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WARMING UP TO USER-GENERATED CONTENT

Edward Lee*

Conventional views of copyright law almost always operate from the “top down.” Copyrights are understood as static and fixed by the Copyright Act. Under this view, copyright holders are at the center of the copyright universe and exercise considerable control over their exclusive rights, with the expectation that others seek prior permission for all uses of copyrighted works outside of a fair use. Though pervasive, this conventional view of copyright is wrong. The Copyright Act is riddled with gray areas and gaps, many of which persist over time, because so few copyright cases are ever filed and the majority of those filed are not resolved through judgment. In these gray areas, a “top-down” approach simply does not work. Instead, informal copyright practices effectively serve as important gap fillers in our copyright system, operating from the bottom up.

The tremendous growth of user-generated content on the Web provides a compelling example of this widespread phenomenon. The informal practices associated with user-generated content make manifest three significant features of our copyright system that have escaped the attention of legal scholars: (i) our copyright system could not function without informal copyright practices; (ii) collectively, users wield far more power in influencing the shape of copyright law than is commonly perceived; and (iii) uncertainty in formal copyright law can lead to the phenomenon of “warming,” in which—unlike chilling—users are emboldened to make unauthorized uses of copyrighted works based on seeing what appears to be an increasingly accepted practice. Although the warming phenomenon has been completely ignored in prior copyright scholarship, warming serves as a

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powerful counterforce to the chilling of speech, even when copyright law is uncertain.

The most significant copyright development of the twenty-first century has not arisen through any law enacted by Congress or opinion rendered by the Supreme Court. Nor has it come from an organized group, movement, or industry seeking to effectuate a change to the copyright system. Instead, it has come from the unorganized, informal practices of various, unrelated users of copyrighted works, many of whom probably know next to nothing about copyright law.

In order to comprehend this paradox, one must look at what is popularly known as “Web 2.0,” a buzzword for the vast array of technologies and platforms on the Internet that enable users to generate content of their own, albeit often “remixed” with the works of others. From blogs to wikis to podcasting to “mashup” videos and social networking sites like Facebook and MySpace, the Web 2.0 culture encourages users to engage, create, and share content online. With users of copyrighted works no longer passive recipients, “user-generated content” (UGC) is now the watchword of today’s Web 2.0 culture.

UGC challenges conventional understandings of copyright law under which copyrights are understood largely as static and fixed from the top down. Under some, if not most, conventional accounts, the author’s exclusive rights and the exceptions to those rights are all fixed in the Copyright Act, as delimited by Congress. Under this view of copyright, copyright holders are at the center of the copyright universe and exercise considerable control over their exclusive rights. Obtaining prior authorization from the copyright holder is typically assumed to be necessary for others legally to reuse the copyrighted work, apart from a fair or other permitted use (which often is not easy to determine in advance). Although the language of the Copyright Act may be open textured in many places, courts can define the relevant copyright standards on a case-by-case basis. Under this formalist approach, there is little, if any, acknowledgement of a possible role for users to shape copyright law from the bottom up.

This Article challenges the conventional account of copyright law, particularly as applied to Web 2.0. The formalist understanding of copyright law ignores reality. It can explain some cases well, particularly those litigated, but it cannot address a welter of factual scenarios that never get resolved in court. The Copyright Act is riddled with gray areas and gaps, many of which persist over time because so few copyright cases are ever filed and the majority of those filed are not resolved by a judgment.¹ While formal licenses allow the parties themselves to fill the gaps

1. Of the 1,889 copyright cases disposed in 2002, 77.6% were dismissed, including 42.3% by settlement. Only 22.4% of the cases (423) led to a judgment, of which only 1.5% were settled by trial.

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, especially for noncommercial uses of copyrighted works. On some occasions, copyright holders may, in fact, prefer to “hedge” by allowing third-party uses of their works informally, instead of by formal license.

My core thesis is that *informal copyright practices*—i.e., practices that are not authorized by formal copyright licenses but whose legality falls within a gray area of copyright law—effectively serve as important gap fillers in our copyright system. They are necessary because formal copyright law has many gaps and gray areas that cannot possibly be filled or clarified fast enough to keep pace with the vast number of uses of copyrighted works that occur each day. Formal copyright licenses might fill some of these gaps, but high transaction costs often make licenses cost-prohibitive or ineffective. And sometimes copyright holders even prefer informal practices over formal licenses.

Informal copyright practices have developed, most notably, for UGC. Whether in blogs, fan fiction, videos, music, or other mashups, many users freely use the copyrighted works of others without prior permission and even beyond our conventional understandings of fair use. Yet, often, as in the case of noncommercial uses of copyrighted works on blogs or in fan fiction, the copyright holders do not seem to care, and, in some cases, publicly condone the general practice. Moreover, the mass practices of many users of popular Web 2.0 sites, like YouTube, of ignoring the need to obtain permission before using someone else’s copyrighted work have even prompted the securing of commercial licenses between Web 2.0 sites and the copyright holders in order to ratify the mass practices of users.² Thus, instead of being condemned as infringement, the unauthorized mass practices of users may have, in some instances, turned out to be the catalyst for subsequent ratification of those practices, albeit in some bargained-for exchange not even involving the users themselves.

Put simply, copyright law as we know it “on the books” is not exactly how copyright law operates in practice. Instead of being defined a priori by statute or at a single snapshot in time, the contours of an author’s exclusive rights in the Web 2.0 world are being defined by a much messier and more complex process involving a loose, unorganized “give and take” of sorts among users, copyright holders, and intermediaries. I make no claim that this process of “give and take” is somehow unique to Web 2.0, but I do think it is far more noticeable on the Internet. Perhaps

U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, INTELLECTUAL PROPERTY THEFT, 2002, at 8 (2004) [hereinafter STATISTICS REPORT].

2. Although YouTube currently faces two major copyright lawsuits based on the allegedly infringing activity of their users, the lawsuits do not challenge the general practice of user-generated content but instead focus on verbatim copying of copyrighted works. See *infra* notes 201–07 and accompanying text.

most fascinating of all, users are often the ones driving the agenda from the bottom up; and copyright holders increasingly, although not always, are taking heed. Users can institute a practice for using another's copyrighted works without prior permission that, over time, copyright holders can accept (or not) and, at times, openly embrace either informally or formally by contract.

One clear example of an informal copyright practice involves fan fiction, a genre that allows users to make derivative works of popular copyrighted works and share them online. This practice has flourished on the Internet—with knowing toleration and even open support by many copyright holders—even though people do not ever obtain formal copyright permission to make the derivative works.³ Another example of an informal copyright practice relates to the popular user-created, pseudo-movie trailers, such as a “scary” version of *Mary Poppins* or a *Brokeback Mountain* version of *Back to the Future*, made from mashups of scenes from copyrighted movies and publicly disseminated on the Internet.⁴ This user-generated practice has become very popular—a genre in itself—notwithstanding the lack of formal licenses from the movie studios. Another popular genre involves citizen mashup videos for (or against) presidential candidates, such as the much ballyhooed “Obama girl” video.⁵ None of these “remix” practices is explained well by the conventional understanding of copyright, which does not recognize a legitimate role for what it might call “technical” copyright infringement. Although a case for fair use could be made in some cases, conventional accounts of copyright law probably would consider fair use doubtful or, at the very least, contestable. In my view, the concept of “informal copyright practice” can better explain these and other practices in the Web 2.0 world because it looks at the actual practices of the interested parties, collectively, as they develop over time.

Lest there be any mistake, I am not suggesting that copyright holders no longer wield any legal control over their works. Nor am I suggesting that copyright law “on the books” is irrelevant or that users can do whatever they want because whatever users do is, ipso facto, OK. Instead, my claim is far more limited. By examining the practices of users, copyright holders, and intermediaries related to UGC, I hope to show how users can and do, in fact, heavily influence what may become a relatively accepted informal copyright practice.

Part I examines how copyrights operate in practice. My approach draws from several different schools, including pragmatism, legal realism, and law and society. It provides a theory of how informal copyright practices can play an integral role in the development of copyright law as important gap fillers to formal copyright law and formal copyright licenses.

3. See *infra* notes 348–65 and accompanying text.

4. See *infra* notes 240–45 and accompanying text.

5. See *infra* notes 314–27 and accompanying text.

These gap fillers effectively serve as a kind of “soft law” to establish acceptable working practices among interested parties, albeit informally. Whether Congress or courts should expressly incorporate informal copyright practices into formal copyright law—and, if so, under what conditions—are important questions that I discuss without final resolution in this Article. Congress and courts have relied on informal copyright practices on many occasions. Existing informal copyright practices can serve as helpful “laboratories of experimentation” for copyright policymakers thinking about formal changes to copyright law. Yet ultimately I do not stake out a normative argument about what formal law should do; that issue I leave open for future inquiry. My goal here is to establish what I believe is an even more important point: that informal copyright practices are vital to the copyright system in their own right, even apart from any later formal adoption by courts or Congress. And they are vital in ways that have remained completely unexamined in legal scholarship.

Part II then elaborates a Five-Factor Informality Test for determining whether we should embrace the development of a particular informal copyright practice as a gap filler. Not all informal practices are legitimate; some are nothing more than copyright infringement. However, other informal practices serve a vital role in filling the gaps left open by formal copyright law.

Part III examines the growing phenomenon of UGC on the Internet and explains why UGC serves important free speech and free press interests. Then, analyzing several different examples of UGC, including citizen campaign videos, movie trailer mashups, fan fiction, and fan Web sites, the Part explains why the informal copyright practices that have so far developed in these areas should be considered legitimate gap fillers for our copyright system under the Informality Test factors.

Part IV draws out the significance of my theory for the copyright system. First, the approach provides a more realistic assessment of how the entire copyright system operates. By identifying where informal practices have developed, we can often see where formal copyright law has failed. Second, my theory demonstrates that users play a far greater role in shaping copyright law than is commonly perceived. In many instances, users have initiated the prevailing practice with respect to UGC—often with later acceptance by the copyright holders.

My theory introduces a new concept—*warming*—to explain how uncertainty in copyright law may influence behavior. Copyright scholarship has primarily focused on how uncertainty in copyright law may chill legitimate speech.⁶ This literature, although accurate for some instances, is incomplete. The practices related to user-generated copyright suggest an opposite, cross-cutting force may also be in play, particularly on the Internet: what I call “warming,” in which users are emboldened to use

6. See *infra* note 410 and accompanying text.

copyrighted works without authorization based on the development of what appears to be an increasingly accepted informal practice. The Internet is especially conducive to the “warming” phenomenon, given the social networking features and rapid development of community norms, such as in the blogosphere. Warming is legitimate if the underlying informal copyright practice serves as a gap filler in copyright law.

This Article builds on insights offered by the growing body of legal scholarship that has taken a more pragmatic bent to legal questions—new legal realism, microanalysis of institutions, new governance, and the like.⁷ These approaches all question the basic, formalist assumption that legal issues must be resolved from the “top down” by Congress, the courts, or administrative agencies. Instead, the new legal realist approach recognizes that legal issues can—and often should—be resolved from the “bottom up,” by interested parties acting outside of formal legal institutions. Although influential in many areas of law, this more pragmatic, realist approach has, for whatever reason, escaped the attention of intellectual property (IP) scholarship. This Article is offered as a beginning to what I hope is greater research and IP scholarship in this area. Studying how informal practices shape the contours of IP law is a huge (if not herculean) endeavor that requires the sustained attention of many scholars, with greater empirical research of how people use works protected by IP in practice. This Article provides just a start. Far more is left to be said.

I. COPYRIGHT IN PRACTICE

Copyright law does not exist in a vacuum. It influences and is influenced by how people use copyrighted works in practice. Yet, in discussions of copyright law, copyright practices are often ignored as if they had no bearing on the formal law of copyright. Under this formalist understanding, the law operates from the “top down.” The Copyright Act establishes the “rules,” which, in turn, limit what practices can develop. Practices outside the “rules” are deemed infringing. This simplistic, yet pervasive understanding of copyright is misguided, however. It presumes that formal copyright has no gray areas, but instead provides clear guidance *ex ante* to the public on the legality of uses of copyrighted works in most factual scenarios. Of course, nothing could be further from the truth. Copyright law is riddled with ambiguities. Against such a backdrop, informal copyright practices are vital to the functioning of the entire copyright system.

7. See *infra* notes 32, 123–26 and accompanying text.

A. *The Legal Realist Critique*

Legal realism has profoundly affected our understanding of many areas of law. Our current understanding of contract law, for example, is heavily influenced by Karl Llewellyn's successful efforts to update formal contract doctrines to be more reflective of commercial practices. Llewellyn's efforts culminated in the Uniform Commercial Code (U.C.C.), which all fifty states substantially adopted.⁸ Article 1 of the U.C.C. has sought, as its express purpose, to update formal contract law and commercial law in the following ways:

- (1) to simplify, clarify, and modernize the law governing commercial transactions;
- (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and
- (3) to make uniform the law among the various jurisdictions.⁹

Related to the second goal, the U.C.C. allows courts and parties to rely on custom, usage, and practices to a much greater extent to determine contracts and sales than did the prior approach under traditional common law.¹⁰

Instead of thinking of the law purely in terms of abstract principles, the legal realist movement recognized the importance of seeing how things operated in context. The U.C.C. took formal, abstract principles of contract and injected a healthy dose of reality into them by recognizing a greater role for custom, usage, and dealing in determining the law of sales and contracts. This constitutes a "bottom up" approach,¹¹ in that it allows practices to determine how the law treats the sale (instead of the other way around). The universal adoption of the U.C.C. (at least in some form) by all fifty states bespeaks its attractiveness for commercial sales compared to the old common law approach.

Given the importance of IP to many business and commercial dealings, one might expect that a similar modernization would have occurred in IP laws to allow greater consideration of custom, usage, and dealing in the marketplace. Surprisingly, however, that has not been the case, at least not in any explicit or systematic way.

8. See ALAN SCHWARTZ & ROBERT E. SCOTT, *COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES* 2 (2d ed. 1991).

9. U.C.C. § 1-103(a) (2001).

10. For example, the U.C.C. relaxes the traditional parol evidence rule to allow evidence of usage of trade and course of dealing to supplement the four corners of a written contract. U.C.C. § 2-202 (2003). It also gives sellers the right to cure, even after the time for performance, thereby facilitating informal adjustment of contract disputes. *Id.* § 2-508. The U.C.C. also allows parties to modify contracts without consideration, *id.* § 2-209(1), and gets rid of the mirror-image rule, *id.* § 2-207(i), so parties can form contracts by exchanging offers and acceptances that are not the same in all respects. Traditional contract law did not allow any of these considerations.

11. The New Legal Realist movement in legal scholarship has emphasized looking at the law from a "bottom up" approach with greater examination of empirical data of how things occur at the ground level. See Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 *WIS. L. REV.* 335, 339-41.

This is particularly surprising given that formal copyright law often embodies customs and practices. Many of the provisions of the Copyright Act were drafted by interested (primarily industry) stakeholders, who were in some sense creating new customs or incorporating existing customs; indeed, many of the exemptions to copyright in sections 108 to 122 of the Copyright Act have the look and feel of a market practice or custom.¹² For example, in the Family Entertainment and Copyright Act of 2005, Congress codified an exemption in section 110(11) that allows people to use existing technology such as Clear Play to program their DVD to skip parts of copyrighted movies that contain nudity, sex, violence, or profanity.¹³ The exemption effectively codifies a custom “for private home viewing” that had developed, particularly among families looking for ways to filter out content in movies that might not be suitable for children. Congress also devised the notice-and-takedown procedures of the DMCA safe harbors for storage and information location tools based on developing industry practices.¹⁴ Congress sometimes even considers some very local customs for codification. In 2008, Senator Specter proposed a bill to allow churches to watch NFL games without violating the public performance right of the NFL—a bill that was specifically designed to ratify the practice of Super Bowl parties held by Baptist churches that had received “cease and desist” letters from the NFL regarding the practice.¹⁵ So far, Congress has punted the issue.

Courts also sometimes consider customs in deciding cases. In doctrines such as fair use,¹⁶ implied licenses,¹⁷ laches,¹⁸ estoppel,¹⁹ and copy-

12. See 17 U.S.C. §§ 108–122 (2000); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 23 (1996) (“The current federal copyright statute (and its predecessors) were composed by representatives of copyright-related industries to govern interactions among them.”).

13. 17 U.S.C. § 110(11) (Supp. V 2005).

14. See S. REP. NO. 105-190, at 45 (1998) (“This ‘notice and takedown’ procedure is a formalization and refinement of a cooperative process that has been employed to deal effectively with network-based copyright infringement.”).

15. See S. 167, 109th Cong. (2005); Jacqueline L. Salmon, *Bill Would End Separation of Church and Super Bowl*, WASH. POST, Feb. 7, 2008, at A6.

16. See *infra* note 24 and accompanying text.

17. A nonexclusive license can be implied from the circumstances. See, e.g., *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776–77 (7th Cir. 1996); *Effects Ass’n, Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990).

18. Laches is an equitable defense, although the circuits are split on its application in the face of the statute of limitations in the Copyright Act. Compare *Lyons P’ship v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) (“Separation of powers principles thus preclude us from applying the judicially created doctrine of laches to bar a federal statutory claim that has been timely filed under an express statute of limitations.”), with *New Era Publ’ns Int’l v. Henry Holt & Co.*, 873 F.2d 576, 584–85 (2d Cir. 1989) (applying laches for two-year delay), and *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 233 (6th Cir. 2007) (recognizing a strong presumption against application of laches for any copyright claim brought within three-year statute of limitations). Laches can be established if (1) the copyright holder inordinately delayed filing suit even though it knew or should have known of the potential claim and (2) the delay resulted in undue prejudice to the alleged infringer. See *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000); *Chirco*, 474 F.3d at 234. While the statute of limitations does not start running until a copyright violation has in fact occurred, the period of delay for a laches defense can begin when the copyright holder has actual or constructive knowledge of an *im-*

right misuse,²⁰ courts routinely consider how informal or market practices bear on the legality of an unauthorized use of a copyrighted work. Indeed, courts may recognize doctrines based on a customary practice in the marketplace that Congress later ends up formally adopting in the Copyright Act itself. For example, the well-known *Aiken* exemption in section 110(5)(A) allows entities to play the radio or television without having to pay license fees for the public performance of copyrighted works being broadcast.²¹ The provision codifies the rule, at least in its effect, announced by the Supreme Court in *Aiken*, decided under the prior 1909 Act.²² The *Aiken* Court's rule was based in part on the customary practices at the time:

The practical unenforceability of a ruling that all of those in *Aiken*'s position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins—to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.²³

The fair use provision also derived from judge-made doctrine that incorporated some notion of what was acceptable under customary practices. Indeed, in explaining the history of the fair use doctrine, the Court in *Harper & Row* traced the doctrine back to notions of "reasonable and customary" use: "[T]he fair use doctrine was predicated on the author's

pending violation. Thus, laches "might in some cases obligate the [copyright holder] to investigate the defendant's plans regarding the exploitation of that copyright." *Kling*, 225 F.3d at 1039.

19. Under copyright law, a copyright holder may be estopped from suing for copyright infringement if (1) the copyright holder knew of the facts of defendant's infringing conduct, (2) "either intended that defendant rely on his acts or omissions or acted or failed to act in such a manner that defendant had a right to believe it was intended to rely on plaintiff's conduct," (3) the defendant was ignorant of the true facts, and (4) relied on the copyright holder's conduct to his detriment. *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.07 (2007). Both informal and industry practices are often relevant to estoppel. *See, e.g.*, *Carson v. Dynegy, Inc.*, 344 F.3d 446, 455 (5th Cir. 2003) (copyright holder estopped from bringing a copyright infringement claim against defendant for using copyrighted worksheet because copyright holder had freely allowed fellow employees to use and modify the worksheet); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006) (copyright holder estopped from suing Google for copying his work for automated cache system in search engine because author knew of Google's caching system but failed to opt out of that system as was easily available by the "industry standard" of using "no archive" metatag in the Web site's code).

20. Copyright misuse is based on the notion of "unclean hands," meaning that the copyright holder's own conduct may, in some cases, disqualify him from asserting any copyright infringement claim during the period of misuse. *See Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516, 520 (9th Cir. 1997); *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 601 (5th Cir. 1996); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977–79 (4th Cir. 1990).

21. *See* 17 U.S.C. § 110(5)(A) (2000).

22. The Court held that the reception of music on the radio did not constitute a public performance. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162–64 (1975). By contrast, § 110(5)(A) simply exempts the reception from the public performance right, characterizing it as not an infringement. *See* 17 U.S.C. § 110(5)(A).

23. *Aiken*, 422 U.S. at 162.

implied consent to ‘reasonable and customary’ use when he released his work for public consumption”²⁴

Despite these copyright provisions and doctrines that derive from or actually consider the practices in the marketplace, neither Congress nor the courts have formally adopted a U.C.C.-type incorporation of custom, dealing, or usage within copyright law. Formal copyright law shies away from expressly recognizing informal practices.

Even more surprising, IP scholarship has all but ignored this issue. Mark Lemley offers one notable exception in a recent essay that provocatively suggests that entities routinely ignore patents while manufacturing products in the information technology (IT) sector that may infringe someone else’s patent.²⁵ According to Lemley, one of the key reasons IT companies ignore the patents of others is that patents are often just probabilistic in nature, meaning that the scope and even validity of patents are often highly uncertain and a large percentage of patents turn out later to be held invalid or not infringed.²⁶

This Article takes a similar, practical approach to examining copyright law. My conclusion for the copyright context, though, is different from Lemley’s for patents. The copyright context presents a different dynamic than the IT sector’s deliberate choice to ignore existing patents. The validity of copyrights are usually never in question, and most individuals dealing with copyrighted works probably do not make as informed or even conscious legal decisions as IT companies do, with advice of legal counsel. Yet the systemic uncertainties in formal copyright law do produce their own kind of informal practices. Given the lack of clear rules for fair use and misappropriation, knowledge of copyright law is often no better than ignorance of copyright law. Even though I am an expert of copyright law, my prediction of what is a fair use probably is no better than the person on the street—or it could be even worse, given that a jury will not typically be comprised of copyright experts and judges often are not well versed in copyright law. My thesis is that, where the content of formal copyright law is so often vague on critical issues, leaving the public with no specific guidance, *informal practices* will likely develop as coping mechanisms.

My approach to examining informal copyright practices is markedly different from prior copyright scholarship. To the extent informal practices are discussed in copyright scholarship, they commonly are portrayed as operating contrary to formal law, typically as infringement, such as in Robert Ellickson’s now-famous account of the “lawlessness” of academic photocopying of material for course packs in universities²⁷ or

24. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 550–51 (1985).

25. See Mark Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19, 21–22.

26. *Id.* at 27–28.

27. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 258 (1991).

the discussion of illegal file sharing.²⁸ By contrast, my approach examines not those practices that are clearly infringing under formal copyright law, but those many practices whose legality or illegality is simply unclear. In my view, these informal copyright practices are not operating outside of the law—they are instead a vital component of the entire copyright system.

The first—and perhaps only—extended examination of custom's role in IP law thus far appears to be the recent article by Professor Rothman published in December 2007.²⁹ Rothman provides an excellent discussion of many issues that cannot be adequately summarized here. Overall, she is skeptical of the courts' or Congress's reliance on custom as a way to provide substantive IP law.³⁰ While she is more willing to allow custom to be used as evidence for some issues, she proposes a list of six factors—(1) certainty of the custom, (2) motivation behind the custom, (3) representativeness of the custom, (4) application of the custom against whom it is asserted, (5) consideration for what proposition the given custom is asserted, and (6) implications of the custom—that all must be typically satisfied before custom is even considered by a court or Congress.³¹

Although I am far more sanguine than Professor Rothman about permitting the use of custom by courts and Congress, my Article focuses on a different question than hers. My primary concern is the role of informal copyright practices that are *not* the subject of any litigation or legislation. I believe this category of informal copyright practice (i.e., those that never reach a court or Congress) is far more numerous, and, therefore, may be more important to understand as a practical matter.

My approach is grounded in the legal realist school. There is an incredibly diverse and rich body of legal scholarship written from this perspective—far too numerous to summarize here and only growing by the day in the “new legal realist” movement.³² I would not claim to be an expert in this literature—in part because IP law scholarship, the field I write in, has largely ignored these insightful discussions about legal realism, pragmatism, microanalysis of institutions, and new governance taking place in other areas of law. Victoria Nourse deserves (unknowingly) some credit for my recent turn to this approach; her engaging presentation of a work-in-progress got me thinking along these realist lines and wondering how IP law fits into this larger discussion taking place in legal

28. See, e.g., Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577, 582 (2006).

29. Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

30. *Id.* at 1967–68.

31. *Id.* at 1969–80.

32. See Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 482 n.16 (citing examples of legal scholarship and the “new legal realist” movement).

scholarship. This Article is my first attempt to tackle that question for copyright law, as applied to the growing phenomenon of UGC. As I said at the outset, this Article is offered as an invitation for future research in this area rather than an attempt at the definitive last word.

B. *Defining the Terms: Copyright Practices*

The copyright world can be divided into two: (1) *formal copyright practices* consisting of formal copyright law and formal licenses and (2) *informal copyright practices* consisting of uses of copyrighted works that are not authorized by formal licenses and that fall either outside of formal copyright law or within a gray area.

“Practice” includes the entire range of activities involving a copyrighted work—such as uses by third parties and/or licenses by authors—that in fact occur after a copyrighted work is created. In other words, it is whatever happens, in practice, to a copyrighted work over time. I differentiate the term “copyright practice” from two other similar terms, *custom* and *social norms*, which are perhaps more frequently used in legal scholarship. Although a practice can overlap with a custom or social norm, the word “practice” captures better the generic notion of whatever occurs in practice, even if only between two parties in a single incident. I intend to use the term “practice” to cover what happens in single isolated incidents, as well as in repeated, widespread fashion. “Custom” and “social norm” may suggest something much larger in scale or more repeated than a single, isolated incident.³³ Also, I think the term “practice” more accurately conveys the informal and fluid nature of how people actually use copyrighted works.

1. *Formal Copyright Practices*

Formal copyright practices are ones that have been either (1) authorized by formal contract by the copyright holder or (2) specifically approved as legal by formal law, whether in a statutory provision or settled court decision. Thus, there can be no question that a formal copyright practice is legal. It clearly is.

The world of formal copyright practices is the one most familiar to courts, lawyers, commentators, and law professors. Formal copyright practices take a formalistic view of copyright law. Under such a view, rights are abstractly and neatly defined by the various provisions—or “black letter law”—of the Copyright Act. A strong preference exists for obtaining formal licenses for every use of any copyrighted work. Indeed,

33. Cf. Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 127 (2007) (discussing the scale of custom for international law and proposing a definition of custom as a “body of practice that has become expected by a people to such a degree that it has become law”); Rothman, *supra* note 29, at 1900 n.1 (discussing various definitions of custom and norm).

this preference is often converted into a simple rule: *unauthorized uses of copyrighted works are infringing*. Sometimes, it is described more fully with the following caveat: unauthorized uses of copyrighted works are infringing *unless they are fair use or fall within another statutory exemption*.

Take, for example, the comment of the President of the Association of American Publishers Pat Schroeder against Google's unauthorized copying of books for its Google Book Search database:

Not only is Google trying to rewrite copyright law, it is also crushing creativity. If publishers and authors have to spend all their time policing Google for works they have already written, it is hard to create more. *Our laws say if you wish to copy someone's work, you must get their permission*. Google wants to trash that.³⁴

Schroeder's comment reflects what might be called the "permission first" mantra. Taken to extreme, this view precipitates a kind of "clearance culture," an environment in which businesses and individuals attempt to obtain a formal license for every single use they make of any copyrighted work, regardless of fair use, *de minimis* borrowing, and other exemptions.

