductions, are not subject to the resale right established by § 109(a), which applies solely to a 'particular . . . phonorecord . . . lawfully made.' 17 U.S.C. § 109(a). We agree with the first reason underlying the district court's finding of infringement. As that is a sufficient reason for affirmance of the judgment, we make no ruling on the district court's second reason." *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 656 (2d Cir. 2018).

digital) sales with a *licensing* business model. The controversy over Amazon's and Apple's use of "Buy Now" buttons (when in fact, nothing but temporary file access is being sold) is another example of this mismatch.¹⁸⁷

The inability of copyright law to respond in real time to changes in technology and consumer preferences can lead to a situation in which some rightsholders can do better by rejecting certain statutory protections, such as that against infringement. In short, "[a]n intellectual property owner can use a myriad of alternative business models to extract value from the free distribution of intellectual property."¹⁸⁸

D. Cost-Benefit Analysis

Ultimately, a rightsholder's decision whether or not to pursue a claim for copyright infringement is a cost-benefit analysis. Systems that monitor for possible copyright infringement are expensive; YouTube's Content ID system, for example, cost over \$100 million to develop¹⁸⁹ — a reasonable sum for YouTube, perhaps, but not for a fledgling start-up. The fact that YouTube nonetheless proceeded with the design and build out of a system to replace Section 512's transaction cost savings points unequivocally to an analysis in which the benefit (in this case, of prospectively infringing — and popular — videos around which advertising can be served) outweighs the cost.¹⁹⁰

Litigation is also expensive. Given the subjectivity of the fair use standard, suing for copyright infringement can be particularly uncertain

¹⁸⁷ See, e.g., Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 317 (2017) (presenting the "results of the first study of the impact of marketing language like the *Buy Now* button on the beliefs and behavior of digital media consumers").

¹⁸⁸ Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 24 (1997).

¹⁸⁹ Paul Sawers, *YouTube: We've Invested \$100 Million in Content ID and Paid over \$3 Billion to Rightsholders*, VENTURE BEAT (Nov. 7, 2018, 3:48 AM), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/> [<https://perma.cc/27CY-BV3C>].

¹⁹⁰ Justin Hughes has suggested an alternative interpretation for the development of Content ID: targeted advertising. As summarized in Sag, *Safe Harbors*, *supra* note 93, at 541: "Targeted advertising is based on a variety of user characteristics, but to the extent that YouTube based its targeting on who watches what, it would be hard to then disclaim knowledge of the same."

and unpredictable.¹⁹¹ Some rightsholders refrain from seeking relief for copyright infringement in a court of law, and instead may resort to various (and often successful) self-help tactics that cost less and promise a more reliable result.¹⁹² Or, as with the case studies in Part I *supra*, may elect to refrain from enforcement altogether.¹⁹³

In addition, and depending on the defendant, the ultimate payoff (if successful) may not really pay off. In the 2008 copyright infringement suit brought by the RIAA against file-sharer Jammie Thomas, for

¹⁹¹ See, e.g., PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1, at 12:3 (3d ed. 2005) (“[N]o copyright doctrine is less determinate than fair use.”); Michael W. Carroll, Fixing *Fair Use*, 85 N.C. L. REV. 1087, 1095 (2007) (noting that “the fair use doctrine produces significant *ex ante* uncertainty”); Joseph P. Liu, Two-Factor *Fair Use?*, 31 COLUM. J.L. & ARTS 571, 574-78 (2008) (proposing that fair use’s multifactor test makes it “notoriously difficult” to accurately predict the outcomes of an infringement suit). *But see* Matthew Sag, Predicting *Fair Use*, 73 OHIO ST. L.J. 47, 79-85 (2012) (challenging the conventional view that “fair use adjudication is blighted by unpredictability and doctrinal incoherence”); Pamela Samuelson, Unbundling *Fair Uses*, 77 FORDHAM L. REV. 2537, 2570 (2009) (suggesting that when users are “careful about how much they take from copyrighted works in relation to their purpose . . . productive uses are likely to be fair”). Notwithstanding these findings to the contrary, the popular notion of risk and the norm of risk-avoidance are still prominent. See, e.g., Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 69-71 (2014) (determining that the risk of very high statutory damages in copyright reinforces a norm of “if in doubt, leave it out”). In a new project, Justin Hughes proposes an alternate explanation for why some commentators can’t agree as to fair use’s predictability; namely: “When commentators talk about fair use being ‘stable [and] predictable,’ they are thinking of the fact patterns that are now handled under *de facto* rules already generated off §107; in those cases, the prior decisions are actually more important than the statutory fair use factors. When commentators speak of fair use being an unpredictable crap shoot, they are thinking of new fact patterns that have not yet been subsumed under a *de facto* rule and thereby require direct application of the §107 fair use standard.” Justin Hughes, *The Sub Rosa Rules of Copyright Fair Use*, 34 HARVARD J.L. TECH (forthcoming 2020) (manuscript at 5).

¹⁹² See Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1458-59 (2019) (describing how various rightsholders use self-help techniques to achieve most of the benefits they might through litigation, but at lower cost and with more certain outcome).

¹⁹³ The newly-proposed copyright small claims act, if ultimately signed into law, might reduce this cost, for better or for worse. The Copyright in Small-Claims Enforcement Act of 2019 (“CASE Act”), S.1273 (2019). For more on the potential benefits and drawbacks of a copyright small claims court, see, for example, Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689 (2018) (outlining scholarly concerns with the proposed implementation of a small claims procedure for copyright). *Cf.* Kevin Madigan, *CASE Act Set to Empower Creators and Impose Accountability*, CTR. FOR THE PROTECTION OF INTELL. PROP. (Apr. 2, 2018), <https://cpip.gmu.edu/2018/04/02/case-act-set-to-empower-creators-and-impose-accountability/> [https://perma.cc/2BQQ-395X] (arguing in favor of the CASE Act’s implementation).

example, an initial verdict of \$1.92 million in favor of plaintiffs was eventually reduced to \$222,000, and affirmed by the Eight Circuit.¹⁹⁴ This was *after* defendant Thomas rejected the RIAA's settlement offer of \$25,000.¹⁹⁵ As of this writing, the RIAA has received no payment from Ms. Thomas, who has publicly stated: "As I've said from the beginning, I do not have now, nor do I anticipate in the future, having \$220,000 to pay this . . . If they do decide to try and collect, I will file for bankruptcy as I have no other option . . . it is what it is."¹⁹⁶

When faced with these prospective costs, and relatively small upside, the benefits of monetizing infringement — be it in the form of revenue, cost savings, or valuable promotion — may win out for some rightsholders.

E. Enforcement Authority

Of the three branches of intellectual property — patent, trademark, and copyright — copyright is the only one that affords a rightsholder protection in the absence of any affirmative act requesting or confirming that such protection is desired. Unlike a patent, which must be applied for and granted,¹⁹⁷ the mere fixation of an expression in a tangible medium results in a copyright.¹⁹⁸ Unlike trademark registration, which requires use of the protected mark in commerce and renewal every ten years,¹⁹⁹ copyright law affords the same protection to both exploited and unexploited works.²⁰⁰ Since 1989, when the United States signed onto the Berne Convention, registration is not even required.²⁰¹ As such, a copyright that only the rightsholder knows about — but that anyone could potentially infringe — is entirely (and inexplicably) possible.