Although it may be easy to dismiss Schroeder's comment as rhetoric in the context of an ongoing legal battle, variations of the same, simplistic principle can be found in copyright hornbooks and treatises. For example, Arthur Miller's *Nutshell on Intellectual Property* describes infringement as follows: "Infringement—a word that is not defined anywhere in the Copyright Act—occurs whenever somebody exercises any of the rights reserved exclusively for the copyright owner without authorization."³⁵ William Patry's new treatise describes copyright infringement in similar fashion: "[W]here an unauthorized material use of a copyrighted work does fall within one of those rights [in sections 106 or 106A], infringement occurs, unless the use is excused by one of the privileges, exemptions, or compulsory licenses found in sections 107 through 122."³⁶

Another characteristic of the formalist approach to copyright is that it examines copyright questions at a single snapshot in time—namely, the moment of unauthorized use of a copyrighted work.³⁷ The determination of whether an unauthorized use is infringement is like an on-off switch:

34. Pat Schroeder & Bob Barr, *Reining in Google*, WASH. TIMES, Nov. 3, 2005, at A18 (emphasis added).

35. ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT* 345 (4th ed. 2007).

36. 3 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 9:2, at 9-14 to 9-15 (2007); see Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 353 (2005) ("Most of us [copyright scholars] readily concede that private copying is and should be infringement in the first instance, unless excused as fair use.").

37. See Sonya K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 *AM. U. J. GENDER SOC. POL'Y & L.* 461, 477 (2006) ("The property theme, which has taken on greater emphasis in modern times, suggests a sort of fixed, unitary, thing-like character that remains largely static, stable, and resistant to modern change.").

the use is either infringing or not infringing at the moment of use. There is no gray area or in-between. Nor is there consideration of how the passage of time may affect the ultimate question of infringement.

To draw an analogy, the formalist approach is similar to Newtonian physics. Newton elaborated three laws of motion for a universe considered to be static, in which time and space were “immutable entities that provided the universe with a rigid, unchanging arena.”³⁸ These laws of motion could be stated with mathematical precision.³⁹ Newton viewed all matter as composed of neatly defined, indivisible atoms.⁴⁰ Similarly, the formalist approach to copyright views copyright as atomistic and subject to black letter laws unchanged by time or space. Under the formalist approach, every unauthorized use of copyrighted works is considered presumptively an infringement. The formalist approach can be reduced to the following simplistic formula: unauthorized use – fair use – other exemptions = infringement.

2. *Informal Copyright Practices*

By contrast, the world of informal copyright practices is much messier. Informal copyright practices are those practices involving a copyrighted work that have yet to be subject to a formal license or a settled court decision finding the practice or general type of practice non-infringing. They are “informal” in that the user of the copyrighted work does not have either a formal license or formal law (as in a statutory provision or court decision) that has clearly legitimized the use or type of use in question. I would classify implied licenses as informal copyright practices, at least if the implied license was not ever recognized as such by a formal court decision.

Informal copyright practices occur routinely every day. Indeed, it is probably fair to surmise that the total number of informal copyright practices dwarfs the total number of formal copyright practices in the United States. In other words, far more people make far more *unlicensed* uses of copyrighted works than licensed or formally authorized uses.

To return to the analogy of physics, examining informal copyright practices can be likened to Einstein’s view of physics, in which the universe is not governed by fixed, unchanging laws of motion.⁴¹ Instead, things are relative through space and time.⁴² Similarly, the way copyright operates is relative to the way people use copyrighted works, and the legal status of those uses may evolve and become clearer—or even change

38. Omar Saleem, *The Physics of Fourth Amendment Privacy Rights*, 32 T. MARSHALL L. REV. 147, 158 (2007) (quoting BRIAN GREENE, *THE FABRIC OF THE COSMOS* 8 (2004)).

39. *Id.* at 157.

40. Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 50 (2002).

41. See Steven Goldberg, *Albert Einstein, Esq.*, 93 GEO. L.J. 319, 320–21 (2004).

42. *Id.*

completely—over time. Although the analogy to physics may seem a little strained, legal realists have drawn on this comparison for some time.⁴³

To many who espouse the formalist view of copyright, informal copyright practices may all sound like a euphemism for copyright infringement. In the section that follows, I explain why this view is mistaken. In some cases, the informal copyright practices could constitute infringement. In other cases, though, they could be fair use or fall within another exemption. In still other cases, the law might be unclear, or the copyright holders might tolerate or later condone the practice without ever granting a formal license. The precise status of the practice in question might, therefore, be unclear. These “gray areas” should be recognized as such. If we were forced to depict this approach in a formula, it would resemble the following: unauthorized use + gray area of copyright law = informal copyright practice = what over time?

C. *Informal Copyright Practices as Gap Fillers in Copyright Law*

When discussing copyright law, it is easy for lawyers to discuss legal issues purely from the standpoint of the “black letter law” of copyright. Controversies over abstract legal principles are debated with little, if any, consideration of how informal practices—such as custom, dealing, and usage—may help to resolve the debate. The expectation is that all answers to copyright issues will come from either the Copyright Act or courts applying it. This expectation does not square with reality, however. The “formal” law of copyright can only go so far. It is filled with many gaps and gray areas. That is why informal practices are needed. They often serve as gap fillers in the copyright system.

Before explaining my theory of “gap fillers,” it is important to distinguish my use of the term “gap” from how it is sometimes used in legal realist literature.⁴⁴ I use “gap” to indicate those areas in formal law where it is relatively unclear *ex ante* how the formal law would treat a particular set of facts. There is a gap in formal law because it is unclear. This is to be contrasted with a “gap” or divergence between formal law and law in action—i.e., circumstances in which people do not appear to be following the law at all. For example, drivers might openly flout the speed limit and drive ninety miles per hour. That, however, is not the kind of gap I speak of. My theory is focused on gaps in the formal law itself, such as would be the case if there were no formal speed limit at all or if the law merely stated that the speed limit must be determined on a case-by-case basis. I use the term “gap” and “gray area” to include those situations that describe when federal courts may appropriately create

43. See Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 241 (1950).

44. See, e.g., Handler et al., *supra* note 32, at 499 (“The suggestion that the ‘gap’ between formal prescription and social actuality should be closed.”).

federal common law within a statute,⁴⁵ as well as those circumstances in which the formal law is uncertain or indeterminate to such an extent that the public has little, if any, basis to determine whether a contemplated use is permissible.

1. *Using Informal Practices to Fill Gaps*

The idea of using practices to fill gaps in formal law is nothing new. In international law, for example, customary practices among nations can become a part of international law.⁴⁶ In tort law, industry custom may provide evidence relevant to the reasonableness of certain conduct.⁴⁷ In contract law, where we have seen probably the greatest discussion of gap fillers, performance, course of dealing, and usage of trade can fill gaps left open in a contract.⁴⁸

My theory of informal copyright practices builds on this basic intuition: sometimes, practices can effectively fill gaps left open by formal law. But my claim to relying on informal copyright practices as gap fillers is far more modest than the examples above. I do not here argue that courts should rely on informal copyright practices in the relatively few copyright cases that are litigated each year. That issue I leave for another day. Instead, my theory focuses on the gaps left open for issues that remain *unlitigated*; that is where the greatest need for gap fillers exists in our copyright system. We should rely on informal copyright practices for the vast amount of *unlitigated* uses of copyrighted works, particularly if the legality of the use in question falls within a gray area of formal copyright law. However, if formal copyright law is clear (such as in holding that unauthorized music file sharing is illegal),⁴⁹ an informal copyright practice is unnecessary.

The primary reason we need gap fillers in copyright law is quite simple: formal copyright law is riddled with gray areas and gaps. At a systematic level, the Copyright Act is not constructed to address *ex ante* the welter of circumstances involving uses of copyrighted works.⁵⁰ Be-

45. See Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 72–73 (2007) (discussing “the federal courts’ authority to craft federal common law—an authority that arises from the need to fill interstices in federal statutory schemes and the reality that courts are the only federal institution capable, at the time the case is before it, of filling those gaps”).

46. See Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 859 (2006).

47. See The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999).

48. See U.C.C. § 2A-207(2) (2005); RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1981); Omri Ben-Shahar, “Agreeing to Disagree”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 396–99.

49. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013–14 (9th Cir. 2001).

50. Cf. Ben-Shahar, *supra* note 48, at 396–97 (discussing efficiency rationales for relying on gap fillers in contract law).

sides a few very detailed, but mostly industry-based, exemptions,⁵¹ the Copyright Act is written at such a high level of generality that many of the key concepts are often too indefinite to inform the public as to whether an anticipated use is infringing, fair use, or otherwise permitted. To be sure, some cases of blatant infringement and commercial piracy are easy to tell. But, by the very way Congress has drafted the Copyright Act, many gray areas and gaps are necessarily created for the myriad of ways and settings in which copyrighted works can be used. Although in other areas of law administrative agencies may help to fill gaps left open by general statutes through extensive rulemaking, regulations, and opinion letters, the Copyright Office (as an Article I agency within the Library of Congress) has had only relatively modest authority in rulemaking and clarifying gaps in copyright law.⁵² Though some copyright scholars argue that the Copyright Office's role should be increased,⁵³ even if it is, I doubt it would be enough to handle all the gaps and gray areas in copyright law. For a variety of reasons explained below, the current copyright system cannot possibly handle, through either litigation or formal licensing, the millions of uses of copyrighted works that occur every day.

Diagram 1 below provides an overall synopsis of my theory. The large circle represents formal copyright law, which signals—or should signal—to the public what is permissible. Yet formal copyright law is filled with many gray areas (depicted by the gray circles), created not only from open-ended, indeterminate concepts such as fair use, but also because of new technologies and new types of uses of copyrighted works. The gray areas can be removed by courts and Congress, as represented by the black-and-white circles that are added to formal copyright law. Unfortunately, however, the number of formal decisions and amendments clarifying the Copyright Act cannot keep up with the fast development of new technologies and new uses. Against this backdrop of formal copyright law, which is riddled with gray areas that do not effec-

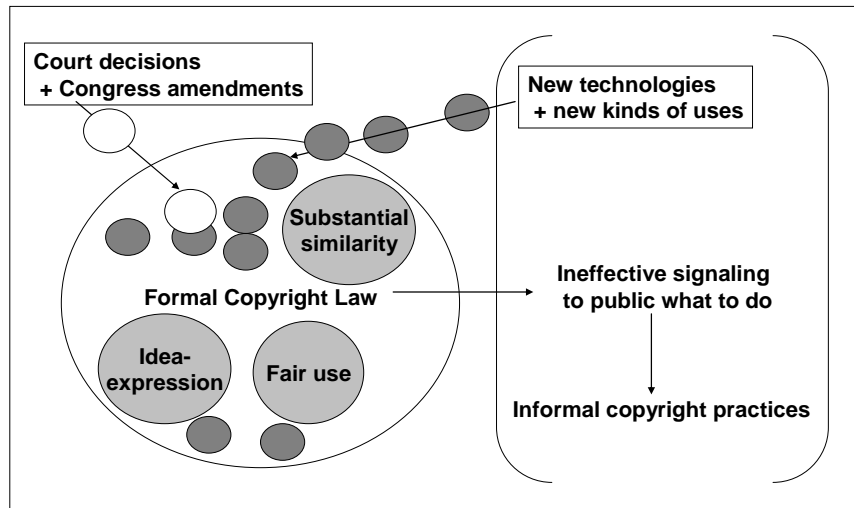
51. See, e.g., 17 U.S.C. § 109(c) (2000) (first sale doctrine); *id.* § 110 (various exemptions for public performances and displays); *id.* § 111 (compulsory license for secondary transmissions by satellite and cable); *id.* § 115 (compulsory license for music covers); *id.* § 116 (compulsory licenses for jukeboxes); *id.* § 117 (limited exemptions for archiving software and repairing computers); *id.* § 118 (compulsory license for use of certain works in public broadcasting); *id.* § 119 (exemption for secondary transmissions by satellite carriers); *id.* § 120 (scope of rights in architectural works); *id.* § 121 (exemption for copying materials for blind and other people with disabilities); *id.* § 122 (compulsory license for secondary transmissions by satellite carriers within local markets).

52. See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 148 (2004) (“The Copyright Office’s regulatory authority has historically been limited to issues relating to its ministerial functions, such as registration and deposit.”).

53. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1123–41 (2007) (proposing a Fair Use Board within the Copyright Office to provide opinions on whether a contemplated use is fair use); Liu, *supra* note 52, at 151–52 (“[R]ather than enacting specific industry exemptions to copyright liability, Congress could delegate to the Copyright Office the authority to promulgate additional exemptions via regulation. Thus, the Copyright Office could issue detailed provisions governing what types of uses of copyrighted works would be exempt from liability.”).

tively signal to the public what is permissible, informal copyright practices develop.

DIAGRAM 1
THE GRAY AREAS OF COPYRIGHT LAW + INFORMAL COPYRIGHT PRACTICES



2. *Why Formal Copyright Law Has Many Gaps*

a. Few Copyright Cases Are Ever Litigated

The first reason that informal practices are important to copyright law is that so few uses of copyrighted works ever get litigated. A formalistic, “black letter law” approach works best in copyright cases that are actually litigated to completion, setting a precedent from the “top down” for the type of practice in question.

In 2006, the number of copyright cases filed was only 4,944, which was consistent with the low numbers in years past.⁵⁴ Of the copyright cases filed each year, only a small fraction ever result in a trial court judgment; in 2002, for example, only 423 cases resulted in a judgment.⁵⁵ In 2007, the federal district courts issued only 130 published opinions in

54. ADMINISTRATIVE OFFICE OF THE U. S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES DISTRICT COURTS (2007) [hereinafter JUDICIAL BUSINESS].

55. See STATISTICS REPORT, *supra* note 1; *supra* note 1 and accompanying text.

copyright cases at any stage of proceedings,⁵⁶ of which only *twelve* contained any discussion of fair use⁵⁷—the all-purpose exemption typically most important for users. During 2007, no published decision analyzed any copyright claim against UGC.

The number of appellate copyright decisions is typically far less. In the past five years, the Supreme Court has decided only two copyright cases.⁵⁸ The so-called “copyright” circuit, the Second Circuit, had only *six* published copyright decisions for 2007.⁵⁹ The Ninth Circuit had only six decisions as well.⁶⁰ As shown in the chart below,⁶¹ most of the other circuits had even fewer copyright decisions.

TABLE I
PUBLISHED COPYRIGHT DECISIONS BY FEDERAL APPELLATE COURTS
2007

	Total Decisions	Decisions Analyzing Fair Use	Cases Analyzing User- Generated Content
First Circuit	6	0	0
Second Circuit	6	0	0
Third Circuit	1	0	0
Fourth Circuit	4	1	0
Fifth Circuit	1	0	0

(Continued on next page)

56. Erin Holmes et al., List of Published Copyright Decisions by Federal District Courts in 2007 (March 10, 2008) (on file with the *University of Illinois Law Review*).

57. See *S&L Vitamins, Inc. v. Australian Gold, Inc.*, 521 F. Supp. 2d 188, 213–15 (E.D.N.Y. 2007); *Red Bull GmbH v. RLED, LLC*, 515 F. Supp. 2d 641, 648 (M.D.N.C. 2007); *Tingley Sys., Inc. v. HealthLink, Inc.*, 509 F. Supp. 2d 1209, 1220 (M.D. Fla. 2007); *Ticketmaster L.L.C. v. RMG Tech., Inc.*, 507 F. Supp. 2d 1096, 1109 (C.D. Cal. 2007); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 636–39 (E.D. Pa. 2007); *Tavory v. NTP, Inc.*, 495 F. Supp. 2d 531, 538–39 (E.D. Va. 2007); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 967–72 (C.D. Cal. 2007); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 190 (D. Mass. 2007); *Blanch v. Koons*, 485 F. Supp. 2d 516, 518 (S.D.N.Y. 2007); *United States v. ASCAP*, 485 F. Supp. 2d 438, 444 (S.D.N.Y. 2007); *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 641–44 (S.D. Tex. 2007); *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 83 (D.D.C. 2007).

58. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

59. See *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116 (2d Cir. 2007); *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007); *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109 (2d Cir. 2007); *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir. 2007); *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007); *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150 (2d Cir. 2007).

60. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Welles v. Turner Entm't Co.*, 503 F.3d 728 (9th Cir. 2007); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788 (9th Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007); *Jarvis v. K2 Inc.*, 486 F.3d 526 (9th Cir. 2007).

61. Edward Lee, Published Copyright Decisions by Federal Appellate Courts 2007 (March 10, 2008) (listing relevant cases) (on file with the *University of Illinois Law Review*).

TABLE I—Continued

	Total Decisions	Decisions Analyzing Fair Use	Cases Analyzing User- Generated Content
Sixth Circuit	9	1	0
Seventh Circuit	3	0	0
Eighth Circuit	0	0	0
Ninth Circuit	6	2	0
Tenth Circuit	2	1	0
Eleventh Circuit	3	0	0
D.C. Circuit	0	0	0
Federal Circuit	2	0	0
Total	43	5	0

And out of all the circuits combined, only *five* decisions contained discussion of the fair use doctrine. *No* federal appellate decision in 2007 considered a copyright claim against UGC.

The low number of published fair use decisions in 2007 is consistent with years past. In an exhaustive study of fair use decisions from 1978 to 2005, Barton Beebe found that the federal courts produced only 10.9 fair use decisions per year.⁶² During that time, the courts of appeals typically produced well under that amount.⁶³ As Beebe concludes, “this is a surprisingly low number of opinions for such an important area of copyright law, particularly one that has received so much academic attention.”⁶⁴

The number of federal copyright decisions represents an exceedingly small number compared to the total number of optional registrations of copyrighted works each year (approximately half a million),⁶⁵ and an even smaller number when compared to the total number of copyrighted works created annually (probably many millions, if not billions, around the world)⁶⁶ and the total number of copyrighted works already in existence (billions more). The number of copyright lawsuits filed recently may, in fact, be somewhat inflated by the numerous law-

62. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 565 (2008).

63. *Id.* at 567 fig.2.

64. *Id.* at 565.

65. U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS: FISCAL YEAR ENDING SEPTEMBER 30, 2005, at 82 (2005).

66. All Internet Web pages, for example, automatically obtain copyrights as long as they have the modicum of originality required. By August 2005, there were 19.2 billion Web pages indexed by Yahoo. See Posting of Tim Mayer to YAHOO! SEARCH BLOG, <http://www.ysearchblog.com/archives/000172.html> (Aug. 8, 2005). By September 2006, Google had indexed about 25 billion Web pages. See Danny Wirken, *The Google Goal of Indexing 100 Billion Web Pages*, SITE PRO NEWS, Sept. 20, 2006, <http://www.sitepronews.com/archives/2006/sep/20.html>.

suits brought by the Recording Industry Association of America (RIAA) against illegal downloaders.⁶⁷

Thus, by any conservative estimate, only a tiny fraction—well under one percent—of all uses of copyrighted works are ever the subject of litigation in court each year. In other words, the vast majority—*probably more than ninety-nine percent*—of uses of copyrighted works are not ever litigated in court. To make matters worse, federal courts produce an exceedingly low number of copyright precedents each year and an even lower number for fair use, the doctrine that is often most essential to members of the public in their use of copyrighted works.

Several different reasons may help to explain the relatively low number of copyright cases. First, litigation is expensive, and copyright holders may be able to achieve enforcement of their copyrights through cease-and-desist letters in many instances. Moreover, probably many copyrighted works are not commercially valuable,⁶⁸ which reduces the incentive for the copyright holder to enforce its copyright. Third, it may be time-consuming and expensive for the copyright holder to catch all incidents of infringement. Fourth, some copyright holders may not be concerned about unauthorized uses of their works, preferring (for any number of reasons) the unrestricted use of their work. Some of these unauthorized uses may well be fair uses, but we probably have no way of knowing for certain if they are not ever litigated.

The dearth of copyright lawsuits filed each year is significant for our copyright system. It puts incredible pressure on copyright issues to be resolved outside of court, whether by formal law, formal contract, or other means. Formal copyright law, however, does an extremely poor job of resolving issues outside of court if the law itself is complex or unclear, or if the issue is novel. Unfortunately for our copyright system, that is often the case, as I explain in the next section.

b. Copyright Law Has Many Gray Areas

Given the high level of generality in the formal law, the relatively few copyright cases brought each year leaves many gray areas in copyright law. As the name implies, a gray area is an area in which it is uncertain how the law would treat the particular use in question.⁶⁹ For a variety of reasons, formal copyright law is riddled with gray areas.

67. According to EFF, the RIAA has sued over 18,000 “John Doe” individuals (many of whom are college students) since 2003. See ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FOUR YEARS LATER 6 (2007), http://w2.eff.org/IP/P2P/riaa_at_four.pdf. It is not clear whether all of the “John Doe” suits are categorized as copyright cases in the Annual Report of the Director of the United States District Courts. See JUDICIAL BUSINESS, *supra* note 54 and accompanying text.

68. See Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953, 955 (2005) (suggesting less than 1% of copyrighted publications are really commercially valuable).

69. See *supra* text accompanying notes 44–45.

Even without a high frequency of litigated copyright cases, the formalist, top-down approach to copyright law could work well if the Copyright Act were written in a way that ordinary people could easily ascertain, ahead of time, whether their contemplated use of a copyrighted work was infringing. If the Copyright Act were clear and easy to understand, people would have an easy time following whatever it said.

Of course, formal copyright law is far from clear or simple to understand. Courts and legal commentators alike have repeatedly acknowledged the complexity and indeterminacy of many key provisions of copyright law.⁷⁰ For example, Judge Learned Hand long ago lamented: “[N]o principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.”⁷¹ The basic test of substantial similarity for infringement—which is vital for the public to evaluate whether its conduct is permissible—is, unfortunately, “largely subjective, thus permitting the finder of fact to give effect to its intuitive judgment of the perceived equities in a case.”⁷² And, of course, the fair use doctrine is notoriously fact-specific, leaving little guidance for users of copyrighted works on whether a particular use is fair.⁷³

Even worse, fair use can act almost as a trap, dangling the lure of protection from lawsuits if one makes a more “transformative” use⁷⁴—which is exactly the same kind of use that can also constitute an infringing derivative work.⁷⁵ How one walks the line between fair transformative use and infringing transformation in a derivative work is harrowing, as shown in the *Wind Done Gone* case where a sequel to *Gone with the*

70. See, e.g., R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 183 (2007) (“A variety of types of innocent infringement likely take place today, but perhaps the most important occurs when someone knowingly copies from an existing work and reasonably but erroneously believes, because of copyright law’s complex and often indeterminate scope, that her copying is permitted, not prohibited, by copyright law.”).

71. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

72. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1005 (1990).

73. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (stating that fair use cannot “be simplified with bright-line rules, for the [copyright] statute, like the doctrine it recognizes, calls for case-by-case analysis”); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 209 (“[T]he fair-use criteria are so ambulatory that no one can give a general answer.”); Lloyd L. Weinreb, Lecture, *Fair Use*, 67 FORDHAM L. REV. 1291, 1291 (1999) (“For all its exposure, our understanding of fair use has not progressed much beyond Justice Story’s observation [that the fair use doctrine] . . . was ‘one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases.’”). A few rare decisions have established a more general principle of fair use, such as in time-shift recording of broadcast shows or in intermediate copying of software for the limited purpose of interoperability. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (time shift recording); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (reverse-engineering). Gideon Parchomovsky and Kevin Goldman argue for the creation of more bright-line “fair use harbors” that would indicate *ex ante* that certain uses are fair. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007).

74. See *Campbell*, 510 U.S. at 579 (stating that transformative “works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”).

75. *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997) (discussing how a preexisting work can be transformed to create a derivative work).

Wind was first considered an infringing derivative work by the district court,⁷⁶ but later a protected fair use by the Eleventh Circuit.⁷⁷

Indeed, some copyright scholars compare the complexity of the Copyright Act unfavorably to the Tax Code.⁷⁸ It is not surprising, then, that a Clinton administration “White Paper” on Intellectual Property and the National Information Infrastructure, which examined copyright law in the Internet age, concluded that few people actually understood copyright law.⁷⁹ That conclusion was confirmed in a recent study on user-generated videos by Professors Aufderheide and Jaszi, who surveyed fifty-one people who had made user-generated videos.⁸⁰ Fifty-four percent of those surveyed admitted that they did not understand when it was permissible to use copyrighted works.⁸¹ During interviews of some of the participants, they showed “ignorance and confusion” about copyright law, even basic principles.⁸² For example, seventy-six percent recognized that fair use permitted them to use copyrighted materials, but none of those interviewed could describe accurately the fair use doctrine.⁸³ I would not blame them, however, given how fact-specific and indeterminate the doctrine is.

It should be easy to see why informal copyright practices will flourish among the public at large when (1) the type of practice in question has never been subject to litigation and (2) the Copyright Act is unclear or indeterminate on basic concepts. In these circumstances, informal practices are “gap fillers”: they fill the gap left by formal copyright law and let people go about their daily lives (utilizing copyrighted works) in the absence of settled precedent clarifying the legality of a particular unauthorized use of copyrighted works.

Take, for example, the unauthorized photocopying of copyrighted works for individual personal use. This practice has been going on since the advent of the copy machine. But the status of personal use photocopying still remains uncertain.⁸⁴ In 1973, the Court of Claims in *Williams & Wilkins* held that the National Library of Medicine’s photocopying of copyrighted works for interlibrary loan (based on a one-copy-per-individual request) constituted a fair use.⁸⁵ The judgment was affirmed

76. See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1365 (N.D. Ga. 2001) (discussing the right to make a derivative work).

77. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268–76 (11th Cir. 2001).

78. See Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 396 (2005).

79. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 204 (1995).

80. PAT AUFDERHEIDE & PETER JASZI, *THE GOOD, THE BAD, AND THE CONFUSING: USER-GENERATED VIDEO CREATORS ON COPYRIGHT 2* (2007).

81. *Id.* at 6.

82. *Id.*

83. *Id.* at 7.

84. See Easterbrook, *supra* note 73, at 208–09.

85. *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345, 1362 (Ct. Cl. 1973).

by an equally divided Supreme Court, giving the decision no precedential value other than the bare result.⁸⁶ Since that time, the courts have not decided the legality of personal use photocopying, and have even attempted to avoid the question.⁸⁷ To this day, the legal status of personal use photocopying remains uncertain, bedeviling legal commentators. As Professor Litman has explained, some personal uses “seem to fall within the literal terms of copyright owners’ exclusive rights, and seem to be excused by no statutory limitation, but which are nonetheless generally considered to be lawful.”⁸⁸

Another example of an informal copyright practice is the custom that university professors retain the copyrights to their work, even though they are employees and therefore fall squarely within the literal terms of the work-made-for-hire provision of the Copyright Act.⁸⁹ Although no court has ever specifically held that professors are exempt from the provision under the 1976 Act, it is virtually uncontested that professors enjoy (thank heavens) a customary exception of sorts from the provision.⁹⁰ This well-recognized customary practice is even harder to explain under the Copyright Act than personal use photocopying, given that the customary practice for professors appears to be contrary to the work-made-for-hire provision in the Copyright Act.

c. Copyright Law Faces Novel Issues of Law and New Technology or Markets

Even if we had a system of copyright that more frequently established precedent governing particular uses of copyrighted work and that

86. *Williams & Wilkins Co. v. U.S.*, 420 U.S. 376 (1975).

87. *See Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 916 (2d Cir. 1994) (“We do not deal with the question of copying by an individual, for personal use in research or otherwise (not for resale), recognizing that under the fair use doctrine or the *de minimis* doctrine, such a practice by an individual might well not constitute an infringement. In other words, our opinion does not decide the case that would arise if Chickering were a professor or an independent scientist engaged in copying and creating files for independent research . . .”). Courts have held that the creation of university “course packs” without authorization from copyright holders was infringement. *See, e.g., Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

88. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879 (2007).

89. *See* 17 U.S.C. § 201(b) (2000) (definition of work made for hire).

90. *See Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (noting that “virtually no one questioned that the academic author was entitled to copyright his writings”); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987) (recognizing that “the academic tradition [of a professor exception to the work-made-for-hire doctrine] since copyright law began” was unchallenged by the University of Illinois). *But cf. Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004) (unpublished assignments by high school teacher fell within work-made-for-hire); *Rouse v. Walter & Assocs., L.L.C.*, 513 F. Supp. 2d 1041, 1065 (S.D. Iowa 2007) (university professors’ creation of software program was work-made-for-hire). For further discussion, see Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987) (discussing the debate); Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL’Y 275 (2002); Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381 (1990).

more clearly defined permissible uses in the Copyright Act, we would still face novel issues of copyright law. Throughout the history of copyright law, new technologies—including the printing press, pianola, radio, jukebox, television, VCR, computer, MP3 player, and the Internet—have raised novel issues.⁹¹

The number of novel issues has only accelerated with the advent of the fast developing technologies of the Internet and the digital age.⁹² Because formal copyright law has a hard time keeping pace with new technologies and markets, we will inevitably encounter novel issues of law for which the formalist, black-letter-law approach cannot provide a definitive answer, at least not until a new precedent is established. Thus, we can expect the development of informal copyright practices when new technologies related to the dissemination, copying, and creation of works are introduced into the market.

d. Copyright Law Is Not Static

One of the shortcomings of the formalist approach to copyright is that it attempts to examine copyright questions at a single snapshot in time—namely, the moment of unauthorized use of a copyrighted work. Under this approach infringement is an on-off switch: the use is either infringing or not infringing at the moment of use and for the rest of time.

Yet this static approach to copyright ignores reality. Copyright issues do not exist in a timeless vacuum. As discussed above, few unauthorized uses of copyrighted works are ever challenged in court—meaning that how the copyright holder reacts to the unauthorized use can be just as important to the question of infringement as the user's conduct. Even if the use is later challenged, cases often settle before trial—thus resolving the case by a copyright practice hashed out between the parties. And even in those cases that are fully litigated, other informal copyright practices may develop during the litigation that may influence the court's decision.

For example, the *Sony* case took three years of litigation in the trial court,⁹³ another two years before the Court of Appeals,⁹⁴ and nearly three years more before the Supreme Court rendered its decision.⁹⁵ Of course, time did not stand still during the eight years it took for the case to resolve. During that time, sales of VCRs dramatically increased, and the practice of American viewers recording television shows became

91. See Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622–26 (2001).

92. See Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1307 (2002).

93. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 432 (C.D. Cal. 1979).

94. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981).

95. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

widespread.⁹⁶ There was a growing public perception that the government had no business trying to meddle with what ordinary people were doing in their homes.⁹⁷ Some of that same sentiment appeared to color the Supreme Court's decision, which in the end noted: "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."⁹⁸

Once we move from a static to a more dynamic view of copyright, we should recognize that just as the law develops over time, so too do informal practices. I think it is helpful to think of informal practices as having life cycles. All have a beginning. Some develop and become widespread. Others go nowhere and possibly end. In the *Sony* case, the informal practice of tape recording TV shows outpaced the courts' various decisions about its legality. Since the Supreme Court's decision to uphold the practice, "time shift" recording flourishes today like never before, albeit on more sophisticated DVR technology that has raised new legal questions.⁹⁹

Professors Hughes and Liu, in separate articles, have provided a helpful injection of time in the analysis of fair use, arguing that the case for fair use may increase as the copyrighted work becomes older.¹⁰⁰ Although their suggestion is a step in the right direction, it does not go far enough. Time should be factored into our basic understanding of *all* copyright issues, on both a micro (individual) and a macro (systemic) level. Every single use of a copyrighted work can be understood individually as having its own life cycle on a micro level. So, too, does every type of practice—such as time-shift recording of TV shows—have its own life cycle on a macro level. Instead of examining snap shots, copyright law should examine the entire life cycle for a particular use in question.

e. Costs of Copyright Enforcement Are High

Gray areas in formal copyright law can persist over time because it may be impracticable for copyright holders to seek court resolution of many legal disputes. Particularly for media companies and commercial works, the copyright holders must make some very practical decisions

96. See JAMES LARDNER, *FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR* 163–67, 197 (1987).

97. See *id.* at 203–05.

98. *Sony*, 464 U.S. at 456.

99. See *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 624 (S.D.N.Y. 2007) (cable company's DVR system allowing subscribers to record shows on company's central servers and play back later facilitated copyright infringement—although defendant did not raise fair use defense).

100. See Justin Hughes, *Fair Use Across Time*, 50 *UCLA L. REV.* 775 (2003); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 *MICH. L. REV.* 409 (2002).

about what kinds of unauthorized uses of their works to go after. The Internet facilitates the nearly instantaneous copying and sharing of works by billions of people around the world. In this digital environment, corporate copyright holders must effectively triage their litigation strategy to focus on those types of activities that are most worrisome to their business—typically, commercial piracy and other unauthorized commercial uses that cut into their existing or planned markets. Given these practical considerations, copyright holders may not ever challenge certain kinds of informal practices, which then continue to exist within a gray area of formal copyright law. The major copyright holders' need for triaging their litigation efforts may lead systematically to the avoidance of court precedent for a range of unauthorized uses the copyright holders find less worrisome or not bothersome at all. Given that strategy, formal copyright law cannot provide the answers to many uncertain issues that simply escape adjudication.

3. *Formal Licenses Cannot Fill All the Gaps in the Copyright System*

Formal contracts can help fill at least some of the gaps left open by formal copyright law. Even if formal copyright law is uncertain, the parties themselves can engage in private ordering, or licensing, to clarify their rights and obligations. Copyright licenses routinely occur in commercial contexts, such as in the movie and music industries. These formally licensed uses fall within the category of formal copyright practices. Software and media companies also try to impose contracts on users of their content through adhesion contracts called end-user license agreements or user agreements, often deployed through “click-on” features on Web sites or shrink-wrap on packaging.¹⁰¹

Although, in the past, formal licenses were probably used mainly by commercial entities with lawyers, Creative Commons has greatly changed the practice on the Internet. Started by Lawrence Lessig in 2001, Creative Commons is a nonprofit organization that provides free digital licenses that enable copyright holders to attach a “Creative Commons” license to their works.¹⁰² The license indicates the terms set by the author—such as allowing others to share, copy, and remix the work, as long as the use is noncommercial and attribution is given. The terms are fixed ahead of time and made known with the work itself, so there are

101. The enforceability of these contracts has generated a considerable amount of discussion. See, e.g., Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 513 (1997); Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up to Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173 (2007); Matthew D. Walden, Note, *Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions*, 58 WASH. & LEE L. REV. 1625 (2001).

102. See Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 285–86 (2007).

virtually no transaction costs for downstream users of the work.¹⁰³ By 2006, nearly 149 million Creative Commons licenses were in existence.¹⁰⁴

Although the Creative Commons movement has been a success by any measure, it still probably has not put a dent into the vast disparity between the number of formal and informal copyright practices. It is probably safe to surmise that most uses of copyrighted works are *not* formally licensed. For example, in the *Grokster* case alone, the movie studios provided evidence that “billions of files are shared across the FastTrack and Gnutella networks each month,” making the “probable scope of copyright infringement . . . staggering.”¹⁰⁵ File sharing is only one small subset of the total number of uses of copyrighted works. People use copyrighted works everyday without formal licenses, in a variety of contexts that are only growing by the day on the Internet. In Web 2.0, the entire Internet is becoming the fodder for “cutting and pasting,” “dragging and dropping,” and reconfiguring and remixing to the user’s own preference. Many unlicensed uses of copyrighted works have colorable claims of fair use. Many probably do not. Regardless, given the sheer number of uses of copyrighted works, it is probably unrealistic to expect that formal licenses should be obtained in all cases. In many situations, the transactions costs may be too high for the particular use in question.

4. *Copyright Holders Sometimes “Hedge,” Preferring to Avoid Formal Licenses*

Even beyond transaction costs, sometimes the copyright holders may actually prefer to allow third parties to use their copyrighted works, *but without* formal licenses. This informal arrangement gives the copyright holders effectively a “hedge.” Under the hedge, the copyright holders can “wait and see” what happens with all the different uses of their works. Some uses the copyright holder may end up liking—whether for free advertising, promotion, or even discovering new talent. For example, Nick Haley, a nineteen-year-old student in the United Kingdom, made an unauthorized mashup video of an iPod commercial, synchronized with a copyrighted song and posted it on YouTube.¹⁰⁶ Once Apple saw it, Apple hired Haley to produce one of Apple’s new television commercials.¹⁰⁷

The advantage of hedging instead of granting formal licenses is that copyright holders can get the best of both worlds: free promotion and

103. *Id.* at 285–94.

104. *Id.* at 286–87.

105. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005).

106. See Stuart Elliott, *Student’s Ad Gets a Remake, and Makes the Big Time*, N.Y. TIMES, Oct. 26, 2007, available at http://www.nytimes.com/2007/10/26/business/media/26appleweb.html?_r=2&oref=slogin&oref=slogin.

107. *Id.*

talent trolling from various unauthorized uses of their works, combined with the ability to later protest other unauthorized uses of their works.

One well-known hedge by a copyright holder involved the famous Saturday Night Live clip “Lazy Sunday,” a hilarious rap parody about *The Chronicles of Narnia*. The skit aired on NBC on December 17, 2006.¹⁰⁸ Soon afterwards, someone reportedly uploaded a copy of the clip onto YouTube without NBC’s permission.¹⁰⁹ NBC, however, did not demand that YouTube remove the clip until nearly two months later; by that time, the clip had already become a huge hit on YouTube, drawing five million views.¹¹⁰ After all the publicity, YouTube CEO Chad Hurley was the one who in fact phoned NBC to ask whether NBC had put the “Lazy Sunday” clip on YouTube.¹¹¹ NBC’s response: we’ll get back to you.¹¹² NBC did, eventually asking YouTube to remove the clip.¹¹³

NBC learned a lesson from the huge popularity that YouTube provided to NBC’s show. Afterwards, NBC even agreed to a deal with YouTube to help promote its shows on YouTube,¹¹⁴ although the “Lazy Sunday” clip still remained only on NBC’s own site. John Miller, chief marketing officer for NBC Universal Television Group, openly admitted, “[W]e want to fully embrace the viral activity that YouTube embraces.”¹¹⁵ NBC has experimented with having a channel on YouTube, but also developed its own video site called Hulu.¹¹⁶

The hedge also is a cost-saving mechanism for major corporate copyright holders. It is much cheaper for them to have a blanket policy against formally licensing their works to individuals. Saying no—or not even responding—to users is far cheaper and easier than having to figure out what requests to approve and on what terms. As Stephanie Marti-

108. See Andrew Wallenstein, ‘SNL’ Skit Puts YouTube on Map, HOLLYWOOD REPORTER, Mar. 21, 2006, available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1002199880.

109. *Id.*

110. *Id.*

111. *The Charlie Rose Show: A Conversation with the Founders of YouTube* (PBS television broadcast Aug. 11, 2006), available at <http://www.charlierose.com/shows/2006/08/11/3/a-conversation-with-the-founders-of-youtube>.

112. *Id.*

113. *Id.*

114. Sara Kehaulani Goo, *NBC Taps Popularity of Online Video Site*, WASH. POST, June 28, 2006, at D1.

115. *Id.*

116. NBC appears to be still working out—or hedging on—its online video strategy. In June 2006, NBC announced a strategic partnership with YouTube in which NBC created its own channel on YouTube to show NBC videos. Press Release, YouTube, NBC and YouTube Announce Strategic Partnership, (June 27, 2006), at http://www.youtube.com/press_room_entry?entry=c0g5-NsDdJQ. In 2007, NBC suddenly removed its YouTube channel, preferring instead to launch its videos on its own NBC site and on Hulu, a joint project between NBC and FOX. Owen Thomas, *NBC Pulls YouTube Channel*, VALLEYWAG, Oct. 21, 2007, <http://valleywag.com/tech/online-video/nbc-pulls-youtube-channel-313276.php>. Later, however, Hulu decided to launch another channel back on YouTube that included NBC videos! Liz Gaines, *Hulu Brings NBC (and FOX) Back to YouTube*, NEWTEEVEE, May 1, 2008, <http://newteevee.com/2008/05/01/hulu-brings-nbc-and-fox-back-to-youtube/>.

nelli, a Disney clearance administrator, explained in response to one such request:

It is difficult to respond to your request, since we certainly understand your worthwhile intentions. Unfortunately, however, I am afraid we are going to have to deny your request to include footage from MARY POPPINS in your home video project, as requested. Due to the growing number of requests that we are receiving from individuals, school groups, churches, corporations and other organizations that wish to use clips from our productions as part of their video projects and other similar uses, we have had to establish a general policy of non-cooperation with requests of this nature. Unfortunately, we simply do not have the staff necessary to oversee and review all of the details of each specific request that we receive in order to determine whether the requested uses fall within acceptable guidelines or whether talent, music or film clip re-use payments to those featured in the footage and other legal clearances would be necessary to obtain before permission for requests of this nature can be granted.¹¹⁷

Of course, an automated online system of licensing media content might alleviate this problem, but, so far, the major media producers have not invested in such a user-friendly system.

The concept of “hedge” encompasses a variety of levels of acceptance or nonacceptance of an informal practice by copyright owners—including tolerated use, acquiesced use, accepted use, publicly encouraged use, and uses that even might be supported by implied licenses. The “hedge” is most effective when the copyright owner cannot be pinned down as having formally authorized the use. A copyright owner might merely tolerate the unauthorized use without stating a public position on it. Or she might speak vaguely in favor of a practice—though without committing to a license or while appearing to express reservations. The copyright owner’s private and public positions may even change or evolve over time—initially against a practice, but then for it, or vice versa. Even the levels of acceptance (or not) of the practice can vary. At one point, the copyright owner might appear to be merely tolerating unauthorized uses. At other points, she might seem to be coming close to approving it. The key to the hedge is that the copyright owner’s precise position is unclear over some period of time, offering a possible strategic benefit to the copyright holder to keep all of its options open.

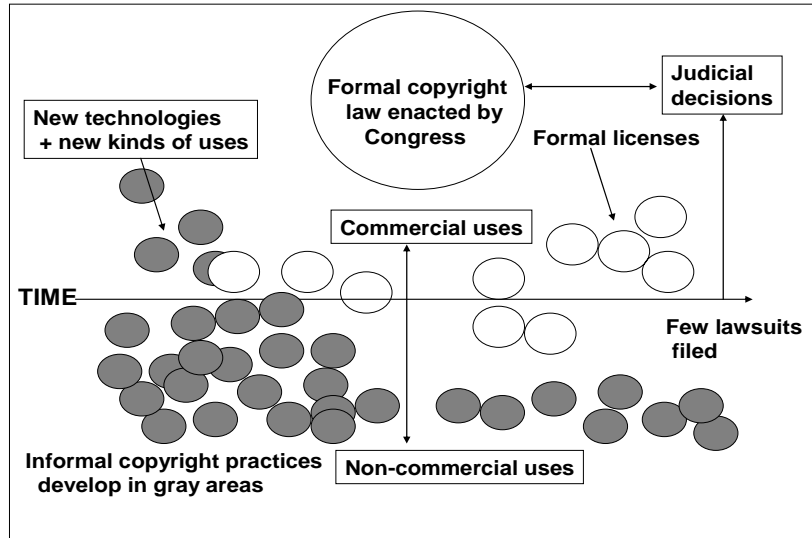
D. Summary

Thus, for a number of reasons, we can expect systematic gaps in formal copyright law. Those gaps can be filled by formal contracts be-

117. See J.D. LASICA, DARKNET: HOLLYWOOD’S WAR AGAINST THE DIGITAL GENERATION 72–73 (2005).

tween the parties, but also by informal copyright practices consisting of unlicensed uses. Informal copyright practices are most needed in copyright law where gaps or gray areas exist in formal copyright law.

DIAGRAM 2
RELATIONSHIP BETWEEN INFORMAL AND FORMAL COPYRIGHT PRACTICES



My theory is depicted graphically in Diagram 2, which injects the important element of time. The entire copyright system must be viewed on a timeline. Copyright is not static. In this dynamic context, formal copyright law attempts to govern copyright relations from the top down, as depicted by the circle at the top of the diagram. For a variety of reasons discussed already, formal copyright law does a relatively poor job at this task because it is filled with so many gray areas—uncertainties and indeterminacies spurred on by new technologies and copyright law’s preference for case-by-case adjudication over clear rules or guidelines.

There are three primary ways to deal with these gray areas. First, Congress and the courts can clarify the Copyright Act. In some cases, Congress may even codify a developing or preexisting custom; in such cases, the informal copyright practice “bubbles up” to the top and is incorporated into the Copyright Act. However, the relatively few published copyright decisions and even fewer copyright amendments each year make this option inadequate to address all of the many uncertainties in copyright law. Second, the parties themselves can engage in private ordering by formal contract, as depicted by the small white circles, which attempt to make the relations between parties more black-and-white.

Commercial licenses fall within this category, as do Creative Commons licenses. High transaction costs and strategic hedging preclude formal contract from being a panacea, however. Third, informal copyright practices can and do develop, especially for noncommercial uses. As depicted in Diagram 2, informal copyright practices (developing within the gray circles) far exceed the number of formal contracts (depicted by the white circles), although informal practices cluster more around noncommercial uses, which are less often subject to a lawsuit or a formal license.

Of course, there is crossover among the categories. Gray circles can become white circles through adjudication of a court decision, which then feeds back into formal copyright law clarifying the legality of the type of practice in question. Congress could also step in to clear up gray areas, as was the case with the Clear Play-type exemption in section 110(11).¹¹⁸ But, often, the gaps in formal copyright law persist over time. Informal practices are therefore necessary for our copyright system to survive.

II. EVALUATING INFORMAL COPYRIGHT PRACTICES—GOOD OR BAD?

This Part examines whether some informal copyright practices can be distinguished as “good” versus “bad.” Although I favor a broad, pluralist approach to accepting informal copyright practices, I believe some practices can be considered illegitimate or contrary to our copyright system. I propose a set of factors—what I call the Five-Factor Informality Test—by which to judge whether we should allow or reject an informal copyright practice.

A. *The Pluralist Approach and the Neutrality Participation Principle*

The starting point of my theory is that determining the “right” balance for our copyright system is indeterminate. People have different views on how best to “to promote the Progress of Science” as the Framers envisioned in drafting the Copyright Clause.¹¹⁹ Some people—e.g., the major corporate copyright holders, including the movie and music industries—prefer a maximalist approach to copyright, giving strong rights to copyright holders. Other people prefer a more moderate or minimalist scope to copyrights, so that users can have greater freedom to reuse copyrighted works as a part of their own creative endeavors. Your view on how well our copyright system functions will inevitably be shaped by where along the spectrum you fall. Although the Copyright

118. See 17 U.S.C. § 110(11) (Supp. V 2005).

119. U.S. CONST. art. I, § 8, cl. 8.

Clause imposes certain limits (e.g., originality, limited times),¹²⁰ Congress has considerable latitude within which to maneuver.

Although we could debate what the proper scope of copyright is, I strongly doubt we would ever reach a consensus. For the purposes of this Article, it is far more productive to recognize the pluralism on this issue and devise a theory that is neutral and fair to all sides.

My theory therefore begins with the basic premise that the development of informal copyright practices should be open to all. Copyright holders do not hold a monopoly over developing informal copyright practices. Nor do users. Everyone should have an equal opportunity to participate in the creation of an informal copyright practice. Thus, gaps in formal copyright law present both a shortcoming *and an opportunity*. It is a shortcoming in that the law fails to inform the public on how to act. It is an opportunity in that the gaps can be filled informally by users, intermediaries, and copyright holders, acting individually or collectively at the ground level.

This is what I call the *neutrality-participation principle*. It is based on a pluralistic view of the overall scope of our copyright system and allows everyone to participate in the process of developing an informal practice. For example, the movie studios can originate industry practices governing copyright issues, such as the need for licenses for commercial uses of a copyrighted work. Likewise, users can also develop informal practices related to copyrighted works, such as photocopying works for personal use. Whether either practice should ultimately be embraced (or rejected) should not depend on who created it.

In this regard, I disagree somewhat with the approach proposed by Professor Rothman in her excellent article on the role of custom in IP.¹²¹ She is skeptical of customs that are not “develop[ed] with input and participation of both IP owners and users and large and small players in the IP industries.”¹²² She prefers customs that are representative of the major interests involved, at least when courts are considering whether to rely on the custom in deciding a copyright issue.

My theory does not focus on the same problem as Rothman’s—a court’s incorporation of custom into copyright law. Regardless, I do not see why the fact that a custom originated from one side—whether a copyright holder or a user—should necessarily make the custom be considered suspect. In my view, informal copyright practices often develop in a far more loose and fluid fashion. Sometimes, interested parties do meet together to hammer out a set of guidelines or “best practices.” But often they don’t. Instead, what happens is that someone just starts an informal practice on her own and sees what happens. The practice might

120. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–47 (1991) (originality); *El-dred v. Ashcroft*, 537 U.S. 186, 209 (2003) (limited times).

121. Rothman, *supra* note 29.

122. *Id.* at 1972.

eventually be followed by others, or it might be rejected or provoke blowback. Or the reaction might fall somewhere in between these outcomes, with others starting an alternative practice of their own. Under my theory, the lack of representativeness in the creation or development of the practice would not necessarily mean that it should be discounted. As long as the opportunity for developing copyright practices is available to all on a neutral basis, my theory does not attempt to evaluate the legitimacy of an informal practice based on who instituted or developed it.

The concept of informal copyright practices shares some characteristics with the New Governance model—the so-called “‘third way’ vision, between state-based, top-down regulation and a single-minded reliance on market-based norms”¹²³—much discussed today in health care, employment and labor law, and environmental law. As Orly Lobel describes, “The new governance model supports the replacement of the New Deal’s hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals.”¹²⁴ Like the New Governance model, my concept of informal copyright practice is “open, dynamic, and diverse with a built-in temporal dimension.”¹²⁵ Informal copyright practices offer a third way of resolving copyright issues. One way is through formal law and litigation. Another way is through formal licensing. But a third way is through informal copyright practices, a kind of “soft law” approach to dispute resolution.¹²⁶

Ultimately, however, my concept of informal copyright practice does not fit neatly within the New Governance paradigm. For starters, most of the informal copyright practices I discuss do not involve any state actors, not even for the coordination or development of the practices. In that respect, New Governance scholars might consider these informal copyright practices nothing other than the market operating—an alternative that New Governance seeks to move beyond with state involvement in coordinating the process by which private actors develop norms in a transparent manner.¹²⁷ Moreover, when informal copyright practices develop, they may not necessarily result from any collective negotiation or decision making among interested stakeholders, or even consciousness of a governance issue. Informal practices can develop without any constituency ever forming or convening to decide what to do. For example, I might use a short clip of a copyrighted show as a part of mashup video to share online, or reproduce on my blog (with proper attribution) some-

123. Handler et al., *supra* note 32, at 494.

124. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004).

125. *Id.* at 348.

126. *See id.* at 388–89 (discussing various ways in which “soft law” is used in legal scholarship).

127. Cf. Alfred C. Aman, Jr., *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State*, 51 N.Y.L. SCH. L. REV. 801 (2006–2007) (discussing how New Governance attempts to move beyond the state-market dichotomy).

one else's entire article, all noncommercially but without permission. My conduct may not be a New Governance tool, but it is an informal copyright practice. If others follow the same sort of informal practice on their own, it gains more of the complexion of a governance development. Yet it still is far more diffuse, uncoordinated, and random than the kind of collaboration that the New Governance movement seeks.¹²⁸ However, if major copyright holders end up supporting the practice too, the informal practice does take on the air of a New Governance solution hashed out loosely by the various actions and reactions of the interested parties over time.

Although our copyright system might be well served if it openly encouraged "New Governance" collaboration among users and copyright holders over the scope and enforcement of copyrights, I am skeptical that big media copyright holders would agree to a process that was so formalized. Crucial to the "hedge" for media companies is the ability to avoid being pinned down on how they enforce their copyrights. Even appearing at the table with users would make it appear that their copyrights are all negotiable.¹²⁹ I think big media prefer to maintain a public front espousing an "all rights reserved" approach to their copyrights, while at the same time hedging on whether to allow certain unauthorized uses of their works without protest. In any event, I do not stake out the strong normative position that our copyright system should be formally revamped to incorporate greater "New Governance" participation and collaboration.¹³⁰ We do have a modest example of this kind of formal structure in the rulemaking process of the Digital Millennium Copyright Act (DMCA) that allows users to seek limited exemptions to the DMCA anticircumvention provision,¹³¹ as well as in the possibility of negotiated fees for statutory licenses for jukeboxes and other industries.¹³² Whether we need more "New Governance" structures within copyright law I leave open for future inquiry. My theory here focuses instead on how informal copyright practices already operate within our existing copyright system.

B. The Five-Factor Informality Test: When Informal Copyright Practices Are Needed Most

As discussed above, informal copyright practices serve as important gap fillers in our copyright system. They fill the gaps left open by formal

128. See Lobel, *supra* note 124, at 400 (describing the New Governance goal of orchestration to make "the governance model meaningful").

129. Other scholars have questioned whether the New Governance paradigm can work in contexts where there are inequalities of power or disputes between strong and weak actors. See, e.g., Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 535, 540 (2008).

130. Cf. Lobel, *supra* note 124, at 377 (discussing the goals of the New Governance model).

131. See 17 U.S.C. § 1201(a)(1)(B)–(C) (2000).

132. See, e.g., *id.* §§ 112(e)(2) (ephemeral recordings), 114(e) (sound recordings), 115(c)(3)(B) (covers), 116 (jukeboxes), 118 (public broadcasting).

copyright law, which is often unclear or unable to resolve new issues definitively without a court decision. Informal copyright practices also fill the gaps created by high transaction costs in obtaining licenses from copyright holders. When formal licenses are not easy to obtain, we can expect that users will rely more on informal practices. Without informal copyright practices, our system of copyright would likely grind to a halt.

With the gap-filling purpose of informal copyright practices in mind, I outline below a nonexhaustive list of five factors that make the development of an informal copyright practice more likely and more legitimate:

The Five-Factor Informality Test for Informal Copyright Practices

- (1) unlitigated use and the absence of settled case law finding the practice or type of practice in question constitutes an infringement;
- (2) the existence of a novel issue of law, such as one involving a new technology;
- (3) the existence of a colorable fair use defense, or other exemption or defense;
- (4) high transaction costs in obtaining formal licenses from copyright holders; and
- (5) no express objection by the copyright holder as to the particular use in question or the type of practice, or some indication that the copyright holder might allow it.

Factors 1 through 3 focus on the more common situations in which formal copyright law is uncertain. These situations create gaps and gray areas because it is impossible to know *ex ante* from formal copyright law whether the particular use in question is legal. The use or even type of use may not have ever been subject to a court decision. It may also present a novel issue of law for which it is not easy to analogize to existing case law governing other types of uses. The user may have a colorable claim of fair use or other exemption.

Factor 3 can also be grouped with Factors 4 and 5 to target those situations in which a user might, for practical reasons, forego obtaining a formal license from the copyright holder. The user might have a colorable claim of fair use or other exemption, or the transaction costs may be too high to locate and negotiate with the copyright holder for a formal license. The law and economics school has suggested, of course, that high transactions costs should be considered as a part of fair use.¹³³ Also, the reaction of copyright holders is very important. Under Factor 5, the level of protest by the copyright holder (or lack thereof) acts as an im-

133. See *infra* notes 134–35 and accompanying text.

portant signaling device to the public at large for whether an informal practice is relatively accepted by copyright holders. If copyright holders vehemently protest an activity (such as unauthorized music file sharing), people will have little, if any, basis to believe that copyright holders condone the practice. By contrast, if copyright holders publicly encourage the practice, people will have a reasonable basis to conclude that it is OK, notwithstanding the lack of a formal license. In some circumstances, there might even be a basis to imply a nonexclusive license or apply estoppel principles that would effectively negate the copyright holder's ability to challenge the particular use of her work in question. However, Factor 5 is not contingent on any determination of estoppel or implied license. It is meant to gauge the informal cues copyright holders send to the public with respect to various uses of their works.