¹⁹⁴ *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 (8th Cir. 2012) (affirming reduced award); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

¹⁹⁵ See David Kravets, *Settlement Rejected in 'Shocking' RIAA File Sharing Verdict*, WIRED (Jan. 27, 2018, 2:47 PM), <https://www.wired.com/2010/01/settlement-rejected-in-shocking-riaa-file-sharing-verdict/> [<https://perma.cc/DG78-RX9H>].

¹⁹⁶ David Kravets, *Supreme Court OKs \$222K Verdict for Sharing 24 Songs*, WIRED (Mar. 18, 2013, 11:58 AM), <https://www.wired.com/2013/03/scotus-jammie-thomas-rasset/> [<https://perma.cc/8S27-UDX5>].

¹⁹⁷ See 35 U.S.C. §§ 111-157 (2018).

¹⁹⁸ 17 U.S.C. § 102 (2018).

¹⁹⁹ 15 U.S.C. § 1051 (2018).

²⁰⁰ 17 U.S.C. §§ 102-104 (2018).

²⁰¹ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter *Berne Convention*].

As a form of property, copyright enjoys what Tim Wu has called an “*ex post* notice right,” or an “opt-in right;” that is, “rights that require action after trespass to create liability — absent complaint, there is no wrong committed.”²⁰² Ian Ayres has termed these kinds of rights “dual-chooser” rights, since they require action by both parties (i.e., the infringer must infringe, *and* the infringed must bring an action for enforcement against the infringer).²⁰³ It is the enforcement authority vested with the rightsholder — or, the “*ex post* notice” — that affords copyright owners the unique opportunity to decline to enforce, and to opt to monetize infringement instead. For example, in his work on network effects in software, Ariel Katz has described the decision not to protect software as a “conscious business profit-maximizing strategy.”²⁰⁴

Importantly, the option to monetize infringement impacts, in some cases at least, the analysis of secondary liability for copyright infringement. Content ID is a good example of this dynamic: In utilizing the ad revenue-claiming system, rightsholders effectively license in real-time what might otherwise qualify as infringement of their copyrighted work, thereby excusing the intermediary — in this case, YouTube — from secondary liability, and/or from implication as an inducer.

F. Norm Heterogeneity

A final impetus for monetized infringement is at once obvious and subtle: As a community, rightsholders do not have a consensus view when it comes to infringement norms. In a forthcoming piece, Brian Frye makes a similar observation with regard to plagiarism in academia:

Gradually, different social groups settled on different sets of plagiarism norms. But the norms were always fluid, changing in response to social and economic circumstances. For example, journalistic plagiarism norms were quite minimal in the early 19th century, but became much more rigid as competition increased in the late 19th century. Initially, copying was encouraged. Newspapers mailed copies to each other, and editors used scissors to compose newspapers under their own byline. But later, as newspapers consolidated and information

²⁰² Wu, *supra* note 24, at 6.

²⁰³ IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* Chs. 3-4 (Univ. of Chi. Press 2005).

²⁰⁴ Ariel Katz, *A Network Effects Perspective on Software Piracy*, 55 U. TORONTO L.J. 155, 156 (2005).

became more valuable, editors began to demand attribution and object to copying.

Similarly, novelists and playwrights expected and demanded more and broader protection as their works became increasingly valuable. They wanted to prevent competition, by any means necessary. Where unattributed copying had once been the norm, plagiarism norms began to emerge.²⁰⁵

The evolving and variable norms that Frye describes in the plagiarism context are observable in the copyright context as well. As a novel threat, piracy was initially viewed as bad not only because it was illegal (i.e., against copyright law), but because game developers, for example, found themselves losing money and didn't like it (i.e., found their norm against unpaid use violated).²⁰⁶ Gradually, different game developers settled on different sets of infringement norms, changing in response to social and economic circumstances: Where an anti-piracy stance had once been the norm, a pro-piracy stance began to emerge for some vendors.²⁰⁷

The different perspectives pertaining to copying and use can also be at least partially explained by generational shifts in norms around unauthorized use. For artists and intermediaries who grew up in the age of the Internet, some uses that were formerly disallowed may have come to be accepted, or normalized, as part of the cultural expectation. This is also true from the users' perspective.

From the perspective of copyright's policy goals, the rule against infringement is explained as protecting authors' incentives to create. But recording artist Khalid has made clear he isn't harmed by WayV's fan video.²⁰⁸ CEO Rami Ismail has made clear that game developer Vambeer would rather consumers pirate their games than deal in gray market keys.²⁰⁹ For these and similarly minded rightsholders, then, this traditional justification is tenuous at best. Put simply, not all

²⁰⁵ Brian L. Frye, *Plagiarize This Paper*, 60 IDEA: IP L. REV. 294, 303 (2020).

²⁰⁶ Or at least, *believed* themselves to be losing money. There is a long-running debate in the space as to whether those who pirate (a game, a film, a CD, etc.) would otherwise become paying customers, or rather would simply be non-customers. The most likely answer is, of course, "it depends," but in any case, the translation is almost certainly not one-to-one.

²⁰⁷ Although he would explicitly not require it, my browbeaten adherence to academic norms of plagiarism obligate me to note that this sentence was intentionally plagiarized/paraphrased from Frye's work, *supra* note 205, at 303.

²⁰⁸ See discussion *supra* Part I.B.3.a.

²⁰⁹ See discussion *supra* Part I.B.2.

rightsholders are anti-infringement. Copyright law's assumption that they are can lead to a mismatch between rule and reality.

III. MONETIZING INFRINGEMENT AS PRIVATE POLICYMAKING

Having explained why rightsholders might opt to monetize, rather than counter, infringement, this Part considers whether private monetization of infringement is normatively desirable, and discusses the implications of private policymaking through nonenforcement, a counterintuitive — but not so unusual — phenomenon. The following subparts consider the possible benefits and concerns stemming from monetized infringement, as well as what role, if any, the government plays or should play.

A. Prospective Benefits

A rightsholder's decision to monetize infringement of their copyrighted work is effectively a decision to opt out of copyright's statutory protection on a one-off basis — vis-à-vis a particular user, for a particular use, at a particular time. This makes the monetization of infringement a form of private ordering in which the parties substitute a private preference *for* infringement over copyright's preference *against* it. As such, many of the benefits enjoyed by rightsholders who monetize infringement of their works mirror those enjoyed by any party who opts out of a statutory regime in favor of private ordering. As discussed in the sections *infra*, these include improved efficiency and tailoring. For its part, the government also benefits from better information-sharing.

1. Efficiency

In an unfortunate twist, copyright infringement suits often pit artists against their fans (who are sometimes artists themselves).²¹⁰ While it may be argued that with fans like that, rightsholders don't need enemies, the reality is that infringement is variable — in impetus, in impact, in intent, and in effect. Nonetheless, copyright law doesn't differentiate beyond willful and non-willful infringement,²¹¹ a distinction that is rarely determinative of whether a particular instance

²¹⁰ See, e.g., Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (involving an infringement claim brought by the author of Harry Potter, J.K. Rowling, and her publishing company against a fan who created and published an online encyclopedia for the series).