Although some copyright lawyers and scholars may advise a "permission first" approach to all uses of every copyrighted work, that approach seems inefficient and impracticable in our modern world. The law and economics school has persuasively shown how transaction costs for negotiating IP can pose significant impediments and even be cost-prohibitive for users to seek permission in every case.¹³⁴ As Professor Gordon explained in the context of fair use:

A particular type of market barrier is transaction costs. As long as the cost of reaching and enforcing bargains is lower than anticipated benefits from the bargains, markets will form. *If transaction costs exceed anticipated benefits, however, no transactions will occur.* Thus, the confluence of two variables is likely to produce a market barrier: high transaction costs and low anticipated profits.¹³⁵

The factors do not all have to be present to justify an informal copyright practice. One factor could weigh very heavily in a particular circumstance, providing sufficient justification for the informal practice. Also, it is important to remember that copyright issues are not static. Any of the five factors could shift over time, thereby strengthening or weakening the need for an informal copyright practice. The five factors can be written along a spectrum to further indicate that each factor may change over time:

Spectrum for the Five-Factor Informality Test for Informal
Copyright Practices

1. Unlitigated use or type of use Litigated use or type of use

134. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 8, 16 (2003) (discussing why the scope of intellectual property must be narrower than physical property, given the high transaction costs for intellectual property); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 357 (1989) (arguing for fair use when "costs of a voluntary exchange are so high relative to the benefits that no such exchange is feasible between a user of a copyrighted work and its owner").

135. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1628 (1982) (emphasis added).

2. Novel issue of the type of use..... Settled issue of law
3. Colorable fair use defense or exemption.....No colorable defense
4. High transaction costs to license..Low transaction costs to license
5. No protest by copyright holder..... Protest by copyright holder

The Five-Factor Informality Test does not hinge on establishing a fair use. Part of the problem with fair use is that it is so fact specific, if not completely subjective. Even if the case for fair use or other exemption is doubtful, the other parts of the Five-Factor Informality Test may in some cases militate in favor of allowing the informal practice. For example, if copyright holders have never challenged or spoken against the practice for many years, that factor alone may tip the balance in the practice's favor, even if it is not a fair use.

C. Examples Applying the Five-Factor Informality Test

With the five factors now on the table, we can apply them to a few well-known practices to see if they aid our understanding. I have selected two examples that should be very familiar to most people: (1) photocopying material for personal use and (2) unauthorized music file sharing. I contend that the former is a legitimate informal copyright practice, while the latter is not.

1. Why Photocopying for Personal Use Is a Legitimate Practice

Photocopying copyrighted material for purely personal use offers a stark example of a huge gap or gray area in formal copyright law. The case for a gap-filling informal copyright practice is compelling.

First, the practice has, for decades, escaped litigation and a settled court precedent. *Williams & Wilkins* was decided by the Court of Claims in 1973,¹³⁶ but its force as authority is shaky or at least unclear, in part because of the Supreme Court's 4-4 split in reviewing the case.¹³⁷ The 1976 Copyright Act now includes a specific exemption for libraries to engage in limited photocopying of works for their patrons for noncommercial purposes.¹³⁸ Curiously, though, the exemption does not speak to the legality of an individual patron's copying for personal, noncommercial use. A library could be deemed exempt under section 108, while an individual patron could be held liable under the Copyright Act. The gap in the law, which has persisted for decades, is not likely to ever be resolved, as copy-

136. 487 F.2d 1345 (Ct. Cl. 1973).

137. *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975). To borrow Judge Leval's description, this issue might be the kind of "question[] that never need[s] to be answered" in copyright law because it is never presented. Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997).

138. See 17 U.S.C. § 108 (2000).

right holders have avoided settling the issue (not wanting to sue an individual for personal photocopying and suffering the negative publicity). Courts, too, have gone out of their way to avoid the issue.¹³⁹ Thus, Factors 1 and 2 cut heavily in favor of the development of an informal practice.

Factor 3 cuts in favor as well. Few would dispute that individuals have at least a colorable (if not successful) claim of fair use in photocopying material for noncommercial, personal use. The noncommercial photocopying of different works can facilitate a person's ability to engage in research, scholarship, and learning. We might be concerned if entire books were being copied, but the labor and cost involved in doing so probably is a sufficient deterrent to keep such practice in check.

Factors 4 and 5 also militate in favor of the development of an informal copyright practice related to noncommercial photocopying. Obtaining permission to photocopy portions of a work for personal use would all but defeat the very practice. The transaction costs are too high. Often a person intending to photocopy a work is seeking to use the material right away or in the foreseeable future, such as for a school project or for the ability to highlight and write on the material. But obtaining copyright permissions can typically take months, if not longer, assuming the copyright holder can be readily identified and located. Even if located, there is no guarantee that the copyright holder will even respond. By all indications, copyright holders are simply not concerned with such personal photocopying of their works. Based on the lack of litigation or protest by copyright holders over the last four decades, users can reasonably surmise that copyright holders do not mind the noncommercial photocopying of portions of their works for personal use.

Under these circumstances, and especially because of the length of time the issue has remained unsettled and escaped court decision, an informal practice is appropriate to fill the gap left open by formal copyright law. All five factors support the informal practice here as a gap filler.

2. *Why Unauthorized Music File Sharing Is an Illegitimate Practice*

Unauthorized music file sharing, even for alleged personal use, provides a contrasting example. Most of the five factors do not indicate any gap that needs to be filled. An informal copyright practice of music file sharing cannot, therefore, be justified as a gap filler.

Factors 1 and 5 militate very strongly against the development of an informal copyright practice as a gap-filler. The unauthorized sharing of music files has been the subject of thousands of lawsuits, including several resulting in court decisions that are all in agreement that such activ-

139. See cases cited *supra* note 87 and accompanying text.

ity is illegal copyright infringement.¹⁴⁰ In considering the scope of secondary liability for developers of file sharing software in *Grokster*, the Supreme Court has also taken the same view.¹⁴¹ Several district courts have recently grappled with the question of whether merely “making available” a copyrighted file online when using file-sharing software—without proof of an actual distribution—constitutes infringement.¹⁴² However that question as ultimately resolved will not undo the basic ruling that unauthorized music file sharing is illegal. The “making available” cases could change the level of proof required, but not the illegal nature of copying or distributing music files without authorization. No one can dispute that the major labels and RIAA have vigorously protested the practice of music file sharing, almost from the start. On these two factors alone, we probably could rule out the need for any gap filling practice.

The other three factors also cut against the recognition of an informal copyright practice. Although some proponents of music file sharing might assert that the law could eventually adopt their position, as it stands the formal law of copyright has rejected their arguments. Today, the law is fairly settled that unauthorized music file sharing is infringement and that fair use does not apply. As to transaction costs, people can always buy music files at relatively cheap prices (ninety-nine cents per file) and obtain exactly the same thing as they would obtain through illegal music file sharing. By contrast, that is not necessarily the case with photocopied works, which often provide a format more conducive to highlighting, annotation, and note-taking than the original work.

When we tally up the Five Factors, they all militate against the need for an informal copyright practice here. Although some proponents of file sharing might contend that eventually formal law will be amended to allow the practice (such as by compulsory license), the existence of the informal practice of music file sharing—which appears to be widespread on the Internet—cannot be justified as a gap filler. There is no gap.

The informal copyright practice of unauthorized music file sharing would have to be defended, then, as a potential agent of future reform, not as a gap filler. However, I do not include such basis within my the-

140. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013–14 (9th Cir. 2001).

141. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005).

142. Compare *Atl. Recording Corp. v. Howell*, No. CV-06-020760-PHX-NVW, 2008 WL 1927353, at *4 (D. Ariz. Apr. 29, 2008) (stating infringement of a distribution right requires actual dissemination of copies or phonorecords, not just proof of making a copy available), and *London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008) (“[M]erely exposing music files to the internet is not copyright infringement . . . [but] [t]he evidence and allegations, taken together, are sufficient to allow a statistically reasonable inference that at least one copyrighted work was downloaded at least once.”), and *Atl. Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 281–82 (D. Conn. 2008) (explaining that actual distribution, not just making a file available, in file-sharing case may be required to prove a violation of distribution right), with *Elektra Entm’t Group, Inc. v. Barker*, No. 05-CV-7340, 2008 WL 857527, at *6 (S.D.N.Y. Mar. 31, 2008) (holding that the distribution right of 17 U.S.C. § 106(3) may be infringed by “[t]he offer to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display”).

ory, which defends the development of informal copyright practices only as gap fillers. Whether informal practices should also in some cases be defended as legitimate reform agents, I leave for future inquiry.

D. Using Informal Copyright Practices as Laboratories of Experimentation

One benefit of allowing the widespread development of informal copyright practices as gap fillers is that they can provide “laboratories of experimentation” for formal copyright law.¹⁴³ As discussed earlier, Congress has repeatedly codified customs, especially as exemptions, in the Copyright Act.¹⁴⁴ Informal copyright practices have the advantage of being tested in the marketplace. Instead of starting from scratch, Congress can learn from actual market experiences before deciding whether an amendment to the Copyright Act is needed and, if so, in what way. Some informal copyright practices might appear to be undesirable after producing negative effects in the market. Congress might consider other informal practices worthy of formal protection, as in the section 110(11) exemption for use of Clear Play-type technology for private home viewing of DVDs.¹⁴⁵

Because informal copyright practices can be freely altered, reshaped, and tested against other informal copyright practices without the need to change formal copyright law, they provide much greater flexibility for resolving copyright disputes and tinkering with the overall balance of the copyright system. Informal copyright practices may well be better suited to deal with the fast-developing technologies in the digital age.

III. USER-GENERATED CONTENT

The most exciting development on the Internet today is the proliferation of content created by ordinary individuals, who often collaborate with each other. UGC offers the promise of furthering important free speech and free press goals, yet it also raises a serious question of possible copyright infringement. This Part shows how informal copyright practices have developed for UGC, which serve as legitimate gap fillers to formal copyright law.

A. Web 2.0 and User-Generated Content

Surf the Internet and you will find a considerable amount of content that has been created, not by the major media producers, but by ordinary, everyday individuals, both young and old alike. In Internet par-

143. Cf. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

144. See *supra* notes 12–15 and accompanying text.

145. See *supra* note 13 and accompanying text.

lance, these individuals are known as “users” of the Internet, and the works they produce are known as “user-generated content,” sometimes abbreviated as UGC. To some people, “user-generated content” may seem just a fancy, if not confusing, term to describe *authors* who are creating works like others have before. I think that is a fair criticism, and I have no particular attachment to the term. However, because “user-generated content” is widely used in both technology and media circles to refer to certain kinds of amateur creations typically distributed on the Internet, I will stick with the term most commonly used. UGC is one of the key attributes of “Web 2.0,” which describes the development of greater opportunities for user participation, creation, and collaboration on the Internet.

1. *The Phenomenal Growth of User-Generated Content*

Web 2.0 applications now allow ordinary people to create expressive works of their own and to share them immediately with millions of others. In a recent Deloitte survey of 2,000 Internet users ranging in age from thirteen to seventy-five, close to half said they had created content—blogs, music, photos, videos, and Web sites—for others to view online.¹⁴⁶ In 2008, the number of blogs alone exceeded 112 million (although some may not be active).¹⁴⁷ Nearly seventy percent of the people polled said they viewed the UGC of others.¹⁴⁸ I make no strong empirical claim that the tremendous growth of UGC could have only developed from gray areas in copyright law. Some practices, such as music file sharing, flourish in spite of clear copyright decisions finding them illegal. It is also very possible that many individuals would ignore copyright law, even if it were crystal clear. Yet, to the extent we believe that formal laws can shape conduct, uncertainty in law completely thwarts that aspiration. Uncertainty in copyright law has provided the backdrop in which UGC has flourished—perhaps surprisingly with the increasing support from the major media copyright holders whose content is remixed by users.

We can expect that the amount of UGC will only grow, probably exponentially, as more and more software companies are developing Web 2.0 applications to enable users to create content of their own. Already web developers have begun talking about the next phase of the Internet—“Web 3.0”—in which the Internet essentially takes over traditionally desktop-based applications (such as word processing, spreadsheets, and PowerPoint) and converts them into Web-based applications that are greatly enhanced by access to unbelievable amounts of informa-

146. *User-Generated and -Watched Content*, Opinions, L.A. TIMES.COM, Jan. 14, 2008, <http://www.latimes.com/news/opinion/la-ed-content14jan14,0,3327482.story>.

147. Technorati tracks 112.8 million blogs. See Technorati: About Us, <http://technorati.com/about/> (last visited Aug. 11, 2008).

148. *Id.*

tion stored in the so-called “clouds”—huge data centers that serve computers through the Internet.¹⁴⁹ As Nicholas Carr discusses, the shift to “cloud computing”—where software applications and data storage come not in the personal computer, but through the Internet connected to powerful databases—has the potential to transform fundamentally how we communicate.¹⁵⁰ Control over media “shift[s] . . . from institutions to individuals.”¹⁵¹

The incredible growth of UGC is the direct result of *technological* innovation, largely driven by the Internet. The Internet is a vast network for communication built on a platform that is open to all. Blogging software, photo- and video-sharing sites, and social networking platforms such as Facebook and MySpace have all made it possible for one person on the Internet to rival the reach of the huge media conglomerates. Each person can now be a publisher, TV network, radio station, movie studio, record label, and newspaper, all wrapped into one.

A considerable part of the development of Web 3.0 is the offering of powerful Internet applications for everyone to remix content as a basic feature of experiencing the Internet. Startup companies like Tumblr¹⁵² and Sprout¹⁵³ are developing innovative platforms for mashups, as are giant tech companies like Microsoft (in its Popfly program)¹⁵⁴ and Intel (in its Mash Maker program).¹⁵⁵ These technologies, though still developing, will fundamentally transform how people use the Internet. The standard operating functions of the Web will enable people to customize and mashup all content on the Web in whatever ways each person chooses. As Robert Ennals, the Mash Maker Architect at Intel explains, “We’re trying to change the nature of what the Internet is, where it’s not a collection of pages, but collection of information. And we want to al-

149. See Stephen Baker, *Google and the Wisdom of the Clouds*, BUSINESSWEEK, Dec. 24, 2007, at 49–53 (discussing cloud computing); Eric Schmidt, *Web 2.0 vs. Web 3.0*, posting of channy to YouTube, <http://www.youtube.com/watch?v=T0QJmmdw3b0> (Aug. 2, 2007).

150. See NICHOLAS CARR, *THE BIG SWITCH* 21–23 (2007).

151. *Id.* at 23.

152. Tumblr is a microblogging site that enables users to post quickly all sorts of content within a blog platform. It is meant for much shorter and more frequent postings than a traditional blog. Tumblr’s motto is “Post anything. Customize everything.” Tumblr, <http://www.tumblr.com> (last visited Aug. 11, 2008); see also Blake Robinson, *Davidville, Inc. Tumbles into the Spotlight with Tumblr*, TECHCRUNCH, Apr. 2, 2007, <http://www.techcrunch.com/2007/04/02/davidville-inc-tumbles-into-the-spotlight-with-tumblr/>.

153. Sprout is a Web site that allows users to mashup content on the Internet and convert it into embeddable widgets. Sprout Builder, <http://sproutbuilder.com> (last visited Aug. 11, 2008); see also Mark Hendrickson, *Sprout Raises \$5 Million for Flash Widget Creation*, TECHCRUNCH, May 13, 2008, <http://www.techcrunch.com/2008/05/13/sprout-raises-5-million-for-flash-widget-creation/>.

154. See Microsoft Popfly, <http://www.popfly.com> (last visited Aug. 11, 2008). Microsoft describes Popfly as follows: “[A] fun, easy way to build and share mashups, gadgets, games, Web pages, and applications.” Overview, Microsoft Popfly, <http://www.popfly.com/Overview/Default.aspx> (last visited Aug. 11, 2008).

155. See Intel Mash Maker, <http://mashmaker.intel.com/web/> (last visited Aug. 11, 2008). The Mash Maker is a browser extension that allows users to create mashups of whatever they browse on the Web. Learn More: FAQs, Intel Mash Maker, <http://mashmaker.intel.com/web/faqs.html> (last visited Aug. 11, 2008).

low users to collaboratively choose how they see that information.”¹⁵⁶ In Web 3.0, people will no longer “surf” the Web—they will mash it.

Of course, building great technology does not necessarily mean that people will use it. However, in the case of Web 2.0 applications, most of which are offered for free on the Internet, people have used them in droves. Part of the attraction of the user-generated culture is very simple: people can now participate. As J.D. Lasica explains, “Hundreds of millions of us are flocking to the Internet as an alternative media source not because it’s more authoritative (although it can be), but because we’re lured by a medium that allows people like us to become part of the conversation.”¹⁵⁷

Another distinct feature of the user-generated culture is that it is often collaborative and part of a larger, social network. The immense popularity of YouTube, MySpace, and Facebook can be attributed to their social networking features (such as adding of “friends”) that allow users to establish connections with people from all around the world. These connections can facilitate all sorts of collaboration, ranging from users simply providing comments to another user’s video or singing performance, to users “remixing” parts of someone else’s video into video responses of their own. Sometimes, the collaborative projects are quite large, as is the case with Wikipedia where users add to, critique, and edit the world’s largest, user-generated encyclopedia.¹⁵⁸

Professor Benkler calls this phenomenon *peer production*, which he argues can be more efficient than firm- or standard market-based approaches in two ways.¹⁵⁹ First, peer production is better at processing information about human capital because it “does not require contractual specification of effort but allows individuals to self-identify for tasks.”¹⁶⁰ In this way, people can self-select for those endeavors for which they are most suited. Second, peer production can produce allocation gains. According to Benkler,

As peer production relies on opening up access to resources for a relatively unbounded set of agents, freeing them to define and pursue an unbounded set of projects that are the best outcome of combining a particular individual or set of individuals with a particular set of resources, this open set of agents is likely to be more productive than the same set could have been if divided into bounded sets in firms.¹⁶¹

156. Martin LaMonica, *Intel Mash Maker: Mash-ups for the Masses*, CNET NEWS BLOG, Apr. 22, 2008, http://www.news.com/8301-10784_3-9921313-7.html.

157. LASICA, *supra* note 117, at 14.

158. *See id.* at 83; *see also* Wikipedia, http://en.wikipedia.org/wiki/Main_Page (last visited Aug. 11, 2008).

159. *See* Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 381 (2002) (defining the term as the “production by peers who interact and collaborate without being organized on either a market-based or a managerial/hierarchical model”).

160. *Id.* at 414.

161. *Id.* at 422.

Finally, UGC is often noncommercial—although this line is getting fuzzier with the growth of symbiotic relationships between commercial entities and individuals engaged in noncommercial pursuits. UGC is typically noncommercial at least in this sense: it is all free. Users usually are not paid to create their own content, and they typically do not charge for others to view their content. Although some users who create may hope one day of “being discovered,” vast amounts of UGC are offered for free on the Internet, unaccompanied by any ads. Of course, there is crossover by users from noncommercial to more commercial enterprises. Google AdSense enables everyone with a blog to incorporate ads.¹⁶² Sometimes, users become discovered through their noncommercial content and sign deals with media companies.¹⁶³ Big media corporations are now even trying to cultivate or sponsor UGC through contests and promotions.¹⁶⁴ Many companies even create videos for users to embed (typically with a logo from the media company) on other blogs.¹⁶⁵ And a few well-known professional artists, such as the musical groups Radiohead and Nine Inch Nails, have embraced aspects of the user-generated model by offering their works entirely for free or at whatever price the consumer desires to pay.¹⁶⁶ Mainstream musicians are even allowing the public to remix their works. For example, hip-hop producer Amplive remixed Radiohead’s album *In Rainbows* without permission and offered it for free online; Radiohead representatives objected but then later allowed Amplive’s remix after a backlash began brewing on YouTube against Radiohead.¹⁶⁷ Nine Inch Nails (NIN) went a step further than Radiohead and released NIN’s latest album *The Slip* under a Creative Commons license, allowing anybody to reuse and remix the music noncommercially, as long as attribution is provided and the user allows other noncommercial remixes.¹⁶⁸ On its Web site, NIN openly encouraged people to remix its music and share it with others, all for free.¹⁶⁹ In short, the lines between noncommercial and commercial, and between media-generated and UGC, are becoming more fluid and blurred.

162. See Google Advertising Programs, <http://www.google.com/intl/en/ads/> (last visited Aug. 11, 2008).

163. For example, Dutch teenager Esmee Denters was signed by Justin Timberlake’s new label, Interscope, to a recording contract after Timberlake heard about the buzz that Denters was creating on YouTube. See Stephen M. Silverman, *Justin Timberlake Signs YouTube Singer to His Label*, PEOPLE, June 5, 2007, <http://www.people.com/people/artivle/0,,200414427,00.html>.

164. See *infra* notes 259–68 and accompanying text.

165. See *infra* notes 280–85 and accompanying text.

166. See Jeff Leeds, *Nine Inch Nails Album Is Free Online*, N.Y. TIMES.COM, May 6, 2008, <http://www.nytimes.com/2008/05/06arts/music/05cnd-nine.html?partner=rssnyt&emc=rss>; David Malitz, *Radiohead’s ‘Rainbows’: Is Free Release a Potential Pot of Gold?*, WASH. POST, Oct. 11, 2007, at C1.

167. See Eliot Van Buskirk, *Mp3s: Amplive’s ‘Rainydayz’ Remix of Radiohead’s ‘In Rainbows’ Album*, WIRED BLOG, Feb. 13, 2008, <http://blog.wired.com/music/2008/02/mp3s-amplives-r.html>.

168. Nine Inch Nails, *The Slip*, <http://dl.nin.com/theslip/signup> (last visited Aug. 11, 2008).

169. *Id.*

2. *The First Amendment Benefits of User-Generated Content*

The shift from consumers being passive viewers of material (i.e., the couch potato model) to now more active participants in the creation of expressive works is good for society. There are numerous reasons one could offer to support generally the growth of UGC on the Internet,¹⁷⁰ putting aside for the moment the difficult copyright issues that may, in some cases, arise with UGC. My reason focuses on the First Amendment. UGC greatly facilitates both the freedom of speech and the freedom of the press.

First, the freedom of speech. In 1997, the Supreme Court considered its first case involving the Internet.¹⁷¹ In striking down, as facially overbroad, provisions of the Communications Decency Act that restricted the transmission of indecent material to minors over the Internet, the Court recognized the tremendous potential the Internet offers for speech:

It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that “[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.” This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.”¹⁷²

A decade later, the “dynamic” and “multifaceted” features of the Internet as a tool of mass communication have become only better, quicker, and more empowering for the ordinary individual. From the perspective of the freedom of speech, UGC is valuable because it enables ordinary people to participate in the marketplace of ideas, potentially reaching audiences never imaginable before. The very “purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail”¹⁷³ By increasing the ability of ordinary individuals to participate in the marketplace of ideas, UGC in-

170. See, e.g., Katyal, *supra* note 37, at 470–79 (discussing performance theory); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 555–67 (2001) (arguing that identity and personhood are developed by the ability to participate in cultural material).

171. See *Reno v. ACLU*, 521 U.S. 844 (1997).

172. *Id.* at 870.

173. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

creases not only the creation and dissemination of speech, but also people's education and ability to interact in a global marketplace.¹⁷⁴

UGC also serves the freedom of the press. The Framers understood the freedom of the press as a separate but related right to the freedom of speech.¹⁷⁵ As historically understood, the freedom of the press meant the freedom of the *printing press*—a right that was intended to make clear that individuals had a First Amendment right to use the technology of mass publication, free of intrusive government regulations.¹⁷⁶ Reacting to the past abuses of the British Crown in restricting the number of presses in England, the Framers hoped to foster the development of technologies that enabled individuals to engage in mass publication and communication in the new Republic.¹⁷⁷ Throughout its cases involving new technologies, the Supreme Court has recognized the important First Amendment goal of preserving access to speech technologies.¹⁷⁸ The amazing Web 2.0 technologies that facilitate the vast amounts of UGC created today all serve this free press interest.

While some may dismiss UGC as amateurish drivel,¹⁷⁹ the First Amendment does not attempt to judge the worth of speech, particularly not based on one person's elitist view. As Justice Harlan famously described, "it is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."¹⁸⁰ Justice Holmes, years earlier, expressed a similar view in the context of copyright law: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."¹⁸¹

174. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

175. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 339–51 (2008).

176. *Id.* at 339.

177. *Id.* at 334–39.

178. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (Internet); *Denver Area Educ. Telecomms. Consortium, Inc. v. FEC*, 518 U.S. 727, 791–92 (1996) (Kennedy, J., concurring in part and dissenting in part) ("[Public access channels] provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.") (quoting H.R. REP. NO. 98-934); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994) (plurality) (cable); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 253 (1974) (newspaper); *Red Lion Broad.*, 395 U.S. at 390 (radio); see also Ginsburg, *supra* note 91, at 1622–26.

179. See ANDREW KEEN, *THE CULT OF THE AMATEUR* 16 (2007) ("What the Web 2.0 revolution is really delivering is superficial observations of the world around us rather than deep analysis, shrill opinion rather than considered judgment.").

180. *Cohen v. California*, 403 U.S. 15, 25 (1971); see also *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.").

181. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

3. *Types of User-Generated Content*

UGC includes a variety of forms, such as user-generated blogs, photographs, videos, podcasts, music, wikis, mashups, and personal Web pages on Facebook, MySpace, and other sites. All UGC can be grouped, however, into two categories: (1) *pure* UGC in which all of the content is produced by the user(s), and (2) *mashup or remixed* UGC in which the user's content is mixed in with content from others, often without their permission. Excluded from my definition of UGC is a mere copy of someone else's work. Thus, time-shift recordings of popular TV shows do not constitute UGC, since the user has added nothing to the material.¹⁸² (Of course, there can be gray areas between the two categories, such as where someone uses a time-shifted clip in a blog that provides extensive commentary. The entire blog may well be considered within the *remixed* category, since some content is added by the user.)

a. Pure User-Generated Content

Much UGC on the Internet falls into the first category of *pure* UGC. Here, there is no problem with potential copyright infringement, since the user has not borrowed material from other copyrighted works.

For example, millions of blogs exist now on the Internet, with thousands of new blogs started each day.¹⁸³ Many blogs consist of original content created by the bloggers who post to the blog. The range of subject matter covered by different blogs spans the range of human thought, from news, politics, sports, technology, fashion, design, music, entertainment, travel, the environment, dieting, sex, personal diaries, and even the law. Although many blogs also include posts that *remix* content from other sources, such as parts of news articles, photographs, and videos, a good deal of the blogosphere falls into the *pure* UGC category.

182. Rebecca Tushnet has criticized the notion that wholesale copying of works serves First Amendment interests somehow less than transformative fair uses. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004). Tushnet sees pure copying of copyrighted works as potentially furthering self-expression and participation in culture through persuasion and affirmation based on works with which the speaker identifies. *Id.* at 564–82. She points out that the Copyright Act itself contains numerous exemptions that allow for straight out copying of works, without any transformation of the original work. *Id.* at 553–54. I agree with Tushnet's basic point that a First Amendment interest exists in the widespread dissemination of works through straight out copying. In an earlier article, I made a similar argument with respect to works in the public domain, which serve "an even more elemental role" than spurring creativity by simply "ensur[ing] universal access to our common culture and knowledge." Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 162 (2003). Once we move to copyrighted works, however, I believe the First Amendment interest in widespread copying and dissemination of works must be balanced with the Copyright Clause's goal to incentivize the creation of works. Even Tushnet admits that "[t]radeoffs are inevitable" in striking this balance. Tushnet, *supra*, at 537.

183. See Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 129 n.7 (2007).

Other examples of pure UGC can be found in the music world. Scores of amateur artists post their original music on MySpace, YouTube, and other sites. Many of these musicians are hoping to become discovered by the music industry, so they share their original music on social networking sites and peer-to-peer networks as a way to reach a larger audience. Although it is still difficult today to become discovered as a musician, we have seen some major successes from UGC. For example, Ingrid Michaelson is an unsigned singer-songwriter who became noticed through her music postings on MySpace Music.¹⁸⁴ Eventually, her manager helped land her song “Breakable” on a 2006 episode of the television show *Grey’s Anatomy*.¹⁸⁵ Later that year, Michaelson also got a deal with Gap to use her song “The Way I Am” in an Old Navy sweater commercial.¹⁸⁶ The producers of *Grey’s Anatomy* liked her music so much they later played two other Michaelson songs and even asked her to compose an original song for the season finale in 2007.¹⁸⁷ Michaelson’s music soon received heavy airplay on radio and VH1,¹⁸⁸ all while she has resisted going with a major label—preferring to remain on her own.

The other big source of pure UGC today is video. I discuss the growth of YouTube and online video in the next section, but let me throw out a few examples of pure user-generated videos. Within a span of two years, users and media companies alike have collectively uploaded more than seventy-five million videos on YouTube.¹⁸⁹ YouTube does not provide statistics on the breakdown of user-generated versus media-generated content on its site, but, by my guesstimate, the majority of videos on YouTube are user-generated. Of the millions of user-generated videos, many are mashups. But many others are pure UGC.

In fact, the channel with the most subscribers all-time on YouTube is “Smosh,” otherwise known as Anthony Padilla and Ian Hecox, two twenty-year-olds from California.¹⁹⁰ Being the Most Subscribed channel on YouTube is akin to being the No. 1 show on TV. Smosh typically receives more than two million views per video, and the duo’s most popular video has generated more than twelve million views.¹⁹¹ What is amaz-

184. See Chuck Crisafulli, *Success Hasn’t Changed Up-and-Comer Michaelson*, BILLBOARD.COM, Dec. 11, 2007, http://www.billboard.com/bbcom/search/google/article_display.jsp?vnu_content_id=1003683959.

185. *Ingrid Michaelson Charts Course for Indies*, BUS. TIMES ONLINE, Dec. 10, 2007, http://www.btimes.com.my/Current_News/BTIMES/BizFocusPDF/1012cmfc48.pdf.

186. *Id.*

187. *Id.*

188. Crisafulli, *supra* note 184.

189. Web Scout, *From the Sunday Calendar: YouTube Hits 75 Million Videos, and What That Means*, L.A. TIMES BLOG, Feb. 28, 2008, <http://latimesblogs.latimes.com/webscout/2008/02/from-the-sund-1.html>.

190. See Smosh’s Channel, YouTube, <http://www.youtube.com/user/smosh> (last visited Aug. 11, 2008).

191. See Smosh’s Videos, YouTube, http://www.youtube.com/profile_videos?user=smosh&p=v (last visited Aug. 11, 2008).

ing about Smosh's success—even over all of the major media producers on YouTube—is that nearly all of the videos Padilla and Hecox produce are pure UGC. The two basically perform comedic skits of their own. It's that simple.

Because pure UGC does not raise problems of copyright infringement, it is not the focus of this Article. In the following sections, I focus on the more problematic category of UGC involving “mashups,” where some UGC has borrowed the copyrighted content of others. Before I do, however, a couple caveats are in order. First, the reader should not get the mistaken impression that UGC is mostly just mashups, works with potential copyright problems. My short discussion of pure UGC reflects not the lack of many examples of this category of UGC, but instead, simply the lack of copyright problem for these works. Second, although I speak about the two categories separately, there are synergies between the two. Pure UGC often is the source for mashup UGC. Particularly within the YouTube community, there appears to be an informal practice of sharing content among many users who are inspired or provoked by the content of other users. For example, users on YouTube who want to respond to another user's video sometimes may borrow content from that video to include in a video response.

In the case of singer-songwriter Terra Naomi, who signed with Island Records after being discovered on YouTube, people from all around the world started singing their own “cover” versions of her irrepressible song “Say It's Possible” and posted them in videos on YouTube.¹⁹² Several of the covers were in foreign languages, including Chinese,¹⁹³ Italian,¹⁹⁴ and Spanish.¹⁹⁵ A few tech-savvy musicians “remixed” Naomi's video, incorporating their own drums, electric guitar, bass, and even vocals to accompany Naomi and her acoustic guitar.¹⁹⁶ There were also several speeded-up versions that sounded like chipmunks singing¹⁹⁷ (which apparently is a popular style on YouTube), and one fan even did a cover singing with a sock puppet!¹⁹⁸

192. A search on YouTube generated 275 clips. YouTube, http://www.youtube.com/results?search_query=terra+naomi+say+it%27s+possible+cover&search_type= (last visited Aug. 31, 2008).

193. See, e.g., *Say It's Possible . . . Chinese Rendition*, posting of aureliaz to YouTube, <http://www.youtube.com/watch?v=I0iCKLsQyew> (Nov. 22, 2006).

194. See, e.g., *Say It's Possible, Italian Version (Terra Naomi Cover)*, posting of ConstantinoSeby to YouTube, <http://www.youtube.com/watch?v=vLa11YRHnV4> (Oct. 13, 2007).

195. See, e.g., *Terra Naomi “Say It's Possible” Translated in Spanish*, posting of gabrielederoso to YouTube, <http://www.youtube.com/watch?v=bMxDX-mcpQg> (Feb. 18, 2007).

196. See, e.g., *Terra Naomi—Say It's Possible Remix*, posting of marone42 to YouTube, <http://www.youtube.com/watch?v=zapd3MLOr04> (July 26, 2006); *Terra Naomi—Say It's Possible (Complete Band Version)*, posting of henrio70 to YouTube, <http://www.youtube.com/watch?v=DLp5Dgja6Os> (Dec. 14, 2006).

197. See, e.g., *Say It's Possible (Double Speed Version)*, posting of iselloap to YouTube, <http://www.youtube.com/watch?v=PHX4aEofnB0> (Nov. 13, 2006).

198. See *Re: Say It's Possible*, posting of kfuzd to YouTube, <http://www.youtube.com/watch?v=jmX9ccwpNrQ> (Apr. 2, 2007).

The Naomi example indicates how pure UGC can feed mashups. Naomi was so impressed with her fan support that she even made another video for her song “Say It’s Possible,” this time a mashup of her own containing footage from her fans.¹⁹⁹ UGC had come full circle: from pure UGC in Terra Naomi’s music video to mashups of her work by her fans, and then finally to her remix video, which mashed up the videos of her fans. In the process, hundreds of works were created.

b. Mashup or Remixed User-Generated Content

As mentioned above, the more problematic category of UGC from the perspective of copyright law are mashups, which are works that incorporate—i.e., “mashup” or “remix”—portions of copyrighted material from elsewhere into their works. These mashups raise copyright issues because the UGC has borrowed from other copyrighted works, often without permission from the copyright holders. Such unauthorized use of portions of copyrighted material might infringe the copyright holder’s exclusive rights of reproduction, adaptation, distribution, public performance, and public display. On the other hand, the borrowing might be fair use, *de minimis*, or simply not misappropriation under the test of infringement.

A copyright traditionalist or formalist might view all user-generated mashups as copyright infringement, even if they are noncommercial. By taking portions of the work and remixing them into another work, the mashups infringe at least the author’s right to copy or make derivative works.²⁰⁰

This simplistic view is misguided. Even in the commercial context, the law allows some borrowing of content from copyrighted works, while not allowing others.²⁰¹ The copyright cases against famed “appropriation” artist Jeffrey Koons provide the perfect illustration. Although some of Koons’s artwork has constituted infringement,²⁰² in *Koons v. Blanch*²⁰³ the court found a fair use. In *Blanch*, Koons used, without permission and for overtly *commercial* purposes, a copyrighted fashion photograph of a woman’s feet dressed in fancy Gucci sandals. Koons placed the copyrighted image within his collage painting featuring three

199. See *Terra Naomi’s “Say It’s Possible,”* posting of terranaomi to YouTube, <http://www.youtube.com/watch?v=AIXlhFIHR8A> (Dec. 31, 2006).

200. See 17 U.S.C. § 106 (2000).

201. See *id.* § 107.

202. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (holding Koon’s sculpture “String of Puppies” infringed the Art Rogers photograph “Puppies,” which Koons closely copied); *United Features Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) (finding infringement by Koons’s sculpture “Wild Boy and Puppy,” which included a figure that closely copied the “Odie” character from the cartoon *Garfield*); *Campbell v. Koons*, No. 91-CV-6055, 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993) (finding infringement by Koons’s sculpture “Ushering in Banality,” which closely copied a photograph of two boys trying to push a pig into a gift box).

203. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

other women's legs and feet—juxtaposed next to images of donuts, a brownie, and apple Danish pastries—against the backdrop of Niagara Falls and a grassy field.²⁰⁴ The collage, titled “Niagara,” was intended to “comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images.”²⁰⁵ In finding fair use, the Second Circuit identified a clear transformative purpose in Koons's use of the fashion photograph to comment on “the social and aesthetic consequences of mass media.”²⁰⁶ The court noted that Koons had changed the “colors [in the photo], the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their . . . purpose and meaning.”²⁰⁷

But there is no easy way to draw the line between what is permissible copying and what is not. The line may be even harder to draw in the noncommercial context, since so few reported cases ever involve non-commercial uses of copyrighted works.

In the commercial context, sometimes taking even very small portions of a copyrighted work and reusing them in another work is considered an infringement. For example, the Second Circuit in *Ringgold v. BET*²⁰⁸ held that a cable TV network's use of a print of a copyrighted quilt as background to a scene was probably an infringement, even though the quilt was only visible for periods of 1.86 to 4.16 seconds at a time, for a total of only 26.75 seconds and never in full view.²⁰⁹ The Second Circuit sent the case back down to the district for a reweighing of the fair use factors, with some suggestion that there was no fair use.²¹⁰ In other cases, fair use has been denied for taking even a very small portion of a copyrighted work if it takes the “heart” of the work, such as the brief copyrighted footage of the Reginald Denny beating during the L.A. riots.²¹¹

In *Bridgeport Music, Inc. v. Dimension Films*,²¹² the Sixth Circuit took an even more parsimonious view of music sampling—i.e., taking parts from a sound recording and using them within another recording, a practice popular in rap music and hip hop. In *Bridgeport*, the court held that unauthorized sampling of just seven seconds of a copyrighted sound recording—which might be shorter than the time it takes to read this sentence—infringed the sound recording copyright, absent a fair use (an is-

204. *Blanch*, 467 F.3d at 427.

205. *Id.*

206. *Id.* at 253.

207. *Id.*

208. 126 F.3d 70 (2d Cir. 1997).

209. *Id.* at 73, 77, 81.

210. *See id.* at 81.

211. *See, e.g.,* L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122–23 (9th Cir. 1997); *see also* Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 629–31 (9th Cir. 2003) (use of copyrighted footage of Elvis for documentary unlikely to be fair use).

212. 410 F.3d 792 (6th Cir. 2005).

sue the court remanded to the district court below).²¹³ The Sixth Circuit took a very dim view of unauthorized sampling and suggested that *any* amount of music sampling, no matter how short, would be infringing.²¹⁴ The Sixth Circuit believed the “music industry . . . [is] best served if something approximating a bright-line test can be established.”²¹⁵ But the exact scope of the ruling is somewhat unclear: the court expressly limited its decision to only music sampling,²¹⁶ and also sent the case back to the district court for consideration of the fair use defense.²¹⁷

In other cases, however, courts have allowed modest borrowing of copyrighted content as fair uses in commercial works. For example, the Southern District Court of New York held that a cable television network’s use of twenty seconds of copyrighted footage from a movie trailer for a biography of the actor Peter Graves was a fair use.²¹⁸ In another case, the same court found a likely fair use based on the copying of between forty-one seconds to two minutes of copyrighted footage of Muhammad Ali for use in defendant’s movie.²¹⁹ Another court found in a different case that a cable network’s use of 14.87 seconds, 21.33 seconds, 43.77 seconds, and 37.43 seconds of copyrighted movies and video for a documentary was likely fair use.²²⁰ Although the *Ringgold* case involved a copyrighted quilt, not video footage, and did not resolve the fair use question,²²¹ these district court cases seem far more receptive to fair use than *Ringgold*.

To cloud the picture even further, the Second Circuit has also held that a book publisher’s reproduction of the *entirety* of seven copyrighted concert posters, in reduced size, for use in defendant’s book about the Grateful Dead was a fair use.²²² And in an earlier case, the court held

213. *Id.* at 796, 805. A musical work means the composition—music and/or lyrics—written by the composer. The sound recording is the performance of a musical work that is captured on a recording. The Copyright Act treats the scope of rights differently, according greater protection for musical works. See 17 U.S.C. §§ 106, 114 (2000).

214. *Bridgeport*, 410 F.3d at 802 (rejecting *de minimis* defense for sampling); see also *Grand Up-right Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991). For further discussion, see Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660 (1999); A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135 (1993); Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119 (2003); David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607 (1992); Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179 (2002); Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 ST. JOHN’S J. LEGAL COMMENT. 373 (2007).

215. *Bridgeport*, 410 F.3d at 799.

216. *Id.* at 798.

217. *Id.* at 805.

218. *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 448–49 (S.D.N.Y. 2001).

219. *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996).

220. *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 139–41 (E.D.N.Y. 2001).

221. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 72, 81 (2d Cir. 1997).

222. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006).

that a movie studio's use of seven copyrighted photographs in the background of the movie *Seven* was *de minimis*, where the photographs were only partially or poorly visible for 35.6 seconds (broken down in increments lasting up to six seconds).²²³

Even with music sampling, some case law has allowed limited sampling under the *de minimis* doctrine. In *Newton v. Diamond*, the Ninth Circuit held that the Beastie Boys' sampling of six seconds of a copyrighted jazz composition was too trivial to constitute infringement.²²⁴ Although the case did not involve the copyright for the sound recording (the Beastie Boys had obtained a license from the sound recording copyright holder),²²⁵ it is at least an open question as to how circuits other than the Sixth Circuit (in *Bridgeport*) would analyze music sampling under the sound recording copyright. The Nimmer treatise, for one, has roundly criticized the *Bridgeport* decision as contrary to prior case law and Congress's intent.²²⁶ It is possible that other circuits would allow some limited forms of sampling, even in that context.

Even the synchronization of music as background in a film sometimes is fair use. In *Lennon v. Premise Media Corp., L.P.*, the Southern District of New York denied a request for a preliminary injunction by Yoko Ono Lennon to stop the showing of the movie *Expelled*—a movie by Ben Stein intended to promote intelligent design and criticize negative portrayals of religious views of creation among the scientific community and media.²²⁷ The court found that the movie studio's use of only fifteen seconds and ten words from John Lennon's famous song "Imagine" was likely fair use, given that the movie's use of the song was intended, in part, to criticize the very message in the song (particularly in Lennon's lyric "no religion") by juxtaposing the song with incongruous visual images of schoolchildren in a circle and then a little girl spinning happily, followed by footage of a Soviet nation parade and then Joseph Stalin.²²⁸ Such use of the song was transformative, regardless of whether it was necessary at all to include the Lennon song in the film.²²⁹

Suffice it to say that even in the commercial context, some borrowing of content from copyrighted works is permissible under the fair use and *de minimis* doctrines. Exactly how much is hard to say, given the existing case law, and even harder yet for noncommercial uses, given the absence of case law. Ultimately, the question of infringement will turn on the facts of each case, such as the amount of taking of the copyrighted

223. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216–18 (2d Cir. 1998); see also *Gordon v. Nextel Comm'ns*, 345 F.3d 922, 924 (6th Cir. 2003) (explaining the *de minimis* use of copyrighted illustrations for roughly twenty seconds total in defendant's television commercial, with poor visibility).

224. 388 F.3d 1189, 1190 (9th Cir. 2004).

225. *Id.*

226. 4 NIMMER ON COPYRIGHT, *supra* note 19, § 13.01[A][2][b], at 13-59 to 13-65.

227. *Lennon v. Premise Media Corp., L.P.*, No. 08 Civ. 03813(SHS), 2008 WL 2262631 (S.D.N.Y. June 2, 2008).

228. *Id.* at *3, 8–9.

229. *Id.* at *9, 12.

work, how the work is transformed, and whether for a commercial purpose. It also may well depend on what judge or jury decides the issue. In the next section, I consider several concrete examples of mashups and suggest why they present gaps or gray areas in formal copyright law.

B. *YouTube and the Growth of User-Generated Videos*

Within a short span, YouTube has fundamentally transformed the Internet. By designing an easy way for people to share videos online, YouTube has made videos a dominant component of the way information is communicated on the Web.

The growth of YouTube has been phenomenal. By December 15, 2005—when YouTube officially launched—people were viewing three million videos a day on YouTube, while people were adding another 8,000 videos each day to the site.²³⁰ Within the first six months of 2006, the growth rate was staggering: the number of visitors grew by 300%, from 4.9 million to 19.6 million per month.²³¹ By July 2006, YouTube served 100 million videos a day, which marked an increase of over 3,200% from the three million per day in the last December.²³² By September 2006, the number of video uploads jumped to 65,000 per day, increasing more than eight-fold from December.²³³ According to Hitwise, by May 2006 YouTube had captured the leading position in the online video market with a 42.94% market share (based on the number of visits to the site).²³⁴ By October 2006, the number of unique visitors to YouTube had grown to 34 million per month, elevating it to one of the top fifteen most visited Web sites worldwide.²³⁵ Within just nine months, the number of visitors to YouTube grew by a staggering 600%. With its simple motto “Broadcast Yourself,” YouTube has appealed to the masses.

1. *The Scope of the Copyright Lawsuits Against YouTube*

Currently, YouTube faces two major copyright lawsuits in the Southern District of New York, a suit brought by Viacom and a class action by several music publishers and professional soccer leagues, among

230. YouTube, *YouTube Opens Internet Video to the Masses*, http://www.youtube.com/press_room_entry?entry=OcN9xXYar1g (Dec. 15, 2005).

231. Nielsen/NetRatings, *YouTube U.S. Web Traffic Grows 75 Percent Week Over Week, According to Nielsen/NetRatings*, July 21, 2006, http://www.nielsen-netratings.com/pr/pr_060721_2.pdf.

232. Marshall Kirkpatrick, *YouTube Serves 100m Videos Each Day*, TECHCRUNCH, July 17, 2006, <http://www.techcrunch.com/2006/07/17/youtube-serves-100m-videos-each-day/>.

233. Bob Garfield, *YouTube vs. Boob Tube*, WIRED, Dec. 2006, at 226.

234. Hitwise, *Hitwise Data Shows Overall Visits to Video Search Sites Up 164%*, May 24, 2006, <http://www.hitwise.com/press-center/hitwiseHS2004/videosearch.php>.

235. Scott Woolley, *Video Fixation*, FORBES, Oct. 16, 2006, http://www.forbes.com/free_forbes/2006/1016/=100a.html.

others.²³⁶ (In an unrelated lawsuit, Universal has sued the social networking site MySpace for alleged copyright infringement based on MySpace users sharing Universal's copyrighted music and music videos.²³⁷) These lawsuits will test the scope and requirements of the DMCA safe harbor for Internet service providers, which Congress enacted in 1998 to provide Web sites with some forms of immunity from monetary damages in copyright cases.²³⁸

It is important to recognize several points about the scope of these two copyright lawsuits against YouTube. The complaints focus on the wholesale copying of the plaintiffs' copyrighted clips by YouTube users, such as highlights of Jon Stewart's *The Daily Show* or broadcasts of English Premier League soccer matches.²³⁹ I would characterize these allegedly infringing clips as basically "time shift" recordings of copyrighted content that do not even fall within the category of UGC. The user has not created any content of her own; she has simply recorded someone else's show. Although the course of litigation could expand the facts alleged by the plaintiffs, it is noteworthy that neither complaint takes issue with any user-generated video that mixes in copyrighted footage as a part of a larger, creative work.²⁴⁰

For our inquiry, the more difficult issue is raised by the synchronization of copyrighted music into user-generated videos. In the class action, several music publishers also challenge the unauthorized use of copyrighted sound recordings and musical works, such as "Black Magic Woman" and John Denver's "Thank God, I'm a Country Boy,"²⁴¹ which have been synchronized into YouTube user videos. This issue is more troublesome for UGC, given the *Bridgeport* decision for commercial sampling of music, as discussed above.

236. See *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, No. 07-CV-3582 (S.D.N.Y. filed May 4, 2007); *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07-CV-02103 (S.D.N.Y. filed March 13, 2007).

237. Universal's lawsuit objects to unauthorized copies of Universal's music and music videos on MySpace, as well as unauthorized synchronization of Universal's music into user videos. See Complaint, ¶ 17, *UMG Recordings v. MySpace, Inc.*, No. 06-CV-07361 (C.D. Cal. filed Nov. 17, 2006), available at <http://news.findlaw.com/hdocs/docs/ip/umgmymospace111706cmp.html/>.

238. See 17 U.S.C. § 512 (2000).

239. See Complaint, ¶ 61, *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, No. 07-CV-3582 (S.D.N.Y. filed May 4, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv03582/305574/1/>; Complaint, ¶ 3, *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07-CV-02103 (S.D.N.Y. filed Mar. 13, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1/>.

240. See Complaint, *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, No. 07-CV-3582 (S.D.N.Y. filed May 4, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv03582/305574/1/>; Complaint, *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07-CV-02103 (S.D.N.Y. filed Mar. 13, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1/>.

241. See Amended Complaint, ¶¶ 99-18-19, *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, No. 07-CV-3582 (S.D.N.Y. filed Nov. 7, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv03582/305574/58/>.

2. Major Copyright Holders Increasingly Support Mashups

From a copyright perspective, one of the biggest developments in the Web 2.0 world has been the reaction of major copyright holders to UGC. By all appearances, major media copyright holders initially took a “wait-and-see” approach, allowing the practice of user-generated mashups to develop. The computer game industry provided the first real glimpse of UGC, with game software companies allowing their users to modify their games and create new versions, dating back to 1999.²⁴² The next really big phase of UGC occurred with the growth of video sharing and YouTube in 2005. Today, many of the major media copyright holders have gone on record as supporting the user-generated practice.

For example, even Viacom (which is suing YouTube for copyright infringement) has publicly embraced user-generated mashup videos. The lead counsel for Viacom in the case against YouTube, Don Verrilli, stated during a debate about the case that the transformative, noncommercial type of unauthorized uses were not problematic.²⁴³ Instead, Viacom objected to the “wholesale” copying and redistribution of copyrighted clips on YouTube—a position that is consistent with its complaint against YouTube. Viacom General Counsel Michael Fricklas expressed the same view in what was to become Viacom’s official policy contained on its Web site.²⁴⁴ The Viacom position stated:

Regardless of the law of fair use, we have not generally challenged users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy or transformative use of a limited excerpt for non commercial purposes.²⁴⁵

Viacom’s position is not atypical for the entertainment industry. A Motion Picture Association of America (MPAA) representative expressed the same view about allowing transformative reuses of copy-

242. See LASICA, *supra* note 117, at 250–51.

243. The UTube Blog, *Viacom v. Google: Their Lawyers Debate the Lawsuit*, Apr. 15, 2007, <http://thetubeblog.com/2007/04/15/viacom-v-youtubegoogle-their-lawyers-debate-lawsuit/>.

244. Viacom posted the letter on its Web site, but the link is no longer operational. The policy was developed after Viacom mistakenly sent a DMCA notice to take down a Stephen Colbert parody, “Stop the Falsiness,” video on YouTube that contained some Viacom content. See Eric Bangeman, *Viacom: We Goofed on Colbert Parody Takedown Notice; Case Dismissed*, ARS TECHNICA, April 23, 2007, <http://arstechnica.com/news.ars/post/20070423-viacom-we-goofed-on-colbert-parody-takedown-notice-case-dismissed.html>. In a recent interview, the General Counsel of Viacom, Michael Fricklas, expressed Viacom’s position in support of transformative reuses of its copyrighted content in non-commercial user-generated mashups and parodies. Interview by Andy Plesser with Michael Fricklas, Executive Vice President and General Counsel, Viacom (Sept. 9, 2007), available at <http://blip.tv/file/378755>.

245. Letter from Mark C. Merrill, Deputy General Counsel, Viacom, to Fred von Lohmann, Electronic Frontier Foundation (Apr. 17, 2007) (available at http://www.eff.org/files/filenode/moveon_v_viacom/0417_letter_fvl.pdf); see also Alexandra Wharton, *Getting into the Mashup*, REVENUE, Sept./Oct. 2007, <http://www.revenuetoday.com/story/Getting+Into+the+Mashup+Mix&readpage=2> (discussing statements by Viacom lawyer Mark Morrill that Viacom “is only interested in pursuing infringement of Viacom material on YouTube for nontransformative, verbatim use. Viacom is not pursuing transformative uses—which is the description that mashups and remixing fall under”).

righted material in a law school panel discussion in which I participated.²⁴⁶ As discussed below, the movie studios have generally allowed the use of their content in user-generated movie trailers that often spoof the movie itself, such as the artful and hilarious one-minute trailer that recasts *Mary Poppins* into a scary movie.²⁴⁷ That user-generated video has been up on YouTube since October 8, 2006 and has generated more than five million views,²⁴⁸ with no complaints from the copyright owner, Disney.²⁴⁹

Dean Marks, a senior vice president of IP of Warner Brothers Entertainment has stated publicly that Warner Brothers supports the practice of YouTube mashups.²⁵⁰

There's "a lot of creativity going on" in mashups posted on YouTube, he said, "and I don't think you've seen a lot of lawsuits" alleging infringement. There's a "difficult line to draw" between protected parody and copyright violations. . . . Urging "breathing room on this" for creators, he noted that content owners have shown suitable "restraint." They distinguish between such use of copyright work and "wholesale copying and redistribution of the entire work" cutting into their own businesses.²⁵¹

Warner Independent Pictures, a part of Warner Brothers, even held a mashup contest to create a trailer for an upcoming movie.²⁵²

Likewise, CBS's CEO Les Moonves has supported allowing users to use clips from CBS shows:

If somebody spends the time to take 20 clips from "CSI Miami," I think that's wonderful That only makes him more involved with my show and want to come to CBS on Monday night and watch my show. And we're going to get paid for the clips this guy takes off our air as well. It's win, win.

Some technologies will work, others will not. We learned a lot watching what happened to the music industry with Napster, and we'd like to avoid those mistakes.²⁵³

246. The conference was held at the Villanova Law School on February 24, 2007. The MPAA representative was Michael O'Leary, Senior Vice President and Chief Counsel for Federal Affairs and Policy.

247. *The Original Scary 'Mary Poppins' Recut Trailer*, posting of moviemkr to YouTube, http://www.youtube.com/watch?v=2T5_0AGdFic (Oct. 8, 2006).

248. *Id.*

249. Disney CEO Bob Iger spoke generally about UGC, not seeing it as a threat to traditional media. In fact, he stated that he wished Disney had come up with the idea for YouTube first. See Chrystia Freeland & Matthew Garrahan, *Transcript: Interview with Bob Iger*, FIN. TIMES, Jan. 31, 2007, http://us.ft.com/ftgateway/superpage.ft?news_id=fto013120071326082907&page=2.

250. Louis Trager, *We're Friend of YouTube Mashups, P2P, Fair Use, Warner Executive Says*, WASH. INTERNET DAILY, Mar. 12, 2007.

251. *Id.*

252. Sara Kehaulani Goo, *Art and Marketing All Mashed Up*, WASH. POST, Aug. 2, 2006, at D1.

253. Mike Sachoff, *CBS Playing on the Digital Field*, WEBPRONEWS, Jan. 10, 2007, <http://www.webpronews.com/topnews/2007/01/10/cbs-playing-on-the-digital-field>.