²¹¹ NB: Statutory damages are potentially higher for willful infringers. 17 U.S.C. § 504 (2018).

of infringement is efficient. For example, the film student who made a fan vid for Crystal Castles' "Plague" did so willfully; it was his thesis project.²¹² He also did so without pay. The video was very popular — as of this writing, it has over 40,000 views.²¹³ As a result, the rightsholders received valuable promotion at no cost to them. In addition, they saved whatever time and money they may have spent on an infringement suit with an uncertain outcome.

To the extent music consumption is a repeat-player game, they also avoided alienating a loyal fan, and so retained the possibility of future earnings from that party. From a private efficiency perspective, it was perfectly reasonable for Crystal Castles' manager to reach out to the fan — not to sue him, but to ask him to let them use his video promotionally. Importantly, Crystal Castles might not make this same decision in the case of, say, a lyric video (commonly understood as a near-perfect substitute for paid streaming). There, it might make more sense to sue for infringement, or, more likely, to issue a takedown notice or to claim revenues against it. In this way, monetized infringement functions as a means of differentiating value among different users and different uses.

As with other forms of private ordering, monetized infringement may also allow for greater overall efficiency since individual rightsholders have better, more accurate information about their respective tolerances, priorities, and resources than the legislature. As such, rightsholders who opt not to enforce against potential infringers can behave more nimbly and flexibly in the face of changing market conditions, new business models, and idiosyncratic circumstances. We might even view Congress's delegation of enforcement authority to private copyright holders as a *de facto* delegation of power to the party with the most information, who is therefore presumed to be in the best position to act efficiently. After all, private rightsholders have more information about themselves than Congress does. Any attempt by Congress to gather this information and act upon it is costly — far more costly than simply leaving it to the relevant rightsholders.

As an added bonus, each time a rightsholder opts to forbear from enforcement against — or even, as in these examples, to actively monetize — infringement, it reduces litigation clutter, a common problem in copyright.²¹⁴ The propensity for litigation clutter in copyright stems, in large part, from how terribly long infringement

²¹² See discussion *supra* Part I.B.3.a.

²¹³ Grbin, *supra* note 121.

²¹⁴ See, e.g., Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1929-30 (2018) (discussing the phenomenon in the fair use context).

litigation takes. In order to sue for infringement, a rightsholder must have a *registered* copyright.²¹⁵ Since 1989, however, registration with the copyright office is not required in order to obtain a copyright.²¹⁶ Prior to 2018, there was a circuit split as to whether a rightsholder necessarily had to have a registration in hand before filing an infringement suit, or whether they could file for registration simultaneously with filing suit.²¹⁷ In *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, the Supreme Court held that a rightsholder cannot file an infringement suit until *after* their work has been registered with, and approved by, the U.S. Copyright Office.²¹⁸ Under current conditions, this can take an average of three to nine months or more.²¹⁹ Expedited registration shortens that to a few weeks, but currently costs \$800 (versus the standard registration fee of \$35),²²⁰ a sum not readily available to all rightsholders. This cost and delay can be avoided, of course, by simply not pursuing an infringement claim in the first place.

Finally, the ability of rightsholders to monetize certain forms of infringement may ameliorate some of the concerns raised by copyright's lengthy term of protection. For example, some commentators have lamented the lack of a supporting cost-benefit analysis.²²¹ Others have

²¹⁵ See 17 U.S.C. § 411(a) (2018).

²¹⁶ See Berne Convention, *supra* note 201.

²¹⁷ Compare *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1341 (11th Cir. 2017) (finding registration completed under 17 U.S.C. 411(a) when the Register of Copyrights *approves* a claimant's application), with *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621 (9th Cir. 2010) (finding registration completed under 17 U.S.C. 114(a) when the claimant's "complete application" is *received by* the Copyright Office).

²¹⁸ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 888 (2019) ("The registration approach, we conclude, reflects the only satisfactory reading of § 411(a)'s text. We therefore reject Fourth Estate's application approach. . . . Under § 411(a), 'registration . . . has been made,' and a copyright owner may sue for infringement, when the Copyright Office registers a copyright.") (citations omitted).

²¹⁹ U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES 1, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> (last visited Jan. 11, 2020) [<https://perma.cc/FP5T-AQDP>].

²²⁰ U.S. COPYRIGHT OFFICE, COPYRIGHT OFFICE FEES 4, <https://www.copyright.gov/circs/circ04.pdf> (last visited Jan. 12, 2020) [<https://perma.cc/P8EY-6YGV>]. For additional background and examples of the impact litigation delay can have, see, for example, Scott Alan Burroughs, *Copyright Litigation: Now More Expensive and with More Delay Than Ever Before!*, ABOVE THE LAW (Mar. 13, 2019, 11:14 AM), <https://abovethelaw.com/2019/03/copyright-litigation-now-more-expensive-and-with-more-delay-than-ever-before/?rf=1> [<https://perma.cc/E6C7-PT7R>].

²²¹ See, e.g., Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 3, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 ("Taken

discussed the inefficiency borne of an overly long period of protection, including the proliferation of market entry of questionable value.²²² As a form of one-off “licensing,” the monetization of infringement helps to mitigate these concerns as rightsholders and prospective users move toward a more efficient distribution.

2. Tailoring

Under a statutory regime like copyright, licensees pay the same rate for use of the same content, regardless of the (admittedly subjective) quality of the particular content and the circumstances of its use. Under Section 114, for example, a stream of Wu-Tang Clan’s *C.R.E.A.M.*²²³ earns the same royalty as a stream of Desiigner’s *Panda*.²²⁴ This heretical outcome²²⁵ is the result of Section 114’s one-size-fits-all nature — one ill-suited for many works and uses. The option to monetize infringement, on the other hand, allows a rightsholder to tailor their enforcement decision to a particular piece of content, to a particular user, and/or to a particular use. This arguably leads to the production and distribution of content deemed valuable by the market — such as certain high promotional value fan vids — while continuing to curb the production and distribution of content deemed undesirable by the market — such as low-quality streaming-substitute lyric videos. As a doctrine, copyright infringement fails to make this important distinction; unauthorized use is unauthorized use regardless of value. By allowing tailoring in accordance with benefit, monetizing infringement improves upon the statutory option to sue.

Another potential benefit of tailoring is that it may allow for greater use of content than would otherwise be permissible under the statutory regime. Instead of only one official music video for Danny Brown’s *Grown Up*, for example, YouTube currently hosts nine such videos (one

as a whole, it is highly unlikely that the economic benefits from copyright [term] extension . . . outweigh the additional costs.”).

²²² See, e.g., Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644, 1680 (2011) (“Though [even stronger copyright protection] would maximize the production of works, rent dissipation theory indicates that the marginal works produced might be of little or negative social value . . .”).

²²³ WU-TANG CLAN, *C.R.E.A.M.* (Loud Records 1993).

²²⁴ DESIGNER, *PANDA*, (Menace 2015).