CBS even agreed to deal with Sling Media, maker of the Slingbox DVR, to allow people to record and post clips of CBS shows on the Internet.²⁵⁴

NBC Universal's General Counsel Rick Cotton expressed similar views:

It bears repeating that short-form mashups, parodies and the like are NOT the primary focus of content owners' anti-piracy activities. Let's be clear that sympathy for parodies and "re-interpretations" should not be used as a justification for inaction in addressing aggressively the wholesale trafficking in complete, unchanged copies of movies and TV programs.

Having said that, most major content owners today want to see fans fully engage with their favorite content and are working hard to provide legitimate ways to do that.

[L]ooking forward, one of the exciting characteristics of the new, digital world is that technology will allow us greater flexibility to respond to consumer desires. . . . We've offered fans material from *Battlestar Galactica* and *The Office* to create mashups. And we expect to expand those offerings both on our websites and on hulu.com.²⁵⁵

As Cotton's remark indicates, major corporate copyright holders have actively encouraged their users to make mashup videos on their Web sites²⁵⁶ and sometimes even on third-party sites. For example, at Universal Pictures, "for each new [movie] release, Universal's marketing team sends out a digital 'tool kit' to sites like YouTube with studio-approved graphics, clips, sound effect and music videos that can be shared."²⁵⁷ As Chairman of Universal Marc Shmuger explained, "If you want to be involved in the cultural debate, you have to allow consumers to be more actively involved. That's a different world order which we are not used to."²⁵⁸

Many companies and artists also hold contests for user-generated mashups, often allowing people to use some of the companies' or artists'

254. *CBS to Allow Viewers to Post Clips on Net*, CBS NEWS ONLINE, Jan. 9, 2006, <http://www.cbsnews.com/stories/2007/01/09/ces/main2344251.shtml>.

255. Saul Hansell, *Bits Debate: On the Rights of Readers and Viewers*, N.Y. TIMES BITS BLOG, Jan. 18, 2008, <http://bits.blogs.nytimes.com/2008/01/18/bits-debate-on-the-rights-of-readers-and-viewers>.

256. Lucasfilm, for example, has promoted user mashups of *Star Wars* on its site, complete with video clips and editing tools, although with restrictions against nudity and pornography. Sarah McBride, *Make-It-Yourself 'Star Wars'*, WALL ST. J., May 24, 2007, <http://online.wsj.com/public/article/SB117997273760812981.html>. Viacom and Sony BMG have also promoted user mashups on their sites. *Id.* To launch its famous swimsuit issue in 2008, *Sports Illustrated* held a video mashup contest in which users could remix footage of the photo shoots taken by the magazine and create mashup videos of their own. See *SI Swimsuit Video Mash Up Sweepstakes*, <http://simashup.secondthought.com/index.html> (last visited Aug. 11, 2008).

257. Laura M. Holson, *Hollywood Asks YouTube Friend or Foe?*, N.Y. TIMES, Jan. 15, 2007, at C1.

258. *Id.*

own footage or music.²⁵⁹ For example, MTV held contests for the best remix video of Kelly Clarkson's "Never Again" and Nelly Furtado's "All Good Things (Come to an End),"²⁶⁰ as well as a contest to spoof movies for the MTV Movie Awards.²⁶¹ Other notable contests include: Sony BMG's contest for remixing an old Duran Duran video,²⁶² David Bowie's contest for his "Rebel Never Gets Old" video,²⁶³ Nike's contest for best sports video mashup,²⁶⁴ Ford Fusion's contest to remix music videos by Tegan and Sara,²⁶⁵ Samsung's lip synch video contest on YouTube,²⁶⁶ and Missy Elliott's mashup contest of her music.²⁶⁷ YouTube regularly co-hosts contests of this sort in the Community section of its Web site.²⁶⁸

Of course, we should not overgeneralize from these statements and examples. Part of my theory is that copyright practices evolve and develop over time. Viacom, NBC Universal, CBS, and others could change their positions (although, at least so far, the evolution appears to be towards growing acceptance of the practice of video mashups). In late 2007, a number of these media companies, along with Microsoft, MySpace, and two video-sharing sites, Veoh and Dailymotion, proposed so-called "principles for user generated content services" that were designed to encourage web services to implement filtering of infringing material uploaded by users, but the principles did not attempt to define what constituted infringement.²⁶⁹ In fact, the companies openly admitted that "we may differ in our interpretation of relevant laws," and "we do not mean to resolve those differences in these Principles, which are not intended to be and should not be construed as a concession or waiver with respect to any legal or policy position or as creating any legally

259. See, e.g., AT&T, News Room, *AT&T Launches Mash-Up Madness Video Contest for Hoops Fans*, Feb. 27, 2007, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23442>; WashingtonPost.com, *Video Mash-Up*, Aug. 1, 2006, <http://www.washingtonpost.com/wp-dyn/content/video/2006/08/01/VI2006080100794.html>.

260. See Antony Bruno, *MTV Service Seeks Revenue from Fan Remixes*, BILLBOARD, July 10, 2007, available at <http://www.reuters.com/article/internetNews/idUSN0620281220070707>.

261. See My MTV Movie Awards '07 on Yahoo!, <http://mtvmovieawards.yahoo.com/spoofs/toolbox> (last visited Aug. 11, 2008).

262. See Duran Duran: "Falling Down" Video Mash-up Challenge, <http://www.duranduranonline.com/fallingdown/> (last visited Aug. 11, 2008).

263. See Bowie Net, <http://www.davidbowie.com/neverFollow/> (last visited Aug. 11, 2008).

264. See Nike: 6.0 Auction Sports Video Mashup Contest, http://www.nike.com/nkeb/v5/#/insider/post_705 (last visited Aug. 11, 2008).

265. See ACIDPlanet.com, *Fusion Flash Concerts' Tegan and Sara Mash-Up Contest*, <http://www.acidplanet.com/contests/fusionflash> (last visited Aug. 11, 2008).

266. See YouTube, *The UpStage by Samsung Contest*, <http://www.youtube.com/profile?user=SamsungContest> (last visited Aug. 11, 2008).

267. See Michael Paoletta, *Exclusive: Missy Elliott, Doritos Team for Multi-Platform Campaign*, BILLBOARD.BIZ, Aug. 24, 2007, http://www.billboard.biz/bbbiz/content_display/industry/e3i4951ddd30e582138477721299144162.

268. See YouTube, *Community*, <http://www.youtube.com/community> (last visited Aug. 11, 2008).

269. The group included CBS, Dailymotion, Disney, Fox, Microsoft, MySpace, NBC Universal, Veoh, and Viacom. See *Principles for User Generated Content Services*, <http://www.ugcprinciples.com/> (last visited Aug. 11, 2008).

binding rights or obligations.”²⁷⁰ (The media consortium’s proposal sparked an alternative proposal for protecting fair use by the Electronic Frontier Foundation (EFF) and other public interest groups.²⁷¹)

Moreover, some Hollywood content producers might be more suspicious of the practice, even though they have not publicly challenged the legality of noncommercial mashup videos.²⁷² And, although directors and screenwriters often do not hold any copyrights to the studios’ movies, they might be appalled at having their artistic creations “mashed up.”²⁷³

The music industry also has had a mixed response. The major labels seem to be supportive. In a partnership with Fliptrack, APM Music (a joint venture of EMI and BMG Music Publishing) has set up a site for users to make their own mashup music videos, with music provided by Fliptrack and APM.²⁷⁴ All of the major labels have struck partnership deals with YouTube, some even allowing the synchronization of recordings from the label’s collection into user-generated videos.²⁷⁵ In fact, these partnership deals with the music labels came about only after many users on YouTube had engaged in the informal practice of using copyrighted music in user-generated mashups. In this fascinating development, users engaged in an informal practice of unauthorized use of copyrighted recordings that eventually precipitated the recording industry’s adoption of the practice in formal contracts with YouTube.

However, not all in the music industry see the issue in the same way. Several music publishers and owners of copyrights to various musical works have joined the class action lawsuit against YouTube.²⁷⁶ Compared to the remixing of parts of copyrighted footage within user-generated videos, a practice that appears to be openly tolerated and even endorsed by a number of Hollywood studios, the unauthorized synchronization of music in user-generated videos has generated a far more divided view. Even before the mashup video, mashup audio tapes and

270. *Id.*

271. See EFF, Fair Use Principles for User Generated Video Content, <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen> (last visited Aug. 11, 2008).

272. For example, Ron Wheeler, senior vice president of content production at Fox Entertainment Group, stated that “[w]e are not in the business of just saying no, but we do consider it unauthorized use.” Holson, *supra* note 257.

273. *Id.*

274. *Fliptrack/APM Music Deal to Create World’s Largest Mashup Music Library*, DATAMONITOR, May 15, 2007, <http://www.datamonitor.com/industries/news/article/?pid=774C9F31-D0BF-40C0-86D4-8D46AB7e88B7&type=NewsWire>.

275. See Wharton, *supra* note 245 (“YouTube has deals with Warner, Sony BMG, EMI and Universal Music Group that enable people to legitimately incorporate works from these record labels’ artists into their user-generated content on YouTube.”).

276. They include Bourne Company, Murbo Music Publishing, Cherry Lane Music Publishing, Cal IV Entertainment, National Music Publishers’ Association, The Rodgers & Hammerstein Organization, Stage Three Music, Edward B. Marks Music, Freddy Bienstock Music, Alley Music, X-Ray Dog Music, The Music Force Media Group, The Music Force, and Sin-Drome Records. See Amended Class Action Complaint, *Football Ass’n Premier League Ltd. v. YouTube, Inc.*, No. 07-CV-3582 (S.D.N.Y. filed Nov. 7, 2007), available at <http://docs.justicia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv03582/305574/58/>.

CDs (such as DJ Danger Mouse's mashup of Jay-Z's *The Black Album* with the Beatles' *The White Album* to make his own *The Grey Album*) drew the ire of some in the music industry.²⁷⁷

On the other hand, the informal practices and even public statements by many major media producers cannot be dismissed out-of-hand. They are significant. Even among musicians, the mashup may be receiving greater acceptance by the efforts of some luminaries in the music world, such as David Byrne and David Bowie, who are encouraging mashups of their music.²⁷⁸ To facilitate sampling, Creative Commons has established easy, online sampling licenses that musicians can attach to their work.²⁷⁹ The fact that all of the major labels have signed partnerships deals with YouTube is also significant. These collective responses of the major content industries serve as informal signaling to the public that UGC is increasingly considered an acceptable practice.

The "mashup" world that we live in seems to be growing by the minute. Vast amounts of professionally produced content are being "unbundled"—by the media companies themselves—to allow users to "cut and paste" the content onto any other site of the user's own choosing. For example, more and more major media companies and professional artists are freely allowing a vast amount of their own content to be embedded on any Web site or blog through embeddable videos and "widgets" (anything that can be stuck in any Web site). For example, the Associated Press,²⁸⁰ the *Los Angeles Times*,²⁸¹ the *New York Times*,²⁸² the *Wall Street Journal*,²⁸³ and the *Washington Post*²⁸⁴ all create videos for users to embed freely on their own sites. So do ESPN,²⁸⁵ Yahoo,²⁸⁶ the BBC,²⁸⁷ CBS,²⁸⁸ NBC,²⁸⁹ FOX,²⁹⁰ Showtime,²⁹¹ and Comedy Central.²⁹²

277. See Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 280–86 (2005).

278. See Joshua Schwartz, *Thinking Outside the Pandora's Box: Why the DMCA Is Unconstitutional Under Article I, § 8 of the U.S. Constitution*, 10 J. TECH. L. & POL'Y 93, 144 (2005) (discussing David Bowie); *My Life in the Bush of Ghosts*, <http://bushofghosts.wmg.com/home.php> (last visited Aug. 11, 2008) (discussing David Byrne and Brian Eno's reissued album *My Life in the Bush of Ghosts*, under Creative Commons license allowing remixes).

279. Creative Commons, *The Sampling Licenses*, <http://creativecommons.org/about/sampling> (last visited Aug. 11, 2008).

280. See Associated Press's YouTube Channel, <http://www.youtube.com/user/AssociatedPress> (last visited Aug. 11, 2008).

281. See Los Angeles Times, <http://www.latimes.com> (last visited Aug. 11, 2008).

282. See N.Y. Times's YouTube Channel, <http://youtube.com/user/thenewyorktimes> (last visited Aug. 11, 2008).

283. See Wall Street Journal Video, http://online.wsj.com/public/page/8_000b.html (last visited Aug. 11, 2008).

284. See Washington Post, *Camera Works*, <http://www.washingtonpost.com/wp-srv/photo/newsvideo.htm> (last visited Aug. 11, 2008).

285. See ESPN Video, <http://sports.espn.go.com/broadband/video/> (last visited Aug. 11, 2008).

286. See Yahoo! Video, <http://video.yahoo.com/> (last visited Aug. 11, 2008).

287. See BBC's YouTube Channel, <http://www.youtube.com/user/BBC> (last visited Aug. 11, 2008).

288. See CBS's YouTube Channel, <http://www.youtube.com/user/CBS> (last visited Aug. 11, 2008).

NBC and FOX have even developed their own site, hulu.com, which allows users to post *entire* episodes of their popular TV shows, such as *The Office* and *The Simpsons*, on other Web sites.²⁹³ Many music labels (e.g., Polydor,²⁹⁴ Warner Brothers²⁹⁵) and popular musicians (e.g., U2,²⁹⁶ My Chemical Romance,²⁹⁷ Timbaland,²⁹⁸ Carrie Underwood²⁹⁹) follow a similar practice allowing users to freely embed their music videos. NBC has gone even one step further in allowing people to freely download copies of NBC shows.³⁰⁰ NBC, in other words, is turning into its own Napster.

Of course, it would be naive to think that Hollywood and media companies have purely altruistic motives in allowing user-generated mashups, along with the embedding of media content. Major media producers have their own financial motives. First, users represent potential new talent, and a number of new artists have already been discovered on YouTube and other Web 2.0 sites.³⁰¹ Moreover, the industry has an obvious financial interest in catering to all the consumers of its content, including the growing number of users who enjoy making mashup videos. As NBC Vice President of Intellectual Property Gillian Lusins admitted, “Users taking our content and doing what they want with it, we have to deal with it. . . . We’re actually trying to co-opt the YouTube model ourselves [by allowing mashups of NBC shows on NBC’s site].”³⁰²

289. See FOX Broadcasting’s YouTube Channel, <http://youtube.com/user/FoxBroadcasting> (last visited Aug. 11, 2008).

290. See NBC, Official Site, <http://www.nbc.com/Video/> (last visited Aug. 11, 2008).

291. See Showtime’s YouTube Channel, <http://www.youtube.com/user/showtime> (last visited Aug. 11, 2008).

292. See Comedy Central: Exclusive Videos and Show Clips, http://www.comedycentral.com/funny_videos/index.jhtml? (last visited Aug. 11, 2008).

293. See Hulu, <http://www.hulu.com/> (last visited Aug. 11, 2008).

294. See Polydor’s YouTube Channel, <http://www.youtube.com/user/polydor> (last visited Aug. 11, 2008).

295. See Warner Brothers Records’s YouTube Channel, <http://www.youtube.com/profile?user=warnerbrosrecords> (last visited Aug. 11, 2008).

296. See U2official’s YouTube Channel, <http://www.youtube.com/user/U2official> (last visited Aug. 11, 2008).

297. See My Chemical Romance’s YouTube Channel, <http://www.youtube.com/user/mYcheMicALroMaNcE> (last visited Aug. 11, 2008).

298. See TimbalandMusic’s YouTube Channel, <http://www.youtube.com/user/TimbalandMusic> (last visited Aug. 11, 2008).

299. See Carrie Underwood’s YouTube Channel, <http://www.youtube.com/user/carrieunderwood> (last visited Aug. 11, 2008).

300. See NBC Official Site, <http://www.nbc.com/Video/> (last visited Aug. 11, 2008).

301. See *supra* notes 163, 184–88, 192–99 and accompanying text (discussing discoveries of Esmee Denters, Ingrid Michaelson, and Terra Naomi).

302. Marianne Richmond, *User Generated Content: NBC and YouTube Mash Up May Have Bonus Outcome, Less Zapping*, RESONANCE PARTNERSHIP BLOG, June 26, 2006, http://www.resonancepartnership.com/2006/06/user_generated_.html.

Put simply, the entertainment industry hopes to “monetize” UGC one day.³⁰³ As Alan Bell, the Executive Vice President of Paramount Pictures, stated:

Regardless of the outcome it behooves the content industry to be involved and figure out a way to leverage user generated content, harvesting talent, building buzz, people editing and mashing up content and building communities and monetizing the ad stream. If I were running a VOD [video-on-demand] or download-to-own video site, I would figure out a way to bring UGC into it.³⁰⁴

Already, the line between traditional media and UGC has begun to blur, as more traditional media attempt to incorporate—and profit from—UGC.³⁰⁵ Because user-generated ads or mashups are often viewed as more authentic or “closer to home” to consumers, media companies are trying to figure out ways to tap into the “user-generated” culture to reach more consumers.

As Kori Bernards, an MPAA spokesperson admitted, “[C]opyright laws come into play here, but the idea of mash-up videos is obviously very popular, and film companies have been moving to harness that as a means of advertising.”³⁰⁶ The movie studios have even purchased the copyrights to some clever fan films.³⁰⁷

3. *User-Generated Political Candidate Videos*

It would be impossible to summarize the millions of user-generated videos on YouTube. I have chosen a few well-known examples where informal copyright practices have developed to fill the gaps left open by formal copyright law in positive ways for society. Given how famous these videos are, there can be no doubt that the relevant copyright holders know about the videos and have decided (thus far) not to challenge the unauthorized uses of their works in the mashup videos.³⁰⁸

303. See Julian Goldsmith, *Media Gurus: User-Generated Content a Big Threat*, CNET NEWS, Apr. 17, 2007, http://www.news.com/2100-1026_3-6176823.html (noting that two-thirds of media executives surveyed believed they would be able to make money out of user-generated content).

304. Dan Farber, *Hollywood Execs Still Cautious About User Generated Content*, BETWEEN THE LINES BLOG, ZDNET, May 2, 2007, <http://blogs.zdnet.com/BTL/?p=4973>.

305. One notable example: the BBC has begun a radical redesign of its entire Web site to incorporate user-generated blogs, videos, and social networking. The BBC's new design is based on three principles, “share,” “find,” and “play”—with the emphasis on “sharing” of content among users. See Mark Sweney, *BBC Unveils Radical Revamp of Website*, GUARDIAN.CO.UK, Apr. 25, 2006, <http://www.guardian.co.uk/technology/2006/apr/25/news.media>; Simon Nelson, *BBC Three Everywhere*, BBC INTERNET BLOG, Jan. 22, 2008, http://www.bbc.co.uk/blogs/bbcinternet/2008/01/bbc_three_everywhere_1.html.

306. See Goo, *supra* note 252.

307. Rafer Guzman, *Now That's Reel Devotion: Fanboy Films Put Viewers Behind Camera to Remake Their Favorites*, NEWSDAY, Feb. 21, 2008, at B4.

308. It goes beyond the scope of this Article to attempt a comprehensive survey of user-generated content online. That task would be daunting for any organization, let alone a single person, particularly given how much new UGC is created daily. Other than campaign videos prepared by the presidential candidates (which I track in detailed monthly reports online), the evidence I present consists of

This first area involves user-generated political campaign videos. For the first time in history, ordinary citizens have the ability to create and disseminate campaign videos to a national audience in order to influence the outcome of national elections. YouTube has actively fostered citizen participation in the electoral process by organizing a feature called “YouChoose.” All of the presidential candidates in the 2008 election were given their own YouTube channel, where they posted campaign videos online. By every measure, the YouChoose program on YouTube has been a smashing success. By the beginning of January 2008, at the start of the primary season, the presidential candidates had posted more than 3,300 campaign videos on YouTube.³⁰⁹ Collectively, the videos were viewed nearly 43 million times.³¹⁰

YouTube (along with CNN) also hosted two debates for the candidates in which all of the questions came from videos submitted by YouTube users. After the debate, YouTube made all of the candidate responses available for repeated viewing on its site. At the initiative of Professor Lessig, CNN even agreed to allow users to freely use its footage of the presidential candidate debates without any copyright restriction whatsoever.³¹¹ Lessig had attempted to persuade both the Republican and Democratic parties to ensure that other networks televising debates of the presidential debates would do the same.³¹² Lessig pointed to what I have called a “gray area” of copyright law, to persuade the two parties to allow free use of footage from the presidential debates:

Unfortunately, however, the uncertainty about the scope of copyright regulation is increasingly one such burden on Internet political speech. This next political cycle will see an explosion of citizen generated political content. Some of that speech will be crafted from clips taken from the Presidential debates. Some of that will be fantastically valuable and important. Yet as the law is right now, it is extremely difficult for an ordinary citizen to understand the boundaries of “fair use,” or the limits to copyright law. It is likewise difficult for companies such as YouTube, or Blip.tv. Indeed, it is even difficult for a skilled practitioner. That uncertainty, if not checked, could produce a cloud over much of this political speech, as sites and universities don’t know how much is too much. It will

anecdotal but well-known examples, supplemented by a few surveys conducted by others. Future empirical studies should be made in this area.

309. See Edward Lee, *Analyzing the Presidential Candidate Videos on YouTube*, Jan. 9, 2008, at 5, available at <http://www.scribd.com/doc/241079/The-Utube-Blog-study-Analyzing-the-Presidential-Candidate-Videos-on-YouTube-Aug-2007>.

310. *Id.* at 6.

311. CNN stated: “CNN debate coverage will be made available without restrictions at the conclusion of each live debate. We believe this is good for the country and good for the electoral process. This decision will apply to all of CNN’s presidential debates, beginning with the upcoming New Hampshire debates in June.” Lessig Blog, *Free Debates: CNN Has Announced It Will Free the Debates*, http://lessig.org/blog/2007/05/free_debates_cnn_has_announced.html (May 5, 2007, 10:03 PST).

312. Lessig Blog, *A Call on the RNC & DNC to Eliminate Unnecessary Regulation of Political Speech*, http://lessig.org/blog/2007/04/a_call_on_the_rnc_dnc_to_elimi.html (Apr. 25, 2008 04:08 PST).

certainly create a temptation by some politicians to invoke copyright law to block particularly effective speech critical of them.³¹³

For the most part, users have been able to freely use TV clips of presidential candidates in user-generated mashups. This environment has cultivated an incredible amount of citizen campaign videos. Users have made scores of “mashup” campaign videos on their own. I highlight a few of the more notable ones below and explain why these user-generated political videos should be considered a legitimate informal copyright practice, filling a gap in our formal law.

a. “Hillary 1984” Video

The most famous campaign video to hit YouTube in 2007 was a slick “mashup” video created by an ordinary citizen, Phil de Vellis. De Vellis’s video was titled “Vote Different,” and it attacked Hillary Clinton.³¹⁴ De Vellis remixed scenes from Apple’s famous “1984” commercial depicting scenes of totalitarianism reminiscent of George Orwell’s *1984* (the Apple ad had introduced the new Macintosh against IBM’s computers back in 1984). De Vellis took the entire Apple commercial, but spliced in video of Hillary Clinton speaking like Big Brother. At the end, a female rebel hurls a hammer at the screen where Hillary speaks, exploding it to pieces. The video ended with the following message, “On January 14th, the Democratic primary will begin. And you’ll see why 2008 won’t be like ‘1984.’” Then, “BarackObama.com” flashed on the screen.

Barack Obama had nothing to do with the creation of the video, as de Vellis later confessed on Ariana Huffington’s popular blog.³¹⁵ As for the reason behind the ad, de Vellis explained,

I wanted to express my feelings about the Democratic primary, and because I wanted to show that an individual citizen can affect the process. There are thousands of other people who could have made this ad, and I guarantee that more ads like it—by people of all political persuasions—will follow. This shows that the future of American politics rests in the hands of ordinary citizens.³¹⁶

The attack ad became an instant Internet sensation, drawing coverage even from the mainstream media. The ad (and several copies of it) drew close to 4.5 million views on YouTube by June 2007.³¹⁷ To put the number into perspective, de Vellis’s video gained more than three times as many views as all of Hillary Clinton’s official videos on

313. *Id.*

314. See *Vote Different*, posting of ParkRidge47 to YouTube, <http://www.youtube.com/watch?v=6h3G-IMZxjo> (Mar. 5, 2007).

315. Phil de Vellis, *I Made the “Vote Different” Ad*, HUFFINGTON POST, Mar. 21, 2007, http://www.huffingtonpost.com/phil-de-vellis-aka-parkridge/i-made-the-vote-differen_b_43989.html.

316. *Id.*

317. See *Vote Different*, *supra* note 314.

YouTube combined at that time. And the video drew more views than each of the other candidates' entire collection of campaign videos on YouTube at the time. According to a Nielsen study, the video drew seventy-five percent of all the traffic to videos related to the candidates on YouTube during March 2007.³¹⁸ The number of total views would rival even the number of viewers for a popular show on cable TV.

b. John Edwards "Feeling Pretty" Video

Another popular video making fun of a presidential candidate involved John Edwards "Feeling Pretty." It was far simpler than the "Hillary 1984" video. It showed Edwards, with the help of a make-up person, obsessively primping his hair before an interview. The primping lasted all of two minutes! Someone acquired the footage and synchronized Julie Andrews singing "I Feel Pretty" from *West Side Story*.³¹⁹ It became a huge hit on YouTube, generating over one million views³²⁰ and drawing much attention in the media.³²¹

c. "Obama Girl" Video

Not all of the user-generated videos about presidential candidates were negative. Some, in fact, supported a presidential candidate, although at times with iconoclastic verve. The most famous video of all was the "Obama girl" video.

It was the brainchild of Ben Relles, an ad executive, who hoped to upstage Hillary Clinton's contest for her supporters to select her campaign song.³²² The video featured an actress, Amber Lee Ettinger, posing as "Obama girl," who openly sings (or lip synchs) to a catchy, bubble-gum tune that she has a "Crush on Obama." The song was sung by a college student, Leah Kauffman, and produced by Rick Friedrich.³²³ The mashup video includes (presumably) copyrighted photographs and footage of Barack Obama, including parts of his famous 2004 Democratic Convention speech, mixed in with Relles's original footage of Ettinger pining for Obama. The "Obama girl" video drew more than 8.2 million views on YouTube,³²⁴ and generated widespread media attention, not to

318. Amy Schatz, *YouTube Fuels—and Foils—Campaigns*, WALL ST. J., June 12, 2007, at A7.

319. *John Edwards Feeling Pretty*, posting of RogerRmjet to YouTube, <http://www.youtube.com/watch?v=2AE847UXu3Q> (Nov. 8, 2006).

320. *Id.*

321. See, e.g., Adam Nagourney, *The Birth of the 'Breck Girl' Story Line*, N.Y. TIMES.COM, Apr. 23, 2007, <http://www.nytimes.com/2007/04/23/us/politics/23web-nagourney.html>.

322. See Jake Tapper, *Music Video Has a 'Crush on Obama': Risque YouTube Song Takes Obama Campaign by Surprise*, ABC NEWS.COM, June 13, 2007, <http://abcnews.go.com/Politics/Story?id=3275802&page=1>.

323. See *"I Got a Crush...on Obama" by Obama Girl*, posting of barelypolitical to YouTube, <http://www.youtube.com/watch?v=wKsoXHYICqU> (June 13, 2007).

324. *Id.*

mention copycat mashup videos by others featuring a Hillary guy³²⁵ and Hillary gal,³²⁶ and Huckabee girl.³²⁷

d. Citizen Mashups Involve a Legitimate Informal Copyright Practice

Under our Five-Factor Informality Test, a strong case can be made that the informal copyright practices for these citizen mashup videos serve as a legitimate gap filler in our copyright system.

Let us consider Factors 1, 2, and 5 together. They all cut in favor of using an informal practice as a gap filler. With respect to Factor 1, using copyrighted content in noncommercial citizen campaign videos has not yet been challenged in litigation. The practice, of course, is very new, basically only a year or two old. Under Factor 2, the issue presents a novel question of law, not only because of the newness of the practice, but the special importance we place on citizen participation in elections under the Constitution. It falls squarely within a gray area in our copyright law. The closest case law appears to come from the commercial context with the use of portions of copyrighted footage for the making of biographical films. Several courts have found fair use, but another has ruled against it.³²⁸ Under Factor 5, the relevant copyright holders have raised no objection to these political mashups, which cuts in favor of allowing the practice, especially because the practice involves political speech and citizen involvement in the national election of the President of the United States.

As to Factor 3, colorable arguments in favor of fair use can be made in each case, although the length of borrowing from the entire Apple commercial in the “Hillary 1984” video and from the entire “I Feel Pretty” song in the John Edwards video make the fair use analysis more doubtful for those two videos compared to the “Obama girl” video.

When determining fair use, courts look to the purpose of the use—such as “for purposes . . . [of] criticism, comment, news reporting”—and consider the four fair use factors in section 107.³²⁹ Under the first fair use

325. See “*I Got a Crush . . . on Hillary*” (*Take That Obama Girl!*), posting of davedays on YouTube, <http://www.youtube.com/watch?v=jLSWudoqtWE> (Jan. 13, 2008).

326. See *Hott 4 Hill-She's Hott for Hillary!*, posting of Hott4Hill on YouTube, <http://www.youtube.com/watch?v=-Sudw4ghVe8> (July 2, 2007).

327. See *Huckabee Girl*, posting of superdeluxecomedy to YouTube, <http://www.youtube.com/watch?v=N7xgtAWfSWM> (Jan. 30, 2008).

328. *Compare* *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (unauthorized use of copyrighted footage, photographs, and music in documentary on Elvis was unlikely to be fair use), *with* *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442 (S.D.N.Y. 2001) (unauthorized use of twenty seconds of copyrighted movie featuring Peter Graves (excerpted from a movie trailer) was fair use in film biography on the actor), *and* *Monster Commc'ns Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996) (unauthorized use of less than two minutes of copyrighted clip of Muhammad Ali in movie biography was fair use). For further discussion, see also *supra* notes 180–94 and accompanying text.

329. See 17 U.S.C. § 107 (2000).

factor (purpose and character of use), the purpose in using copyrighted footage of the presidential candidates was to make a *transformative* use in a citizen's political campaign video.³³⁰ The citizen videos involve criticism and parodies of some of the presidential candidates, as well as commentary and support for others—all of which falls within recognized purposes of fair use.³³¹ All of the citizen videos appear to be noncommercial as well. Even if some had a commercial element, the Supreme Court has explained that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”³³²

The fair use argument is strengthened by the First Amendment concerns in protecting the ability of citizens to participate in public discourse about the election of the President. Under Supreme Court precedent, political speech is at the core of the First Amendment.³³³ As Justice Scalia has noted, “The First Amendment creates an open marketplace where ideas, *most especially political ideas*, may compete without government interference.”³³⁴ Protecting the ability of citizens to participate and express their views during a national election for the highest office of the land presents a concern of the greatest importance under the First Amendment.³³⁵ Although the Court rejected in *Harper & Row* the creation of a “public figure” exception to copyright,³³⁶ the case involved a stolen, unpublished manuscript of Gerald Ford's memoirs being published commercially without his authorization. By contrast, here, there has been no indication that any of the material in the citizen videos was stolen or that any copyright holder's right of first publication was usurped.

The second fair use factor (nature of the copyrighted work) presents a more mixed analysis. The “Hillary 1984” video borrows from an Apple ad, as well as copyrighted footage of Clinton in a campaign speech. As a news event, the Clinton speech receives narrower copyright

330. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.”).

331. 17 U.S.C. § 107 (fair use “for purposes such as criticism, comment, news reporting”); see *Campbell*, 510 U.S. at 580–81 (parody fair use); see also *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (copying twenty-two stills from Zapruder film of Kennedy assassination was fair use in part because of “public interest in having the fullest information available on the murder of President Kennedy”).

332. *Campbell*, 510 U.S. at 579.

333. See *Virginia v. Black*, 538 U.S. 343, 365 (2003); *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

334. *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008) (emphasis added).

335. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (“Preserving the integrity of the electoral process, preventing corruption, and ‘sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government’ are interests of the highest importance.”); see also *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 692–93 (1998) (Souter, J., dissenting) (“Given the special character of political speech, particularly during campaigns for elected office, the debate forum implicates constitutional concerns of the highest order, as the majority acknowledges.”).

336. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

protection than the Apple ad. Similarly, in the John Edwards “Feeling Pretty” video, the news footage of Edwards has a smaller scope of protection, but the “I Feel Pretty” song, as a creative work, receives full copyright protection. In the “Feeling Pretty” video, the synchronization of a copyrighted sound recording might be viewed unfavorably by courts. Probably the strongest case for fair use is presented by the “Obama girl” video, since it borrows the smallest amount of copyrighted material and has its own original music.

The third fair use factor (amount and substantiality of portion used in relation to the copyrighted work as a whole) also is somewhat mixed. The “Hillary 1984” video relied on an entire Apple commercial, which cuts against fair use. The same holds true for the John Edwards “Feeling Pretty” video, which relied on two minutes of the “I Feel Pretty” song. As the Supreme Court has noted, however, there are no bright-line rules for fair use.³³⁷ The “extent of permissible copying varies with the purpose and character of the use,” and, at least in some cases, taking the entire or a substantial portion of a copyrighted work does not negate a finding of fair use.³³⁸ The “Obama girl” video presents an easier case for fair use, given its use of only snippets of footage of Obama.

The fourth fair use factor (effect of the use upon the potential market for or value of the copyrighted work) is debatable as well. Using brief news footage of the presidential candidates in well-covered public debates or speeches probably has no financial impact at all on the copyright holders. Also, the video of Edwards primping his hair, behind the scenes, probably would not be the kind of footage that a network would even think to license out. However, in the case of the Apple commercial, Apple might have an arguable claim that the mashup video has harmed the marketability of the old commercial by making it less likely that Apple could ever reuse the commercial in an arresting way (although it is probably rare for a company ever to reuse an old TV commercial). Likewise, the copyright owners to the “I Feel Pretty” song could claim the lost revenue from a synch license. My point, however, is not to prove that the political mashup videos are fair uses. Instead, it is to show that colorable claims of fair use exist.

Finally, if we look at Factor 4 under my Informality Test, high transaction costs for licenses support embracing the informal practice of citizen mashups. Average citizens probably face high transaction costs to obtain licenses from an entity like Apple or a music publisher. There is no guarantee that either would even respond right away, if ever, to a request from a small-time individual. By the time the user cleared all the rights (assuming she could afford it), the presidential election may well be already over.

337. *Campbell*, 510 U.S. at 577.

338. *Id.* at 586–87.

Thus, if we balance the Informality Test factors, most, if not all, support the acceptance of the informal practice of citizen campaign mashups. Even if we concluded that the fair use defenses for the “Hillary 1984” and John Edwards “Feeling Pretty” videos were doubtful, if not unavailing, we still could accept the practice under the balance of the other factors in the Informality Test. Of course, a copyright holder could eventually file a lawsuit against a citizen political mashup video—which could change the balance of factors. FOX News, in fact, sent cease-and-desist letters to both Senator John McCain and Governor Mitt Romney, demanding that each candidate remove from their campaign videos a small portion of copyrighted footage from their FOX News debate.³³⁹ Both candidates invoked fair use and continued to use the clips in their video ads. Although FOX rejected their fair use claim, it seems unlikely that FOX would sue two presidential candidates for using footage of their own debate in campaign videos. But it is possible. Under my theory, we must embrace the possibility of further developments and changes to both informal and formal copyright practices. By declaring an informal copyright practice legitimate now, we do not dictate that it must be so considered forever. Copyright law evolves.

4. *User-Generated Movie Trailer Mashups*

Another popular form of user-generated video is the movie trailer mashup, which involves taking snippets of a movie and transforming them into a very short movie trailer, often in humorous ways unintended by the author of the movie.

For example, Chris Rule made a one-minute mashup trailer of *Mary Poppins*, converting the Disney children’s classic into what appeared to be a trailer for a scary movie.³⁴⁰ The mashup trailer generated more than five million views.³⁴¹ Someone else transformed the horror film *The Shining* into a one-minute trailer for a romantic comedy.³⁴² Another person mashed up two movies into a two-minute trailer called “Brokeback to the Future,” which reconfigured scenes from *Back to the Future*, synchronized with music from *Brokeback Mountain*, to suggest a homosexual love story between the characters played by Michael J. Fox and

339. See Jim Rutenberg, *Fox Orders Halt to McCain Ad*, N.Y. TIMES POL. BLOG, Oct. 25, 2007, <http://thecaucus.blogs.nytimes.com/2007/10/25/fox-orders-halt-to-mccain-ad/>; Jason Linkins, *Fox News: Romney Is Violating Copyright Law, “We Will Respond,”* HUFFINGTON POST, Nov. 2, 2007, http://www.huffingtonpost.com/2007/11/02/fox-news-romney-is-violated_n_70929.html.

340. See Janet Kornblum, *Mashups Add Splice to Movies*, USA TODAY.COM, Jan. 22, 2007, http://www.usatoday.com/tech/news/2007-01-22-trailer-mashups_x.htm; *The Original Scary ‘Mary Poppins’ Recut Trailer*, *supra* note 247.

341. See *The Original Scary ‘Mary Poppins’ Recut Trailer*, *supra* note 247.

342. See *The Shining Cut*, posting of neochosen to YouTube, http://www.youtube.com/watch?v=KmkVWuP_sO0 (Feb. 7, 2006).

Christopher Lloyd.³⁴³ The number of mashup movie trailers probably totals in the thousands and is likely to grow.³⁴⁴ Some people have even started a Web site to track the latest ones.³⁴⁵

Under the Five-Factor Informality Test, movie trailer mashups are a legitimate informal copyright practice. The analysis is similar to the analysis for political mashups, although the political speech involved in the campaign videos probably presents a more compelling case.

First, the practice of movie trailer mashups is fairly new and has not been the subject of litigation. Second, there is no settled copyright precedent regarding the practice, thus putting it within a gray area in our copyright law. Third, the arguments for fair use are at least colorable, although perhaps more contestable for any synchronization of copyrighted music (such as in the “Brokeback to the Future” video). Each of the videos makes a noncommercial, transformative use of short clips—totaling only one or two minutes—from a feature length movie; existing case law provides some support for fair use with such limited borrowing.³⁴⁶ Each mashup trailer can also be considered parody fair use, since they make fun of the original movies whose scenes are reconfigured with a contrarian twist.³⁴⁷ Finally, the transaction costs are probably too high for any user to clear rights with the movie studios, none of whom have objected to the movie trailer mashups, despite—or perhaps because of—their widespread circulation on YouTube and favorable publicity in the media.

C. *The Growth of User-Generated, “Fan” Material*

1. *Fan Fiction*

Fan fiction is one of the oldest and most popular types of user-generated, “fan” material. Fan fiction dates back well before the Internet, at least to the 1860s when fans wrote parodies and sequels of beloved Lewis Carroll works, such as *Alice in Wonderland*.³⁴⁸ The Internet has made fan fiction more popular and prominent by enabling people to share their fan fiction with others, in easy-to-search databases.³⁴⁹ Some of the more popular subjects of fan fiction include *Harry Potter*, *Star Trek*, and *Star Wars*, although the range of subjects is great and includes anime, books, cartoons, comics, games, movies, and television shows.³⁵⁰

343. See *Brokeback to the Future*, posting of orangeohm to YouTube, <http://www.youtube.com/watch?v=zfODSPIYwpQ> (Feb. 1, 2006).

344. Kornblum, *supra* note 340.

345. See The Trailer Mash, <http://www.thetrailermash.com/> (last visited Aug. 11, 2008).

346. See *supra* notes 218–23 and accompanying text.

347. See *Campbell v. Acuff-Rose Music, Inc.*, 507 U.S. 569, 588–89 (1993).

348. See Meredith McCardle, Note, *Fan Fiction, Fandom and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 440 (2003).

349. *Id.* at 453.

350. See FanFiction.net, <http://www.fanfiction.net> (last visited Aug. 11, 2008).

Basically, any part of our culture could become the subject of fan fiction. By 2003, one Web site, fanfiction.net, had more than 500,000 user-generated works of fan fiction.³⁵¹

Several scholars have already discussed the uncertain status of fan fiction under copyright law.³⁵² In order to write fan fiction, writers typically borrow characters and some story lines from copyrighted works, such as *Harry Potter*, without express permission or license from the authors of the copyrighted works. Such unauthorized use of copyrighted works could violate the copyright holders' rights to copy, distribute, and make derivative works.³⁵³ On the other hand, fair use seems like a strong argument, particularly for noncommercial fan fiction. Other copyright scholars have already elaborated a very respectable case for fair use in fan fiction, so I will not repeat the analysis here.³⁵⁴

Instead, for our purposes, it is important to examine the practice of fan fiction as an informal copyright practice. On whole, the five Informality Test factors support allowing the practice as an important gap filler in our copyright system.

First, even though fan fiction has existed for years, no copyright holder has challenged it to a judgment in court. Consequently, there is no case law that directly considers the legality of a third party's use of copyrighted characters and story lines in fan fiction. The *Wind Done Gone* case, involving a published sequel to *Gone With the Wind* written from the perspective of a slave, provides support for fan fiction, although the case involved a strong parody or criticism of the original work that may be absent in much fan fiction, and regardless, other courts might be less receptive to reuses of copyrighted characters.³⁵⁵ At least a colorable fair use claim exists for fan fiction,³⁵⁶ especially if noncommercial. Also, there is a possible argument that the idea-expression dichotomy should be applied in a way to allow reuses of "culturally iconic literary characters."³⁵⁷

351. McCardle, *supra* note 348, at 453.

352. See, e.g., Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007); Katyal, *supra* note 37; Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551 (2005); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997); Mollie E. Nolan, Comment, *Search for Original Expression: Fan Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533 (2006).

353. See 17 U.S.C. § 107 (2000).

354. See, e.g., Chander & Sunder, *supra* note 352, at 612–20; Tushnet, *supra* note 352, at 664–81.

355. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268–69 (11th Cir. 2001); cf. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757–58 (9th Cir. 1978) (unauthorized use of Disney characters in "counter-culture" comic books was not a parody fair use because defendant took too much Disney content).

356. See *supra* note 353 and accompanying text.

357. See Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 938 (2007); see also Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437 (1994); Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Super-*

In addition, the transaction costs would be high for individuals to attempt to obtain licenses from the copyright holders. There is no easy, systematic way of trying to obtain a license, other than to try to locate and reach the copyright holder. Half the challenge may be even getting a response from some of the more prominent copyright holders, such as J.K. Rowling, the author of *Harry Potter*. On fanfiction.net, more than 355,000 works of fan fiction exist for *Harry Potter* alone.³⁵⁸ Although Rowling has been very successful and probably has considerable resources at her disposal, it is hard to imagine her support staff responding to that many requests for a license. Moreover, if the relevant copyright holders start charging fan fiction writers license fees of any significant amount, the fees may turn out to be cost-prohibitive. Just imagine an elementary school student who desires to write a short story involving Harry Potter asking her parents to borrow \$100 so that she can pay a license fee.

Factor 5 presents a mixed picture. A few prominent authors whose works are often the subject of fan fiction have publicly supported the use of their characters in fan fiction, although the level of support sometimes varies or is qualified even among these authors. While arguments can be made that some of the public statements by these authors give rise to implied licenses, estoppel, or other defenses, these arguments are by no means certain. Some of the authors' public statements seem to hedge. And, in any event, Factor 5 is not contingent on determining whether an implied license or estoppel has occurred.

J.K. Rowling has publicly supported use of her characters in fan fiction, as long as the fan fiction is not commercial, obscene, misattributed as Rowling's own work, or published in book format or in print; in an ongoing case, Rowling has sued the publisher and author of the planned publication of a *Harry Potter* lexicon in book format (although she has permitted an online version).³⁵⁹ *Star Trek* creator Gene Roddenberry and Paramount Pictures have both publicly approved noncommercial *Star Trek* fan fiction, as long as proper attribution is given.³⁶⁰ On the other hand, a few authors have come out publicly against all fan fiction using their characters. Anne Rice, for example, has stated on her Web site: "I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters.

man: The Convergence of Intellectual Property Laws to Protect Fictional, Literary, and Pictorial Characters, 44 STAN. L. REV. 623 (1992). *But cf.* Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940-66 (1999) (suggesting justifications for protecting "cultural objects" with copyright).

358. See FanFiction.net, Books, <http://www.fanfiction.net/book/> (last visited Aug. 11, 2008).

359. See Ariana Eunjung Cha, *Harry Potter and the Copyright Lawyer; Use of Popular Characters Puts 'Fan Fiction' Writers in Gray Area*, WASH. POST, June 18, 2003, at A1; *Stopping the Presses on a Potter Book*, N.Y. TIMES, Nov. 10, 2007, at B8; Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC, May 27, 2004, <http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm>.

360. Katyal, *supra* note 37, at 516.

It is absolutely essential that you respect my wishes.”³⁶¹ Rice reportedly sent out dozens of cease-and-desist letters to stop fan fiction of her work from being posted online.³⁶² In between the two poles are a few authors, like George Lucas and Lucasfilm, who encourage some fan fiction but attempt to restrict the terms allowed for fan fiction of their works.³⁶³ Lucasfilm, for example, gave people the ability to post fan fiction on the Star Wars Web site, but then asserted a right of copyright over whatever fan fiction was posted.³⁶⁴ (Some people bristle at Lucas’s attempt to limit reuse of his work, given his apparently extensive borrowing from Japanese culture and other works for his *Star Wars* movies.³⁶⁵)

Adding up the Five Factors, fan fiction falls within a gray area of copyright law—and has for a number of years.³⁶⁶ That conclusion is consistent with how the popular media portrays it, as evident in the title of a recent news article that read: *Harry Potter and the Copyright Lawyer; Use of Popular Characters Puts ‘Fan Fiction’ Writers in Gray Area.*³⁶⁷ Although a few authors have publicly criticized fan fiction and expressed their disapproval (which cuts against the acceptance of the informal practice), none has taken it upon herself to challenge the practice in court. In the past, several authors have sent cease-and-desist letters to stop fan fiction of their works, but those letters, which have had only limited effectiveness, have not ever led to a fully litigated case.³⁶⁸

Perhaps for the works of those authors who object to fan fiction, the practice is more precarious under the Five-Factor Informality Test. For example, it may well be that Anne Rice has effectively established her own informal practice in disallowing or discouraging fan fiction of her work. Yet for most works, noncommercial fan fiction is a far more accepted practice. At least until a copyright holder challenges the practice of fan fiction in court and a precedent is established, we should view noncommercial fan fiction as a legitimate, informal copyright practice.

2. *Fan Web Sites and Blogs*

Fan web sites and fan blogs are another popular form of UGC. Early on, during the mid-1990s, Hollywood seemed hostile to allowing such fan sites to blossom. For example, in a much-publicized contro-

361. AnneRice.com: Messages to Anne Rice Fans, <http://www.annerice.com/ReaderInteraction-MessagesToFans.html> (last visited Aug. 11, 2008).

362. See Nolan, *supra* note 352, at 556–57.

363. *Id.*

364. Katyal, *supra* note 37, at 511–12.

365. For the similarities between Lucas’s work and other works, see Jon Casimir, *Star Wars Crib Notes*, SYDNEY MORNING HERALD, May 11, 2002, <http://www.smh.com.au/articles/2002/05/10/1021002387791.html>; Ridwan Khan, *The Bushido of Star Wars*, ANIME FRINGE, June 2004, <http://www.animefringe.com/magazine/2004/06/feature/04.php>.

366. Katyal, *supra* note 37, at 499.

367. Cha, *supra* note 359.

368. See Nolan, *supra* note 352, at 557.

versy, FOX network sent cease-and-desist letters to stop fans of *The Simpsons* and other shows from using copyrighted or trademarked material.³⁶⁹ The cease-and-desist letters prompted twenty-seven fan sites to shut down and seventeen sites to remove FOX copyrighted material.³⁷⁰ A few sites refused to do anything, while some even initiated a massive online protest against FOX that included protest sites and emails against FOX.³⁷¹ Given all the negative publicity, FOX eventually relented and began to allow fan sites if they posted disclaimers stating that they were not affiliated with FOX.³⁷² The use of disclaimers is now a fairly common practice among fan sites and for UGC generally—even though disclaimers are unlikely to provide any defense to copyright infringement (although they do help in terms of avoiding trademark infringement). For example, one common disclaimer is the “no copyright infringement intended” disclaimer prevalent among user mashup and fan videos on YouTube. As one user-generated mashup for *Grey’s Anatomy* stated:

DISCLAIMER: I am simply a fan of the show. There is no copyright infringement intended. I am not affiliated with abc, shondaland or any of its affiliates. If there is a problem with this video being posted, please notify me and it will be removed promptly.³⁷³

A search of YouTube for this kind of disclaimer resulted in more than 200,000 videos.³⁷⁴

Today, Hollywood studios appear far more receptive to fan Web sites. (Imagine that.) Many fan Web sites have been up for years, without protest from Hollywood. For example, Nohomers.net, which follows *The Simpsons*, has existed since 2001.³⁷⁵ The site contains numerous copyrighted images from the TV show.³⁷⁶ At the bottom of the Web page is the following disclaimer:

“The Simpsons” TM and copyright FOX and its related companies. All rights reserved. This website, its operators, and any content contained on this site relating to “The Simpsons” is not authorized by FOX. NoHomers.net and its maintainers do not take responsibility for the actions and comments made by members of “The No Homers Club.”³⁷⁷

No Homers is easy to find through a Google search for “Simpson fan.” There are at least twenty-five other *Simpsons* fan sites, all easy to find

369. See Katyal, *supra* note 37, at 515.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Grey’s Anatomy Music Video Breathe Anna Nalick (Complete)*, posting of ElleBrand to YouTube, <http://www.youtube.com/watch?v=CP5mFTq6vv0> (Nov. 5, 2006).

374. See YouTube, “No Copyright Infringement Intended” Video Search Results, http://www.youtube.com/results?search_query=no+copyright+infringement+intended (last visited Aug. 11, 2008).

375. See NoHomers.net, Your Daily Dose of The Simpsons, <http://www.nohomers.net/index.shtml> (last visited Aug. 11, 2008).

376. See NoHomers.net, Simpsons Image Gallery: The Simpson Family, <http://www.nohomers.net/content/gallery/family/> (last visited Aug. 11, 2008).

377. *Id.*

through Google.³⁷⁸ One site even provides a directory of the most popular *Simpsons* fan Web sites.³⁷⁹ Most of the fan Web sites contain copyrighted images from the TV show, and a number even include copyrighted footage from the show.³⁸⁰ Given the number of easy-to-find fan Web sites, some of which have been around over a decade,³⁸¹ there can be no question that FOX has an informal practice of allowing these fan sites.

The same holds true for *American Idol*, another popular FOX show that draws a huge fan following. For example, Rickey.org has been religiously blogging about *American Idol* since at least 2004.³⁸² The blog is immensely popular among *American Idol* fans and even among the actual singers from the show who have met Rickey in person and appear on his blog. By May 2008, Rickey.org had more than twelve million views.³⁸³ Over the past few years, Rickey's blog has expanded to include coverage for other television shows, such as *Big Brother*, *Dancing with the Stars*, *Project Runway*, *So You Think You Can Dance*, and *Survivor*.³⁸⁴ But the blog is still known best for its *American Idol* coverage. On the blog, you can find not only still photos from the show, but video clips of the performances as well.³⁸⁵ Rickey.org typically provides some commentary about the *Idol* contestants' performances, as well as whom he would like to see win the competition.³⁸⁶ Rickey's blog posts routinely generate comments from other *American Idol* fans, who share their own views of the performances.³⁸⁷ Just as with the *Simpsons* fan blog, Rickey.org has a disclaimer on its site: "This blog is not affiliated in any way with FOX, American Idol, 19 TV Ltd., FremantleMedia, ABC, NBC, CBS, CW or Bravo."³⁸⁸

The number of easy-to-find fan sites for *American Idol* is even greater than the number for *The Simpsons*. Based on my research, there are at least fifty *Idol* fan Web sites, most of which use copyrighted images from the TV show and a good number use copyrighted video clips from *Idol* as well.³⁸⁹ None of these unauthorized fan Web sites can be ex-

378. See Erin Holmes & Edward Lee, *The Simpsons Fan Websites Chart*, Mar. 1, 2008 (on file with the *University of Illinois Law Review*).

379. See The Simpsons Directory, <http://www.simpsonsdirectory.com> (last visited Aug. 11, 2008).

380. See Holmes & Lee, *supra* note 378.

381. See, e.g., Last Exit to Springfield, <http://www.lardlad.com> (last visited Aug. 11, 2008) ("Last Exit to Springfield © 1997–2007"); Simpsons Channel, <http://www.simpsonschannel.com> (last visited Aug. 11, 2008) ("This is an unofficial website owned and maintained by Adam Wolf, 1997–2008").

382. See Rickey.org, February 2004, <http://www.rickey.org/?m=200402> (last visited Aug. 11, 2008).

383. See Rickey.org—American Idol 24/7, <http://www.rickey.org> (last visited Aug. 11, 2008).

384. See *id.*

385. See, e.g., Danny Noriega's American Idol Audition, <http://www.rickey.org/?p=6991#more-6991> (last visited Aug. 11, 2008).

386. See Rickey.org, *supra* note 383.

387. See *id.*

388. See *id.* (under heading "About" at bottom of page).

389. See Erin Holmes & Edward Lee, *American Idol Fan Websites Chart*, Mar. 1, 2008 (on file with the *University of Illinois Law Review*).

plained well by formal copyright law, which would most likely consider them infringing given the lack of copyright permission. Yet I believe it is fairly clear that FOX knows about the existence of these fan sites but has an informal practice of allowing them to flourish.

Applying the Five-Factor Informality Test to the above fan sites presents a closer issue than the other UGC we have examined, particularly for the fan Web sites containing copyrighted video or audio clips from the shows. First, fan Web sites have not been the subject of litigation, which is not all that surprising given the folly of suing one's own fans! Second, the law is unsettled in this area, and will likely remain so until some copyright holder has the gumption to sue a fan.

However, the argument for fair use may be less strong or more debatable, at least in some aspects, compared to the other UGC examined here. Under the first fair use factor, the fan Web sites' use of copyrighted images or clips from the TV shows probably has at least some purpose in commenting on the show. The extent of commentary, though, varies and can be quite minimal at times.³⁹⁰ Even with commentary, the republication of images, audio, or video clips does not seem as transformative on fan Web sites as either the mashup videos or the fan fiction discussed above. The mashups and fan fiction used portions of copyrighted material to create new, original works. The fan Web sites seem to be using portions of copyrighted works to comment on them—which, although a recognized fair use purpose, might be considered by some to be less transformative than creating a video mashup or work of fan fiction.

Second, the nature of the copyrighted shows varies. *The Simpsons* is a fictional, animated work, so it receives the full scope of copyright protection. *American Idol* is a reality show competition with performances of copyrighted music, so it straddles between nonfiction in some parts, which deserve narrower copyright protection, and creative expression in other parts, which deserve full protection.

Third, the amount of copyrighted material taken also varies. The still images represent only a tiny fraction of any of the TV shows and do not offer a substitute for the show itself. But the video or audio clips from the shows can capture, effectively, the "heart" of the show.