²²⁵ Unlike the inherent subjectivity involved in most judgments of musical quality, this determination is ironclad, and the author will not accept opinions to the contrary (also known as “wrong opinions”).

official, and a variety of fan videos and remixes).²²⁶ To the extent copyright is concerned with incentivizing creation, leaving the enforcement decision to rightsholders who may opt instead to monetize infringement is one way to accomplish that goal.²²⁷

3. Information

In contract law, a penalty default is an unpalatable fallback option that kicks in unless the parties to the contract negotiate otherwise.²²⁸ One of the advantages afforded by the existence of a penalty default is that it can induce the parties — who are each most knowledgeable about their respective situations, but generally (and certainly relatively) ignorant as the counterparty's — to “reveal information by contracting around the default penalty.”²²⁹ For example, where a contractual default leads to an undesirable result for Party A (possessor of information unknown to Party B), Party A may be incentivized to negotiate around the default, thereby revealing their (formerly private) information. Importantly, Party A reveals this information not only to Party B, but also to the government, which in turn can use that information to draft not just better laws, but also to make better enforcement decisions.

Consider, for example, the case of the federal government's shutdown and seizure of the torrent site Megaupload. According to the Department of Justice (“DOJ”), Megaupload boasted “more than one billion visits to the site, more than 150 million registered users, 50 million daily visitors and account[ed] for four percent of the total traffic on the Internet. The estimated harm caused by the conspiracy's criminal conduct to copyright holders is well in excess of \$500 million. The conspirators allegedly earned more than \$175 million in illegal profits

²²⁶ Online search for YouTube Danny Brown's Grown Up, www.google.com (Jan. 10, 2020).

²²⁷ This is not intended as a statement on the quality of the incentivized creation, nor the desirability of more content over less. Some scholars have argued persuasively that this follow-on creation may actually be inefficient insofar as we might encourage creators to produce superfluous works very similar to existing works, where that effort might be better invested elsewhere. See, e.g., Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33 (2004) (finding that increasing copyrighted material does not necessarily create variety); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007) (arguing less content shows consumer disinterest).

²²⁸ Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989).

²²⁹ *Id.* at 94.

through advertising revenue and selling premium memberships.”²³⁰ Using its authority under Section 506,²³¹ the government seized the site, and has been trying to get New Zealand to extradite its founders — including principal Kim Dotcom — ever since.²³² This decision was made with the robust and unanimous support of such major content representatives as the RIAA and the MPAA, each of whom also filed separate civil lawsuits against the torrent site.²³³ The fact that small-and medium-budget films sometimes encourage piracy of their films as a form of marketing that they can’t otherwise afford,²³⁴ however, suggests that not all rightsholders are the same. It is unclear whether possession of this information on the infringement preferences of smaller budget films would have changed the government’s position on Megaupload, but it may have. For example, the DOJ might have decided to allow impacted content owners to opt into (or out of) a settlement instead.

The music and publishing industries’ partial abandonment of DRM for physical CDs and some e-books²³⁵ is another example of information revealed by private non-enforcement of the right against infringement. Section 512(i)(1)(B) conditions an intermediary’s protection from secondary liability on its agreement not to interfere with “standard technical measures,”²³⁶ defined in Section 512(i)(2) as

[T]echnical measures that are used by copyright owners to identify or protect copyrighted works and (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable

²³⁰ *Justice Department Charges Leaders with Widespread Online Copyright Infringement*, U.S. DEP’T. OF JUSTICE (Jan. 19, 2012), <https://www.justice.gov/opa/pr/justice-department-charges-leaders-megaupload-widespread-online-copyright-infringement> [<https://perma.cc/GA5S-KLVS>]; see also *Superseding Indictment of Megaupload at 2*, *United States v. Dotcom*, No. 1:12CR3, 2012 WL 4788433 (E.D. Va. Oct. 5, 2012).

²³¹ 17 U.S.C. §§ 506(a)(1)(A), (a)(1)(C) (2018).

²³² The latest appeal was filed by defendants in June 2019. See Nick Perry, *Kim Dotcom Fights US Extradition in New Zealand’s Top Court*, AP NEWS (June 10, 2019), <https://apnews.com/e086e013950143dea8e0ed8e7b0f3b7d> [<https://perma.cc/FNN4-2FGC>].

²³³ See, e.g., Stuart Dredge, *Kim Dotcom and Megaupload Sued for Copyright Infringement by Music Labels*, GUARDIAN (Apr. 11, 2014), <https://www.theguardian.com/technology/2014/apr/11/riaa-mpaa-megaupload-kim-dotcom-piracy-lawsuits> [<https://perma.cc/TF69-RT26>] (noting that the RIAA and MPAA filed lawsuits against Megaupload).

²³⁴ See discussion *supra* Part I.B.3.b.

²³⁵ But not, notably, for streaming or digital book lending by libraries.

²³⁶ 17 U.S.C. § 512(i)(1)(B) (2018).

and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.²³⁷

While DVD DRM is technically the only system implemented “pursuant to a broad consensus,” the DRM measures implemented on other formats is often considered under this same standard. Record labels began abandoning DRM in 2007.²³⁸ E-publishers and e-book platforms, like Amazon’s Kindle, have followed suit, openly declining to track how many devices a purchased e-book is transferred between.²³⁹ To some extent, the move away from technical protection measures is a reflection of changes in technology that have made these systems increasingly easy to circumvent.²⁴⁰ This information might allow lawmakers to update the legislative framework in light of changing circumstances. In this example, legislators looking to improve the efficiency of copyright law might remove the condition in 512(i), thereby setting an assumption of no DRM as the default, and allowing private parties to negotiate for such protections when and where they find them useful.

B. Potential Concerns

The preceding subpart outlined some of the ways that infringement can be better — for rightsholders, for users, for society, and for the legislature — than non-infringement. Unfortunately, with these benefits also comes various opportunities for gamesmanship, as this subpart describes.

²³⁷ *Id.* § 512(i)(2).

²³⁸ Only to see their sales increase. See, e.g., Freek Vermeulen, *How Removing Copy Protection Increased Record Companies’ Music Sales*, FORBES (Jan. 27, 2014, 12:14 PM EST), <https://www.forbes.com/sites/freekvermeulen/2014/01/27/how-removing-copy-protection-increased-record-companies-music-sales/#741fa77e2ca5> [https://perma.cc/TKL9-AG5W].

²³⁹ See Bruner, *supra* note 152.

²⁴⁰ In the Seventh Triennial Rulemaking on Exemptions Granted in Section 1201, online video games were brought under the exemption for the first time, though more narrowly than petitioners had hoped. This is because, interestingly, video game developers argued DRM was still vital in that particular market. For a summary of the arguments, see Keton Hansrajh, *The Expanded DMCA Exemption for Video Game Preservation Grants a Small Victory Amidst the Seventh Triennial Rulemaking*, EFF (Nov. 26, 2018), <https://www.eff.org/deeplinks/2018/11/expanded-dmca-exemption-video-game-preservation-grants-small-victory-amidst> [https://perma.cc/9YPK-UNS3].

1. Anticompetitiveness

As with other forms of private ordering, the option to monetize infringement may favor larger, more powerful rightsholders and platforms. As HBO's highest-ever grossing franchise,²⁴¹ HBO's *Game of Thrones* can afford to boast of being the "most torrented."²⁴² A fledgling Netflix series that ends up canceled for lack of paying viewership, however, cannot.

Moreover, because the enforcement decision is made on a one-off basis, a rightsholder could use the option to favor certain infringers over others, whether intentionally or unintentionally. For example, a fan might see Khalid's tweet praising and promoting WayV's fan vid of "lovely"²⁴³ and be induced to spend time and money producing their own video for the track, only to find it taken down or blocked by the record label.

If that result seems like a case of "ah, well, that's the risk one takes," consider what happens when we move to a vertically integrated example: Television streaming service Hulu is wholly owned by Disney.²⁴⁴ Disney owns tens of thousands of television and film properties,²⁴⁵ and also operates several platforms via which they are distributed.²⁴⁶ Subscribers to Hulu (both ad-free and with ads) may download the Hulu app to as many devices as they like, but may only stream simultaneously on any two devices.²⁴⁷ Hulu competes directly with, among other parties, streaming service Netflix. In an effort to

²⁴¹ A title formerly held by *The Sopranos*. See Deborah Dsouza, *The Success of Game of Thrones in 5 Charts*, INVESTOPEDIA (Apr. 29, 2019), <https://www.investopedia.com/the-success-of-hbo-s-game-of-thrones-in-charts-4684966> [https://perma.cc/M3DM-QZMZ].

²⁴² See, e.g., Holly Brockwell, *Game of Thrones Takes Most-Torrented TV for 7th Year Running*, GIZMODO (Jan. 2, 2020, 2:30 AM), <https://www.gizmodo.co.uk/2020/01/game-of-thrones-most-torrented-tv/> [https://perma.cc/GV87-2M26].

²⁴³ See discussion *supra* Part I.B.3.a.

²⁴⁴ See Mike Snider, *Disney Takes over Hulu. What's It Mean for Cord Cutters, Binge Watchers? Change Is Coming*, USA TODAY (May 14, 2019, 3:08 PM ET), <https://www.usatoday.com/story/tech/news/2019/05/14/disney-bought-hulu-whats-mean-cord-cutters-binge-watchers/3665629002/> [https://perma.cc/6TNF-4689].

²⁴⁵ See Emily Todd VanDerWerff, *Here's What Disney Owns After the Massive Disney/Fox Merger*, VOX (Mar. 20, 2019, 1:10 PM EDT), <https://www.vox.com/culture/2019/3/20/18273477/disney-fox-merger-deal-details-marvel-x-men> [https://perma.cc/P3JW-W3NM].

²⁴⁶ See, e.g., *Homepage*, DISNEY+, <https://www.disneyplus.com> (last visited Jan. 11, 2020) [https://perma.cc/L6XF-H9X4] (advertising Disney's other platforms).

²⁴⁷ *How Many Screens Can I Watch Hulu on at the Same Time?*, HULU (May 27, 2020), https://help.hulu.com/s/article/streams?language=en_US [https://perma.cc/KQE2-964P]. An "unlimited screens" option was recently added for an additional \$9.99/month. See *id.*

attract customers away from Netflix and toward the Hulu platform, Hulu might decide to ignore its own two-device rule and let subscribers simultaneously stream on any number of devices in any number of locations. Once they put Netflix (and other similarly situated entities) out of business, they can go back to enforcing the limitation (because disgruntled consumers now have nowhere to go).

The possibility of nefarious lock-in is particularly strong in the e-commerce context. In her work on platforms and antitrust, Lina Khan writes that:

Amazon, like other e-book sellers, has used a scheme known as [DRM], which limits the types of devices that can read certain e-book formats. Compelling readers to purchase a Kindle through cheap e-books locks them into future e-book purchases from Amazon. . . . It becomes unlikely that a reader will then purchase a Nook and switch to buying e-books through Barnes & Noble, even if that company is slashing prices.²⁴⁸

It is not only consumers who might be harmed by the anticompetitive behavior of market-dominant platforms. As author Cory Doctorow explains:

[I]f [my publisher] sells you one of my books for the Kindle locked with Amazon's DRM, neither I, nor [my publisher], can authorise you to remove that DRM. If Amazon demands a deeper discount (something Amazon has been doing with many publishers as their initial ebook distribution deals come up for renegotiation) and [my publisher] wants to shift its preferred ebook retail to a competitor . . . it will have to bank on its readers being willing to buy their books all over again.²⁴⁹

The recent litigation over application programming interfaces (“APIs”) in *Google v. Oracle* offers another example.²⁵⁰ In that case, Oracle and software developer Sun Microsystems were both members of the American Committee for Interoperable Systems (“ACIS”), an organization whose basic message was that reuse, or reimplementa-

²⁴⁸ Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 760-61 (2017) (citations omitted).

²⁴⁹ Cory Doctorow, *Why the Death of DRM Would Be Good News for Readers, Writers and Publishers*, GUARDIAN (May 3, 2012), <https://www.theguardian.com/technology/2012/may/03/death-of-drm-good-news> [<https://perma.cc/94ZB-NXSQ>].

²⁵⁰ *Oracle America, Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018), cert. granted, 140 S. Ct. 520 (2019).

of APIs is not infringing.²⁵¹ At the time, such a policy made sense for two relatively small companies working to scale up. Later, when then-behemoth Oracle bought Sun Microsystems, they sued their competitor Google for doing the very thing they'd previously advocated for.²⁵²

To the extent that a copyright is itself a “mini-monopoly,” selective enforcement of copyright may be used as a form of predatory pricing, effectively raising the barrier to entry. In their work on the subject, Danny Ben-Shahar and Assaf Jacob note that where antitrust law is sensitive to “predatory pricing or to unlawful monopolization, [an] incumbent may eventually reach the same result by selectively failing to enforce copyrights.”²⁵³ In other words, a rightsholder might monetize infringement as a means of maintaining their dominant position while skirting the antitrust laws.

One way to mitigate the potential for anticompetitive effects stemming from a rightsholder's one-off decision to monetize, rather than enforce their rights against, infringement might be to require that all similarly-situated counterparties be treated equally — both across partners and over time. In other words, a record label either monetizes fan vids (regardless of their quality or promotional value), or it doesn't. Of course, this would also obviate the tailoring and efficiency benefits discussed in Part III.A *supra*.

Another approach might be to apply a theory of estoppel to rightsholders who selectively monetize infringement. Black's Law Dictionary defines “estoppel” as “[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before . . . [.]”²⁵⁴ Applying this to the video game developer who tells prospective customers to pirate a game rather than purchasing a game key from a reseller, the rightsholder would be estopped from later pursuing infringement claims against a user who does so. Similarly, a record label who uses Content ID to claim advertising around 99% of user-uploaded videos containing its copyrighted music (we can assume a healthy mix of both fair use and infringing use) would be estopped from selectively terminating its “authorization” at will. Worded

²⁵¹ V. SRIDHAR, EMERGING ICT POLICIES AND REGULATIONS: ROADMAP TO DIGITAL ECONOMIES 95 (Springer 2019) (“American Committee for Interoperable Systems (ACIS) historically supported the freedom to re-implement software interfaces.”).

²⁵² See, e.g., Brief of Copyright Scholars as Amici Curiae in Support of the Petitioner at 16-17, *Google LLC*, 886 F.3d 1179 (No. 18-956) (noting that Oracle was a member of ACIS when ACIS argued that reusing API is not infringing).

²⁵³ Danny Ben-Shahar & Assaf Jacob, *A Preach for a Breach: Promoting Copyright Infringements as an Optimal Monopolistic Behavior* 3 (Aug. 2000) (Working Paper) (on file with author) (citations omitted).