Finally, the fourth fair use factor is debatable in this instance. Hollywood studios could argue that fan Web sites' unauthorized use of content hurts the studios' licensing of such material or cultivation of fan sites on official Web sites. To the extent other viewers use the fan Web sites for time-shifted recordings of the shows, the fan sites might eat into the

390. *Compare* Religious Tech. Ctr. v. Netcom On-Line Commc'ns Inc., 923 F. Supp. 1231, 1256 (N.D. Cal. 1995) (posting copyrighted materials of Scientology was not transformative where defendant added little or no criticism), *with* Religious Tech. Ctr. v. F.A.C.T. Net, Inc., 901 F. Supp. 1519, 1525 (D. Colo. 1995) (likely fair use for Web site opposing Scientology in creating electronic database of Scientology writings to criticize them).

advertising revenue for the shows. On the other hand, the Hollywood studios do not appear to have developed a market for licensing with fan Web sites, and more and more networks are allowing users to freely embed clips from the networks' shows, now including *The Simpsons* (although not yet *American Idol*).³⁹¹ The studios may, in fact, benefit financially from all the publicity the fan Web sites bring to their shows, particularly the most successful fan Web sites—which typically rely on greater borrowing of copyrighted material. In short, the argument for fair use is contestable, but at least colorable.

Once we consider the remaining parts of the Informality Test, however, they militate in favor of recognition of the informal practice. Transaction costs of negotiating a license from the networks may be too high for individual fans. After some initial protests from several copyright owners, a number of them now knowingly allow such fan Web sites. It is obvious to see why: Hollywood studios have a direct financial interest in cultivating fans and viewers of their shows. Many fan Web sites and blogs are created and read by teenagers, who represent the most desirable age group for advertisers,³⁹² so Hollywood studios probably are reluctant to regulate these Web sites for fear of upsetting the fan base for their shows. Some studios probably even (secretly) love the successful fan Web sites that essentially provide the studios with both free advertising and an authentic advocate in the user-generated community. Of course, the studios still retain the power to publicly denounce the practice of fan Web sites' using their shows without permission or file a lawsuit against a fan Web site to establish precedent for this area. Until they do, however, the copyright practices will continue to evolve informally.

D. Summary

This Part explained why the practices associated with a number of different kinds of UGC—i.e., citizen political campaign mashups, movie trailer mashups, fan fiction, and fan Web sites—should be considered legitimate gap fillers in copyright law. It bears emphasis that my analysis does *not* depend on proving fair use applies to all of these examples. The issue may well be debatable or even doubtful in some cases, but it is only one factor in my overall analysis under the Five-Factor Test. The lack of clarity in the law *and* the responses (or lack thereof) from the copyright holders also factor prominently in the analysis.

Although I have attempted to present representative examples of UGC from the copious amounts of such material on the Web, my analysis should not be mistaken for an argument that *all* UGC is necessarily

391. See *supra* notes 280–300 and accompanying text. FOX has allowed embeddable videos from *The Simpsons* at hulu.com.

392. Cecilia Ogbu, Note, *I Put up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners*, 12 S. CAL. INTERDISC. L.J. 279, 285 (2003).

legitimate, or that the examples I discussed involve legitimate practices *forever*. Different examples of UGC could present an entirely different set of factors, such as greater protest by copyright holders, a lawsuit filed against a user, or a more commercial user Web site.³⁹³ Even the examples I have used can change over time. Neither copyright law nor copyright practices are static.

IV. SIGNIFICANCE OF INFORMAL COPYRIGHT PRACTICES FOR THE COPYRIGHT SYSTEM

This Part concludes by examining the significance of adopting my theory of informal copyright practices. The change is more than semantic. It provides the public and copyright policymakers a better understanding of how our copyright system, in fact, operates, which in turn can inform how future copyright disputes and debates should be resolved. Copyright issues need not always, or even typically, be resolved by Congress or the courts. Informal copyright practices provide a “third way” of dealing with copyright problems.

A. *Taking a More Realistic and Holistic Approach to Copyright*

In this Article, I have advocated for taking a more realistic and holistic approach to copyright. I would characterize the key components of this approach as follows.

First, we need to recognize that practices, even informal ones, matter in copyright law. Too much copyright scholarship has focused on *formal* copyright law—which, although very important, represents only a tiny fraction of the entire world of copyright relations.³⁹⁴ Even reform-minded proposals in copyright scholarship have fixated on changing *formal* copyright law.³⁹⁵ And to the extent “private ordering” in copyright is discussed, the scholarship often considers private ordering in the context of formal contracts.³⁹⁶

Of course, formal copyright law and formal copyright licenses are important parts of our copyright system, and much scholarship should be devoted to examining them. Yet there is a huge part of our copyright

393. For example, a photo agency sued gossip blogger Perez Hilton for allegedly using its copyrighted images on his blog without permission. See Robin Abcarian, *Perez Hilton Takes Their Best Shots*, L.A. TIMES, Dec. 17, 2006, at A1.

394. For example, one could peruse some recent copyright articles. See, e.g., Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799 (2007) (analyzing “opt out” position for digital libraries and recommending fair use and statutory solutions); Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007) (arguing for recalibration of merger doctrine).

395. See, e.g., Carroll, *supra* note 53, at 1123–41; Liu, *supra* note 52, at 150–51.

396. See, e.g., Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005); Loren, *supra* note 102, at 271; Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45 (2007).

system—probably the substantial majority of it—that relies on *informal* practices that are never litigated and never subject to formal licenses. Often, these informal practices help to fill gray areas and gaps left open by formal copyright law. This important part of our copyright system is all but ignored in copyright scholarship. This Article has offered one theory for why informal copyright practices develop in our copyright system—as important gap fillers without which our copyright system could not function.

Once we recognize that some informal copyright practices are necessary for our copyright system to function, we can get a better picture of the entire copyright system as a whole, particularly its deficiencies. A systemic feature—or defect—in the Copyright Act is that, for the most part, its provisions do not inform the public, even when aided by copyright lawyers, of the legality of many different uses of copyrighted works *ex ante*. This inherent uncertainty makes the Copyright Act even worse than the Tax Code, which, despite its complexity, provides millions of taxpayers at least with enough certainty for them to figure out how much taxes to pay each year—even providing the public with the option of electing the simpler, standard deduction.³⁹⁷ But, in copyright, there is no “standard” fair use or exemption.

The question then becomes how to deal with this systemic uncertainty in copyright law. One way to deal with the problem is to clarify the Copyright Act with more amendments by Congress, more litigated cases in federal courts, and more rulemaking by the Copyright Office. In other words, fill the gaps and gray areas in formal copyright law with more formal law. This approach would probably be somewhat helpful, but, given the ever changing technological developments, it seems doubtful that Congress and the courts could ever really catch up to fill all the gaps as even more are created. Also, there are significant costs to adopting this approach. As currently constructed, neither the federal courts nor the Copyright Office is set up to handle a substantial increase in copyright cases or workload. More funding and resources would be needed. And, given the time it takes to litigate a case through appeal, along with the possibility of a circuit split or just confusing opinions from the federal courts, there is no guarantee that increased litigation will do an adequate job in getting rid of gray areas in copyright law. As far as Congress is concerned, given its reliance on interested stakeholders to draft copyright legislation, it seems very doubtful that such amendments would be all that clarifying or helpful to the public. Congress could be subject to a “persistent asymmetry” in which copyright legislation represents primarily the well-organized lobbyists and media industries.³⁹⁸ We

397. See 26 U.S.C. § 63(c) (2000).

398. See LANDES & POSNER, *supra* note 125, at 408; Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987). As the Supreme Court has described, the 1976 Copyright Act “was the product of two decades of negotiation by representatives of creators and

also must not forget that the primary source of the inherent uncertainty in the Copyright Act is its drafter, Congress. There is no reason to believe that Congress can do a better job than it has done before.

Another way to deal with the problem is to shift more effort to formal licensing to fill the gaps of copyright law. The recording industry, for example, typically includes both “work-for-hire” and assignment provisions in their contracts with performers, in order to handle the legal uncertainty surrounding whether their signed performers would even fall within the work-made-for-hire provision.³⁹⁹ Licenses are more common for commercial ventures, but they could also be used for noncommercial uses. The “permission first” credo of some major copyright holders would probably favor this approach. When in doubt, people should just get a license for every single contemplated use of a copyrighted work. The reform-minded Creative Commons has attempted to make this easier online by enabling copyright holders to attach blanket copyright permissions for the use of their works under terms they set ahead of time.⁴⁰⁰ In this way, the transaction costs are removed because downstream users do not have to bargain for anything; they simply read the terms of the blanket license. Although incredibly successful among individual copyright holders,⁴⁰¹ the Creative Commons licenses do not yet appear to be used as widely among the major media copyright holders. Until the major copyright holders do (or adopt some alternative, user-friendly system of licensing), it is unlikely that formal licenses can fill all the gaps in copyright law. Not even the major corporate copyright holders are staffed to handle the millions of requests for licenses that would probably occur on a monthly, if not weekly, basis if users had to ask for permission for every use of a copyrighted work. The transaction costs for the users may well be prohibitive, particularly for noncommercial uses. And many companies may prefer a strategic “hedge” that allows them to benefit financially from unauthorized uses of their works (such as through fan Web sites) without ever formally endorsing or licensing the practice.

A third option—the one proposed in this Article—is to rely on informal copyright practices to handle at least some of the gaps and gray areas in formal copyright law. Informal copyright practices can be likened to a less formal and less organized cousin of the Creative Commons license.⁴⁰² Both address the problem of clearing “copyright permissions,”

copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress.” Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743 (1989).

399. Daniel Gould, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 96–97 (2007); see also *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999).

400. See Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45.

401. Nearly 149 million Creative Commons licenses exist. See *supra* note 98 and accompanying text.

402. Cf. Carroll, *supra* note 400, at 46 (“For the time being, a number of implicit understandings have grown up around digital technologies, and these understandings have led to norms and implied

and both can embody important norms in the digital age, such as allowing noncommercial (re)uses of a work, provided attribution is given to the author. An informal copyright practice and a Creative Commons license, however, are quite different in approach. The Creative Commons license is a formal blanket copyright license, fixed by the author along with the dissemination of the work; therefore, it works squarely within our conventional understanding of copyright law and its preferred, if not required, practice of obtaining *prior* permission. By contrast, an informal copyright practice is a dynamic practice relating to the use of copyrighted works that begins informally, without a formal license or express permission from the copyright holder, but evolves over time in such a way that the practice may be accepted, by and large, by the copyright holder. The “give and take” over the terms of the informal practice occurs loosely, if not haphazardly, over time and space.

My position is not that informal copyright practices should be the only approach we adopt to deal with gaps in copyright law. It may turn out that some informal copyright practices are illegitimate under my proposed test or other basis.⁴⁰³ Also, there may be some informal copyright practices that Congress or the courts decide to formally adopt in copyright law—which would give even greater clarity and legitimacy to the practice in question. I do not mean to suggest that Congress and the courts should abdicate their responsibility to fill gaps in copyright law. Instead, I argue that informal copyright practices must be one approach that we consider, given how our current copyright system is so poorly constructed to handle these gaps and gray areas in any other way. Informal practices represent a loose kind of “give and take” among users, intermediaries, and copyright holders. It is much looser and messier than formal copyright law. There is no negotiation of a formal license. Instead, the “negotiation” occurs at a macro level with users and copyright holders acting and responding to one another’s practices. Although some policymakers and copyright scholars may disagree with this approach, the challenge for them is coming up with a viable alternative.

Looking at informal practices can also help us evaluate ongoing copyright controversies. This Article has examined in depth some of the practices related to UGC. But we can apply the same approach to other controversies, such as the ongoing debate over digital rights management (DRM) and the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA).⁴⁰⁴ Practically speaking, the most significant development in the entire debate over DRM and the DMCA has come not in formal copyright law. Instead, it has come from the negative response

licenses that serve important coordinating functions. As robust as these informal mechanisms are, however, greater clarity and coordination can often be had when copyright owners explicitly designate which copyright events they consider to be permissible.”).

403. Cf. Katyal, *supra* note 37, at 465 (discussing exclusion of minorities and women in copyright industries).

404. See 17 U.S.C. § 1201 (2000).

of users, which in turn has led Steve Jobs of Apple iTunes, EMI, Universal Music Group, Warner Music Group, and Amazon to abandon DRM for music files.⁴⁰⁵ The music industry's about-face has had secondary effects in the book publishing industry. Major publishers such as Random House, Penguin Group, and Simon & Schuster also decided to abandon DRM on audiobooks.⁴⁰⁶ An informal copyright practice may not necessarily tell us what the law ought to be, but at least if supported by widespread acceptance, it can provide workable solutions for the time being.

To us lawyers, informal copyright practices may seem unsatisfying and scary. They are only *informal*, typically not contained in any writing, and therefore seem so precarious. What if a copyright holder somewhere objects to the practice? The informal practice might not stand up in court. That is certainly possible, but not all that likely given how few copyright cases are litigated. No matter how precarious informal copyright practices may appear to lawyers, those practices are what guide the conduct of millions of users far more than formal copyright law.

B. Users Play a Far Greater Role in Copyright Law than Perceived

Once informal copyright practices are considered as parts of our copyright system, we must recognize that users play a far greater role in the development of copyright law than is commonly perceived.

Most copyright scholarship portrays users as having little, if any, role in copyright law's development. As Professor Cohen writes, "Copyright doctrine . . . is characterized by the absence of the user."⁴⁰⁷ This view is buttressed by the fact that most, if not all, of the provisions in the Copyright Act were drafted by industry stakeholders, often without the inclusion of any representative acting on behalf of users.⁴⁰⁸ Even where formal copyright law favors users, copyright holders can impose greater formal restrictions on user rights through contract and the so-called "end user license agreement."⁴⁰⁹

This critique is largely accurate as a critique of formal copyright law, but it says nothing about what happens in practice. The relatively few copyright cases filed each year must temper our understanding of the reach of formal copyright law. Far more copyright relations are informal than formal; few ever get resolved by formal copyright law. Although copyright holders do hold a lot of power over how their works are exploited, users are not powerless. En masse, users can exert tremendous

405. See Steve Jobs, *Thoughts on Music*, APPLE, Feb. 6, 2007, <http://www.apple.com/hotnews/thoughtsonmusic/>; Erick Schonfeld, *Amazon Adds Warner Music to DRM-Free Roster*, TECHCRUNCH, Dec. 27, 2007, <http://www.techcrunch.com/2007/12/27/amazon-adds-warner-music-to-drm-free-roster/>.

406. See Brad Stone, *Publishers Phase Out Piracy Protection on Audio Books*, N.Y. TIMES, Mar. 3, 2008, at C2.

407. Cohen, *supra* note 36, at 347.

408. See Litman, *supra* note 12, at 23.

409. See Moffat, *supra* note 396, at 50–51.

power in how copyrighted works are exploited. Sometimes, users may even hold more power, collectively, than all copyright holders combined.

With the huge growth of UGC online, users represent a powerful force in the copyright dynamic. Users, not copyright holders, are the ones who have started the informal practices associated with UGC that eventually many copyright holders have tolerated and even openly embraced.

C. “Warming” Versus “Chilling” Effects on Speech

1. Gray Areas as Chilling

Copyright scholarship has extensively discussed the numerous ways in which copyright law may be used by copyright holders to chill legitimate speech, particularly fair uses of copyrighted works.⁴¹⁰ The Electronic Frontier Foundation (EFF) even started a project called the Chilling Effects Clearinghouse to gather, in a searchable database, cease-and-desist notices and DMCA notices sent from copyright holders to individuals and entities.⁴¹¹ To date, the project has collected over 1,600 cease-and-desist letters.⁴¹² EFF adds hyperlinks to the letters to explain the legalese contained therein. Law clinics at Harvard, Stanford, Berkeley, San Francisco, Maine, George Washington, and Santa Clara also assist in the project.⁴¹³ In a study of 850 cease-and-desist letters, Jennifer Urban and Laura Quilter concluded that thirty-one percent presented only weak claims of infringement.⁴¹⁴

According to the standard “chilling” argument, a major contributing factor to the chilling of speech is the uncertainty in the scope of copyright law and fair use.⁴¹⁵ Uncertainty in the law may enable copyright holders,

410. See, e.g., Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219 (2007); Tushnet, *supra* note 182, at 582; Jennifer M. Urban & Laura Quilter, *Efficient Process of “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006); Rachael Braswell, Note, *Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters to Chill Protected Speech on the Internet*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241 (2007); Derek J. Schaffner, Note, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL’Y 145, 163 (2005).

411. See Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited Aug. 11, 2008).

412. See Chilling Effects Clearinghouse, Cease and Desist Notices: Copyright, <http://www.chillingeffects.org/copyright/notice.cgi> (last visited Aug. 11, 2008).

413. See Chilling Effects Clearinghouse, *supra* note 411.

414. Urban & Quilter, *supra* note 410, at 667. The MIT Free Culture group tracks on its Web site 238,322 videos in YouTube to see how many are removed for alleged copyright violations. YouTomb, <http://youtomb.mit.edu> (last visited Aug. 11, 2008). As of August 2008, the Web site identified 8,129 such videos removed from YouTube. YouTomb, Statistics, <http://youtomb.mit.edu/statistics/> (last visited Aug. 11, 2008).

415. Carroll, *supra* note 53, at 1148 (“Copyright law must respond to the rise of copyright owner aggression and its chilling effects and respond to increasing uncertainty surrounding uses of new technologies by providing greater *ex ante* certainty about the scope of fair use or by reducing the risks of relying on fair use through *ex post* relief.”).

particularly corporate ones, to scare people from making legitimate fair uses of copyrighted works by holding out the threat of litigation. As Professor Lessig likes to put it, “[F]air use . . . simply means the right to hire a lawyer to defend your right to create.”⁴¹⁶

I do not doubt that some of these concerns about “chilling” of speech by our copyright system are justified, particularly where the alleged fair use occurs in the commercial context. In other writings, I have discussed the possibility of chilling myself.⁴¹⁷

2. *Gray Areas as Warming*

Yet the concerns about “chilling” must be tempered by consideration of another phenomenon that has completely escaped the attention of copyright scholars. For lack of a better word, I will call the phenomenon “warming.”⁴¹⁸

“Warming” describes the phenomenon when users make unauthorized uses of copyrighted works based in part on the belief that it is acceptable because it is a larger-scale practice engaged in by others. Because copyright law is often complex, unclear, and uncertain, users take their cues about what is an acceptable copyright practice by looking to what others are doing without challenge from copyright holders. Uncertainty in the law does not *cause* warming—or chilling, for that matter. It all depends on how people *react* to an environment in which the law is uncertain. To draw an analogy, the glass is neither half-full nor half-empty. Instead, it all depends on the perspective of the person viewing the glass. Some may view it as half-full, others half-empty, while others may view it as both half-full and half-empty. Over time, people’s view may change, influenced perhaps by other people’s perception. The same holds true with uncertainty in copyright law. Whether it lends itself to the chilling—or warming—of speech all depends on the public’s reaction to it.

Take, for example, the growth of mashup videos online, such as the citizen political mashups or the movie trailer mashups discussed above. The phenomenon started out simply with one person making and sharing a mashup video online. Soon, others began making mashups of their own. Because copyright holders have not challenged or discouraged the practice—but many, in fact, have publicly supported it, even risk-averse individuals like me (who might not have risked making a video, given the uncertainty of copyright law) have begun creating and sharing mashups

416. LAWRENCE LESSIG, *FREE CULTURE* 187 (2004).

417. See Lee, *supra* note 175, at 50–51; Lee, *supra* note 92, at 1313.

418. In legal scholarship, the term “warming” or “warming effect” has apparently been used only once before to describe the opposite effect to the chilling of speech. See Thomas W. Hazlett & David W. Sosa, “Chilling” the Internet? Lessons from FCC Regulation of Radio Broadcasting, 4 MICH. TELECOMM. & TECH. L. REV. 35, 43 (1998). I have not seen the term used formally in copyright scholarship.

of their own, given what appears to be a growing acceptance of the practice. This is a case where uncertainty in copyright law, a gray area, leads to *warming*, not chilling, of speech.

My theory of warming is not predicated on people's attempt—or lack thereof—to understand copyright law. I do not assert that all users must *consciously* think about uncertainty in copyright law for warming to occur. Some people might be completely oblivious to copyright law. But that does not change the signaling that occurs through informal copyright practices that can lead to warming. An activity that is widespread and that gains increasing public support from major copyright holders signals to people at least an informal acceptance of the practice. The precise status of the practice under formal copyright law becomes irrelevant—except in those infrequent occasions when a lawsuit is brought and fully litigated to completion.

Warming explains why people have not been chilled from making photocopies for personal use, despite the uncertainty in formal copyright law. It also explains why so much activity on the Internet appears to grow exponentially, drawing more users to engage in the practice—whether it is blogging, writing fan fiction, or creating mashups or other UGC. In a networked environment, people can view what millions of others are creating. The Internet is especially conducive to the “warming” of speech, given its network effects and its fostering of social networking communities in which people can easily see—and share—the creations of others online. Warming is a form of bandwagon effect, which refers to the phenomenon of how people's views can be shaped by how others view an issue.⁴¹⁹ “[E]ach new person on [an] . . . upward bandwagon induces additional people to climb on.”⁴²⁰ The Internet itself is a huge breeding ground for bandwagon effects.⁴²¹

Very few copyright scholars have recognized this phenomenon. To the extent gray areas in copyright are discussed in the literature, they more commonly are attacked as sources of potential chilling of creative endeavors.⁴²² While in many cases that probably is true, there is nothing inherent in uncertainty in the law that automatically gives rise to chilling. A lot depends on context, such as whether the unauthorized use is commercial or noncommercial, whether the copyright holders object, the strength of the fair use defense, how much of a gray area exists, and simply how people view the issue over time.

419. Cf. Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 514–16 (2007) (discussing bandwagon effects).

420. *Id.* (quoting TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 69–82 (1995)) (internal quotations omitted).

421. See JEFFREY H. ROHLFS, BANDWAGON EFFECTS IN HIGH-TECHNOLOGY INDUSTRIES 5 (2001) (“The largest and most successful bandwagon, apart from the telephone, has been the Internet Perhaps most important, the Internet serves as a vast resource to facilitate free speech and free expression across the globe.”).

422. See sources cited *supra* note 410 and accompanying text.

For example, as Professor Katyal explains for fan fiction:

The uncertainty over the status of fan fiction presents copyright scholars with an important lesson regarding the development of creativity in cyberspace. While the formal laws of copyright reveal a set of tools for the unapologetic chilling of appropriative expression in cyberspace, many copyright owners tend to engage in a much more dynamic dialogue with their consumers and permit fan fiction to exist so long as it ensures the purity and control of the original creator. At best, the result is the development of two parallel markets that are both non-rivalrous and build upon each other for creativity. The problem is that copyright law, as it is formally structured, enables a hierarchic division between the two that permits the latter to be silenced if the expression proves objectionable or problematic, and here is where slash is so vital, and vulnerable, as a result.⁴²³

Examining the inner-dynamic between formal copyright law and informal copyright practices deserves far more inquiry than I can devote here. I will share a few preliminary thoughts, however. I believe the dynamic between the formal and informal worlds of copyright is far more fluid and multidirectional than is commonly thought. Even in Professor Katyal's example of a "slash" work of fan fiction (making the original male characters in a story into homosexual characters or with a homoerotic overtone⁴²⁴), I believe there is a lot more possible "give and take" between fan fiction writers and copyright holders than simply a "silencing" of speech as soon as a cease-and-desist letter is sent. The fan fiction writer might remove the fan fiction but then repost it later, possibly under a different username. The writer might seek help from pro bono attorneys, such as those with the Chilling Effects at EFF, the Stanford Center for Internet & Society Fair Use Project, or the Berkman Center at Harvard, which are all well known in the online community. The writer might also organize an online protest and create bad publicity for the author. Or the writer might simply do nothing, banking on the fact that no person has ever been sued for posting noncommercial fan fiction. Although it is possible that some authors (perhaps Anne Rice) do effectively chill fan fiction writers from using their characters, the sheer amount of fan fiction on the Web suggests that the practice of writing fan fiction is not as precarious as one might think. Even Katyal concedes that the legal efforts against fan fiction "have so far done little to stem the general growth of fan fiction in cyberspace."⁴²⁵

423. Katyal, *supra* note 37, at 517; *see also* STUART BIEGEL, BEYOND OUR CONTROL?: CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE 74 (2001) (noting the inability of the average Netizen to understand the complexities of intellectual property law combined with the ease of use and the strong prevailing social norms that support widespread and indiscriminate copying).

424. *See* Katyal, *supra* note 37, at 468.

425. *Id.* at 469–70.

Also, the dynamic between formal and informal copyright appears to have as one major fault line the divide between *noncommercial* and *commercial* uses. Fair use is not supposed to hinge on the noncommercial-commercial divide; it is but one factor in analyzing the purpose and character of the use.⁴²⁶ But, as a practical matter, noncommercial uses of copyrighted works in UGC do not generate much protest or concern among the copyright holders, while commercial ones do.⁴²⁷ For the fair use inquiry, such a divide is over- and under-inclusive. Some noncommercial uses should not be considered fair uses, while some commercial uses should. Yet, if most copyright holders are worried only about any commercial uses of their works, the more problematic area to examine is what informal copyright practices should be adopted (if any) for such *commercial* uses. This Article has focused on the noncommercial side of the equation; future inquiry must also examine the commercial side.⁴²⁸ That is probably where “chilling” can have its greatest hold.

Consistent with our holistic approach to copyright, it would be fruitful to examine our copyright system and map out all those areas where either chilling or warming occurs. Only then can we assess how well our copyright system is promoting progress and creativity.

D. Giving Hollywood Some Credit

Finally, we should give credit where it is due. Examining the informal copyright practices that have developed around UGC should help us cut through a lot of the overblown rhetoric—on both sides—that has so plagued discussions of copyright issues. To their credit, most Hollywood studios and other major media copyright holders have not rushed to shut down the general practice. Although some cease-and-desist letters have been sent to fan sites, particularly early on, most media copyright holders allow—and many even publicly encourage—the growth of UGC. The environment today for UGC seems far more hospitable than it did back in the mid-1990s.⁴²⁹ Although Hollywood studios may well have hopes of “monetizing” UGC one day, they should be applauded for freely allowing and even encouraging people to engage in this creative pursuit. The “rules” for UGC are by no means settled, but, for the time being, informal copyright practices among users and copyright holders have led to the creation of many user-generated works that are nothing short of breathtaking.

426. See *Campbell v. Acuff-Rose Music, Inc.*, 570 U.S. 569, 584 (1994).

427. One typical response comes from Jeffrey Ulin of Lucasfilm, who remarked, “If fans are using *Star Wars* material for fun, that’s one thing. If someone tries to commercialize it, that’s where we’ve drawn the line.” McBride, *supra* note 256.

428. See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1018–30 (2004) (discussing the need to amend copyright law to foster amateur creations).

429. Cf. Steve Silberman, *The War Against Fandom*, WIRED.COM, June 4, 1997, <http://www.wired.com/culture/lifestyle/news/1997/06/4231>.

V. CONCLUSION

The Internet has exposed a systematic failure of the Copyright Act—it is not drafted in a way to provide people with sufficient *ex ante* guidance on whether particular uses of copyrighted works are permissible without formal licenses. Written at an extremely high level of generality, the Act is plagued by ambiguities and gaps. This systematic problem is compounded by the incredibly small number of copyright cases and even smaller number of copyright decisions published each year. Although formal licenses can ameliorate this problem, they do not provide a panacea, particularly when transaction costs are high or when copyright holders strategically “hedge” on licensing. As an alternative, our copyright system relies on informal practices to help fill all the gaps left by formal copyright law. This gap-filling function has been nowhere more prominent than in the Web 2.0 practices of UGC. The tremendous growth of UGC has been supported by the development of informal copyright practices among users, intermediaries, and major media producers alike. Buttressed by the social networking features of the Internet, a “warming” phenomenon has cultivated these practices by emboldening users to use copyrighted works, in the face of legal uncertainty over fair use and formal copyright law, by making it easier for people to see how others are using copyrighted works online. Many of the major copyright holders have contributed to this warming of speech by supporting (even if only strategically for their own self-interest) the practice of UGC.