²⁵⁴ *Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

differently, a user whose fan vids have always been simply claimed by a rightsholder under Content ID can be said to have a reliance claim that such uploads will not be taken down (or litigated against, as the case may be). This would retain the prospective benefits of monetized infringement, while giving potentially confused consumers more certainty.

The recent litigation over use of copyrighted photos to create political memes is a good example of the estoppel argument in practice. In early 2020, Representative Steve King used a copyrighted photo of Laney Marie Griner's in a meme for use as part of King's re-election campaign, something Griner has referred to as "vile" and "disgusting."²⁵⁵ The challenge for her case against King doesn't stem from the legion of legitimate licensees — including Coca-Cola, General Mills, Microsoft, and Marriot — but rather from the unlicensed uses of the image in legions of unauthorized memes.

2. Distributional Impact

On the one hand, the monetization of infringement can be viewed as a decision borne of privilege. For example, we might say that Khalid — whose latest album enjoyed 202,000 album-equivalent sales in its first week of release²⁵⁶ — can afford to monetize the work of creative fans like WayV, who only serve to add to his vast popularity, and to motivate his fan base. We might not say the same of a fledgling artist who finds herself losing precious advertising revenue to an unauthorized upload of her official video. Similarly, HBO's *Game of Thrones* — a television series that has earned \$2.28 billion over eight seasons²⁵⁷ — might be well-positioned to enjoy its unconventional distinction as "most pirated series." The same would probably not be said of an indie film whose filmmaker finds herself unable to compete with the pirated copies flooding torrent sites. In this way, the monetization of infringement can

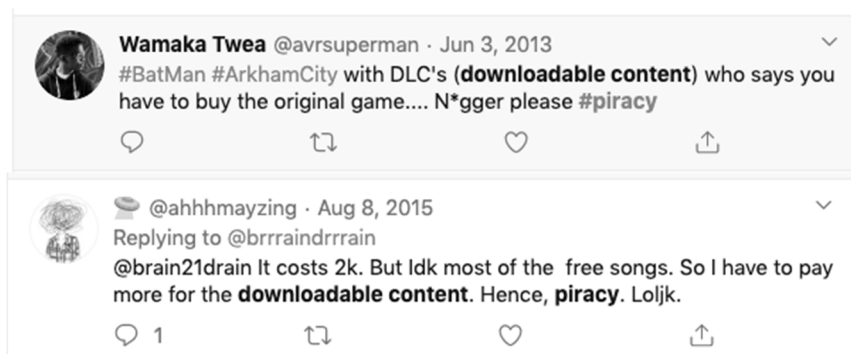
²⁵⁵ Ashley Cullins, *Mom of "Success Kid" Threatens to Sue Rep. Steve King for Using the Meme in Fundraising Effort*, HOLLYWOOD REP. (Jan. 27, 2020, 2:53 PM), <https://www.hollywoodreporter.com/thr-esq/rep-steve-king-threatened-lawsuit-use-success-kid-meme-1273866> [<https://perma.cc/65GL-LGX5>].

²⁵⁶ Keith Caulfield, *Khalid's 'Free Spirit' Debuts at No. 1 on Billboard 200 Albums Chart*, BILLBOARD (Apr. 14, 2019), <https://www.billboard.com/articles/columns/chart-beat/8507048/khalid-free-spirit-debuts-at-no-1-on-billboard-200-albums-chart> [<https://perma.cc/3FCT-NKNG>].

²⁵⁷ Entertainment Strategy Guy, *How 'Game of Thrones' Generated \$2.2 Billion Worth of Profit for HBO*, DECIDER (May 21, 2019, 12:00 PM), <https://decider.com/2019/05/21/game-of-thrones-hbo-profits/> [<https://perma.cc/MY95-MG72>].

be seen as yet another opportunity available only to those content owners who are already in a privileged position.

In addition, to the extent powerful content owners set consumer expectations, their enforcement decisions can bind unwilling competitors. For example, gamers may come to understand that piracy of video games is fine so long as they purchase DLC:



An indie developer with a game that doesn't feature DLC could then find itself losing sales with no potential upside. The former could be said to be forbearing by choice; the latter, by default. After all, bringing a lawsuit for copyright infringement is costly and time-consuming under the best of circumstances; under a flood of infringement monetized by larger developers, it may well prove untenable. Under this view, monetizing infringement worsens extant distributional justice concerns.

Unlike other private ordering alternatives such as Creative Commons ("CC"), the phenomenon of monetizing infringement is not an across-the-board license or permission. A work licensed under CC's Attribution-NonCommercial ("CC BY-NC") license, for example, allows others to "remix, adapt, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms."²⁵⁸ The terms "their" and "they" in this definition refer to all-comers. This is explicitly *not* the case in monetized infringement, where a rightsholder's enforcement decision can vary from user to user, from use to use, and from work to work.

On the other hand, the monetization of infringement might be viewed as an equalizer of sorts. The small-budget film, unable to afford much in the way of marketing, might encourage torrenting as a means of

²⁵⁸ *About the Licenses*, *supra* note 15.

boosting box office numbers. Likewise, a little-known niche television series might attract the attention of a behemoth like Netflix by encouraging piracy of its episodes as a means of proving viewership. On balance, then, the distributional effects of monetizing infringement might go either way, and should be kept in mind when amending legislation that might make the practice more or less accessible.

3. Norm-Setting

Consumer confusion and conflicting social norms merit further discussion. When a user uploads one fan vid and gets retweeted by the artist, then uploads another fan vid and gets a strongly worded warning and takedown from YouTube, it sends a mixed message: is this allowed, or isn't it? Social norms play a large role in whether or not people act in accordance with various laws and regulations:

To the extent that laws align with, establish, or enhance the operation of norms[,] compliance with laws is not solely a function of formal enforcement . . . And, of course, laws do frequently align with preexisting social norms. Though “special interests” certainly play a role in the formulation of social policy, it remains the case that laws “formulated in ways that are congruent with social norms are much more likely to be enacted than laws that offend such norms.”²⁵⁹

Mixed signaling from rightsholders can lead to mixed social norms, which in turn may reduce the application and effectiveness of the relevant rule — in this case, the rule against infringement.

There is also the risk of cross-genre and cross-context confusion. An example of the former is an avid gamer, accustomed to the norm that games can be pirated so long as you make in-game purchases, who might reasonably assume that they can pirate a film (perhaps in order to peek and see if it's worth seeing in theaters, or perhaps just to avoid paying altogether). An example of the latter is a Hulu subscriber who currently shares a login with eight of their roommates, and is surprised to find that Hulu's sister service, Disney+, locks after two devices. Because consumers are highly unlikely to know what is in a company's terms of service,²⁶⁰ Disney+ may even end up expending customer

²⁵⁹ David E. DePianto, *Sticky Compliance: An Endowment Account of Expressive Law*, 2014 UTAH L. REV. 327, 338 (citing Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157, 159 (2000)).

²⁶⁰ See, e.g., Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUSINESS INSIDER (Nov. 15, 2017, 4:30 AM), <https://www.businessinsider.com/terms-of-service-agreements>.

service time (and money) responding to indignant (albeit misinformed) consumers.

In his work on “shallow signals,” Bert Huang uses copyright as an example of a “private permission” that might mislead as to the legality of UGC:

You see one of today’s hit songs being played in dozens of homemade videos posted on YouTube. Feeling confident that there is little risk of copyright enforcement, you decide to use a different hit song in your own video. What you don’t realize, however, is that the first hit song happened to be covered by a blanket license arranged by YouTube itself with that specific radio label.²⁶¹

Incomplete information and a lack of sophistication on the part of the emulator can lead to unintended illegality. Of course, in the case of copyright infringement — a strict liability offense — the actor’s lack of intent is of no consequence.

One possible solution has been suggested by Michael Carroll in the context of fair use. He proposes a “Fair Use Board” in the Copyright Office that would rule on fair use petitions, effectively issuing “no-action” letters (with a favorable ruling) that would immunize the user from prosecution for copyright infringement.²⁶² Tim Wu has similarly proposed a “Copyright No Action” policy:

Here the idea is that owners of copyrighted works, to the degree that they accept and want to encourage limited usage of their works, can declare so to the world, allowing them to focus on only the most economically significant infringements while increasing the certainty of those who might want to use the works. They can do so using a “no action policy,” which would describe those uses of the works that the owner will not enforce.²⁶³

This would not obviate all of the concerns stemming from selective enforcement and monetization, but it might mitigate user confusion (to the extent users were aware of, and had read the contents of, such declarations).

com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 [https://perma.cc/2PLY-E92E] (citing a Deloitte survey finding 91% of adults accept terms of service without reading them).

²⁶¹ Bert Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2241 (2013).

²⁶² Carroll, *supra* note 191, at 1090-91.

²⁶³ Wu, *supra* note 24, at 24-25.

In their work on user privileges in copyright, Gideon Parchomovsky and Phil Weiser present an alternate, two-stage mechanism:

In the first stage, Congress would require all owners and distributors of digital content to endorse a set of user privileges without decreeing the specific content of those privileges. In addition, Congress would require content owners to state clearly what user privileges their terms of use would afford and would empower the FTC to oversee compliance. If, and only if, these measures fail to yield a desirable level of accommodation, Congress would move to the second stage and increase the regulatory burden on content owners by specifying, based on the measures adopted in stage one, the precise content of the privileges that content owners must adopt.²⁶⁴

This approach — if extended beyond the fair use context — may best serve the goal of (i) taking advantage of many of the benefits stemming from private ordering, such as tailoring and information-forcing; while (ii) mitigating some of the concerns resulting from monetizing infringement, such as inaccurate norm-setting and anticompetitive enforcement.

4. Transparency & Accountability

One indisputable drawback of an enforcement decision made by a private party is a lack of transparency. We can speculate as to the impetuses that have led record labels to embrace some fan vids and shun others, for example, but we don't have any confirmed takeaways or hard-and-fast "rules" as to how to make a fan vid that will evade an infringement charge and instead be embraced as a monetization opportunity. This uncertainty can lead to "inefficiency and gamesmanship."²⁶⁵

Another potential downside to the private monetization of copyright infringement is that it may override congressional intent.²⁶⁶ In

²⁶⁴ Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 126 (2010).

²⁶⁵ See García, *Penalty Default*, *supra* note 17, at 1169-71.

²⁶⁶ Alternately, one might argue that Congress has given rightsholders the right to enforce their rights, or not, as they see fit. See, e.g., Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 620 n.190 (2010) ("One can interpret an owner's willingness to transact as an indication that the market price is less than the owner's subjective value in retaining control and avoiding the risk presented by transacting with another party.").

establishing exclusive rights for copyright holders in Section 106,²⁶⁷ and in giving them remedies for infringement, the legislature determined infringement to be undesirable, inefficient, and counterproductive for copyright's goal of incentivizing creation. The private monetization of infringement arguably contradicts the congressional prescription,²⁶⁸ and thereby arguably diminishes the strength of copyright's protection for all rightsholders. The fact that most rightsholders monetize infringing (and potentially infringing) user-generated videos to upload to YouTube sets a norm — right or wrong — that posting a video using someone else's content is fine, so long as you relinquish your right to any advertising revenues. This norm is imposed on all rightsholders, including those who disagree — they can opt to takedown, but these isolated takedowns are largely ineffective, and cannot hope to stem the tide of uploads.²⁶⁹

Considered *en masse*, the monetization of infringement can amount to unilateral policymaking. Take for instance the example of several large video game developers monetizing piracy of their games by selling DLC to the pirates. The position of the companies controlling a majority market share readily becomes the position of the market. Game developers whose products do not make money on DLC have little to no power to “undo” the policy set by the other developers.

Finally, a regime — like copyright infringement — that leaves enforcement to private parties allows Congress to pass laws that on their face appease powerful lobbyists, despite the fact that in practice, private forbearance renders them far less impactful. As Barron and Rakoff note in their work on big waiver, this can allow politicians to shirk — to look like they're doing something when they're really not, and/or to pass off their lawmaking responsibilities to private citizens whose preferences may not be representative of all affected parties.²⁷⁰

²⁶⁷ 17 U.S.C. § 106 (2018).

²⁶⁸ I say “arguably” because as noted we might view Congress's grant of enforcement authority to rightsholders as a nod of approval for private ordering of this sort.

²⁶⁹ See, e.g., Kevin Madigan, *Despite What You Hear, Notice and Takedown Is Failing Creators and Copyright Owners*, CTR. FOR PROTECTION INTELL. PROP. (Aug. 24, 2016), <https://cpip.gmu.edu/2016/08/24/despite-what-you-hear-notice-and-takedown-is-failing-creators-and-copyright-owners/> [<https://perma.cc/2CLX-4YXL>] (noting, with regard to Taylor Swift's album 1989, that the record label “sent over 66,000 DMCA takedown notices. Despite their considerable efforts, over 500,000 links to the album were identified, and ‘1989’ was illegally downloaded nearly 1.4 million times from torrent sites”).

²⁷⁰ See Barron & Rakoff, *supra* note 163, at 307.

The literature has focused primarily on copyright's tendency to outsource enforcement to platforms via secondary liability.²⁷¹ An equally concerning proposition raised by the monetization of infringement is the outsourcing of enforcement to rightsholders. The potential problem with the replacement of the state with an individual rightsholder is that the private party's interests may not reflect Congress's. Specifically, "private suits tend to act as a substitute for public enforcement rather than a complement. . . . To the extent that private suits take the place of public enforcement in certain sectors or geographic areas, the ability for private objectives to supplant public objectives is magnified."²⁷²

Moreover, delegation of enforcement to algorithms — as in the case, for example, of Content ID —

[L]acks sufficient measures to ensure that online intermediaries are held accountable for their actions, failures, and wrongdoings. . . . Algorithmic enforcement mechanisms are nontransparent in the way they exercise discretion over determining copyright infringement and fair use; they afford insufficient opportunities to challenge the decisions they make while failing to adequately secure due process; and they curtail the possibility of correcting errors in individual determinations of copyright infringement by impeding the opportunity for public oversight.²⁷³

In his work on "DMCA-plus" agreements such as Content ID, Matthew Sag emphasizes that:

[T]he defining feature of DMCA-plus arrangements is not that those choices are good or bad, but rather that they are choices made by rightsholders and platforms--not users, or Congress, or even courts. Not only are these choices private, they are often obscure, such that it is difficult to determine from the outside even what choices have been made.²⁷⁴

²⁷¹ See, e.g., John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 *CARDOZO L. REV.* 1821, 1824 (2013) (claiming that "uncertainty 'outsources' enforcement costs to Internet platforms").

²⁷² Sarah L. Stafford, *Private Policing of Environmental Performance: Does It Further Public Goals?*, 39 *B.C. ENVTL. AFF. L. REV.* 73, 79-80 (2012).

²⁷³ Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 *STAN. TECH. L. REV.* 473, 478 (2016).

²⁷⁴ See Sag, *supra* note 93, at 559.

The monetized infringement described herein differs significantly from, for example, a Creative Commons license in that the latter is explicit, and preannounced, with prescribed terms and limits. The monetized infringement described herein may be explicit or implicit. It may be “announced” — like the game developers’ plea to prospective key purchasers — or it may be on a case-by-case basis—like in the case of fan videos. To the extent Congress delegates enforcement authority to rightsholders, it might consider measures to mitigate the potential for public-private interest misalignment, perhaps by reading implicit terms into such monetization thereby constraining their ability to revoke and/or limit use after the fact. Another option might be to read an implied license into the monetization of infringement, protecting at least parties whose use was previously monetized from being claimed against in the future for the same use. The next subpart details the government’s role further.

C. Role of Government

Parties will circumvent a statute and engage in private ordering when they can (or when they believe they can) do better — make more money, save more money, avoid a transaction cost like negative PR, etc. This requires an unpalatable statute, also known as a penalty default.²⁷⁵ Where a statute is a misfit — as the copyright statute is for many works and uses²⁷⁶ — private rightsholders can (and do) engage in various forms of DIY tailoring, including monetizing infringement. The government’s role in monetizing infringement, then, is to set a baseline against which the private parties’ gains can be measured. In setting a one-size-fits-all statute that is slow to respond to technological change and subject to legislative capture, the legislature has established in copyright an ideal penalty default statute.

To the extent this allows those for whom the statute works to operate under it, and those who can do better via private ordering to do so, the government might do best to simply set the default and then stay out of the way (assuming no market harm caused by the default).²⁷⁷ Indeed,

²⁷⁵ See García, *Penalty Default*, *supra* note 17.

²⁷⁶ See *supra* Part III.A.2.

²⁷⁷ In their seminal article on behavioral economics and the law, Cass Sunstein and Richard Thaler urge caution when setting governmental defaults, as they tend to be “sticky.” Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1201 (2003) (“[I]n many domains, people’s preferences are labile and ill-formed, and hence starting points and default rules are likely to be quite sticky. In these circumstances, the goal should be to avoid random,

copyright's compulsory licenses may be viewed as the inevitable result of monetized infringement: rightsholders who have accepted the fact that infringement benefits them and now seek governmentally enforced payment.

Notably, copyright does not have a designated agency with the authority to adapt or tailor the statute.²⁷⁸ At best, the Copyright Office supports the legislature through the preparation of non-binding studies and reports, and through the maintenance of an informational compendium.²⁷⁹ Perhaps this suggests that Congress recognized its limitations in this area, and so it intentionally set a penalty default that would encourage private ordering — in this case, the monetization of infringement.

The government's role as backstop is very important for monetized infringement. It allows rightsholders — such as Aphex Twin and Warp Records — to look like good guys when they embrace and promote a fan vid, while retaining the right to revert to the statute in instances of undesired infringement. It allows the signatories to Content ID to earn advertising revenues from YouTube, unless and until they decide to move on to another business model, at which point they can again turn to the statute for protection. Indeed, the very development of arrangements like Content ID were prompted by the threat of litigation stemming from the statute as backdrop: For example, Content ID was developed “while copyright litigation was pending against [YouTube] in federal court. Google launched Content ID shortly after acquiring

inadvertent, arbitrary, or harmful effects and to produce a situation that is likely to promote people's welfare . . .”).

²⁷⁸ Perhaps it should. See Brad A. Greenberg, *Rethinking Technology Neutrality*, 100 MINN. L. REV. 1495, 1553-55 (2016) (discussing an enhanced role for a copyright agency). But see Jake Linford, *Improving Technology Neutrality Through Compulsory Licensing*, 100 MINN. L. REV. HEADNOTES 126, 142 (2016) (“For better or worse, Congress designated itself the institution responsible for making wholesale revisions to the Act . . . agencies are already empowered to shape copyright law by managing compulsory damage regimes and crafting exceptions to liability for circumventing technological protection measures or trafficking in technology that circumvents those measures.”).

²⁷⁹ See, e.g., U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101 (3d ed. 2017) (stating its purpose is to instruct agency staff and provide information); *Policy Reports*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/policy/policy-reports.html> (last visited Oct. 21, 2020) [<https://perma.cc/V8CV-3QV2>] (providing a collection of policy reports).

YouTube and getting sued by Viacom and other copyright industry plaintiffs for billions of dollars in statutory damages.”²⁸⁰

CONCLUSION

The notion that copyright infringement is something to be mitigated relies upon an assumption that it necessarily harms rightsholders. The conventional account is that infringement always diminishes artists’ ability to earn a living, thereby reducing their incentive to create. In order to preserve creative output — and with it, a culturally robust society — copyright law must therefore stop infringement where it can, and punish it (often severely) where it cannot.

This Essay has presented a series of case studies demonstrating just the opposite to be true. Infringement does not always harm rightsholders. Instead, they may benefit via new, more efficient business models, increased revenues, and lower costs. In these cases, *monetizing* infringement may lead to an improvement in overall efficiency.

By describing the paradox of rightsholders who actively monetize infringement of their copyrighted work, I aim to suggest that we have a long way to go toward a positive theory of copyright. As we move in that direction, I hope to offer several major takeaways for both scholars and legislators. Importantly, monetized infringement demonstrates that rightsholders are a heterogeneous group with endogenous preferences. It is not only the case that one statutory license doesn’t fit all content, but also that one perspective of infringement as “bad” doesn’t fit all content owners.

A nuanced and critical examination of infringement enforcement in practice should lead us to reconsider the axiomatic assumption that rightsholders are necessarily anti-infringement. Perhaps legislators have been misled by lobbyists’ doomsday scenarios that describe infringement and piracy as the ultimate threat to the creative industries. By effectively allowing for DIY tailoring, perhaps the option for rightsholders to privately forbear is keeping the current (otherwise, one-size-fits-none) regime workable. Congress might be well-served to consider the information that monetized infringement provides when amending and updating the current statute. At the very least, recognizing that infringement can be “good” should guide us toward a regime that takes into account diverse perspectives and outcomes.

²⁸⁰ Annemarie Bridy, *Copyright’s Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 14 (John A. Rothchild ed., 2016).

Finally, a theory of monetized infringement is a theory of private policymaking. Like governmental and administrative forbearance, private ordering via nonenforcement relies on a delegation of enforcement authority. Unlike governmental and administrative forbearance, private ordering via nonenforcement runs the risk of placing a potentially disproportionate share of power in the hands of already dominant players, while further disenfranchising less established artists, intermediaries with fewer resources, and traditionally marginalized communities. This possibility should be taken seriously by scholars and lawmakers concerned about copyright's role as a driver of inequality.