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THE EMPEROR'S NEW COPYRIGHT

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ABSTRACT

Copyright law aims to incentivize the creation of original works by extending protection against copying to rightsholders. Not all works merit copyright protection, however. Some are specifically excluded from it. Increasingly, these excluded works nonetheless parade around as if cloaked in copyright protection. This Article seeks to expose them.

Through a series of contemporary examples, this Article delves into the underexamined, extrastatutory revenue streams made possible by the mere existence of copyright law, notwithstanding its nonapplication, or misapplication, to the work at issue. Some of these examples involve the abuse or misuse, both incidental and intentional, of statutory rights, or from outright chicanery. Other examples involve a platform-legislator that overrides statutory law and, in some cases, congressional intent via private policymaking that sets a new norm for the entire sector. Still other examples see private parties wielding market power in order to close perceived gaps in the statutory law in their favor. Some of the examples involve no copyrighted work at all. The emperor has no clothes.

In all cases, the purported rightsholder derives extrastatutory revenue in the name of copyright while potentially threatening the statute's purported goal of incentivizing creation for public consumption. In this tale, the government plays the role of complicit advisor through a combination of delegation, abdication, and enforcement forbearance, while power disparities relegate users and

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consumers to the role of hapless townspeople who play along for fear of repercussion.

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INTRODUCTION

Copyright law aims to incentivize the creation of original works by extending to rightsholders legal protection against copying.[1] Not all works merit copyright protection, however. Some are specifically excluded from it. Increasingly, some of these works nonetheless parade around as if cloaked in copyright protection. This Article seeks to expose them.

The last few years have seen a plethora of headline-grabbing transactions involving works from genres traditionally protected by copyright: an invisible sculpture sold for thousands of dollars;[2] a major record label claimed an untold sum in advertising revenue earned by a third-party's parodic music video posted on YouTube;[3] a painter uses a mobile app to pinch an additional royalty anytime their painting is resold, forever;[4] and a digital artist, Beeple, sold an allegedly unique copy of a digital collage for hundreds of millions of dollars.[5] Unfortunately, these examples are representative of a growing trend. In 2021, nonfungible tokens ("NFTs") on works of art made up sixteen percent of the global market.[6] YouTube is currently processing over four million advertising revenue claims per day.[7]

All of these transactions share something in common: they reflect successful efforts by purported rightsholders to make money from the mere existence of

[1] According to the incentive theory of copyright, society encourages the production of creative works by offering protections designed to result in financial rewards for creators. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). More specifically, copyright extends protection to creators in order to foster the creation of work for public consumption.

[2] Peony Hirwani, *Italian Artist Sells 'Invisible' Sculpture for More than £12,000*, INDEPENDENT (June 4, 2021, 2:32 PM), https://www.independent.co.uk/arts-entertainment/art/news/salvatore-garau-invisible-sculpture-auction-b1859657.html.

[3] Lindsay Dodgson, *PewDiePie Says He's Losing All Revenue from a 30-Minute Video Because He Played an Unrecognizable Celine Dion Cover*, INSIDER (Nov. 26, 2020, 7:59 AM), https://www.insider.com/company-claims-pewdiepie-video-revenue-celine-dion-recorder-2020-11 [https://perma.cc/MDX7-PUWB].

[4] *UppstArt App Pays Resale Royalties to Emerging Artists with Blockchain Technology*, MKTS. INSIDER (July 24, 2018, 8:45 AM), https://markets.businessinsider.com/news/stocks/uppstart-app-pays-resale-royalties-to-emerging-artists-with-blockchain-technology-1027394031 [https://perma.cc/L268-FYA4] (explaining how artists can receive royalties through blockchain technology).

[5] Jacob Kastrenakes, *Beeple Sold an NFT for $69 Million*, VERGE (Mar. 11, 2021, 10:09 AM), https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-every days-69-million [https://perma.cc/NA3C-S3YN].

[6] Sam Gaskin, *Out of Nowhere, NFTs Now Constitute 16% of the Global Art Market,* OCULA (Mar. 11, 2022), https://ocula.com/magazine/art-news/nfts-now-constitute-16-percent-of-the-art-market/ [https://perma.cc/CM5X-NJZF].

[7] Ernesto Van der Sar, *YouTube Processes 4 Million Content ID Claims Per Day, Transparency Report Reveals*, TORRENTFREAK (Dec. 7, 2021), https://torrentfreak.com/youtube-processes-4-million-content-id-claims-per-day-transparency-report-reveals-211207/ [https://perma.cc/CX2B-DSW6].

copyright law, notwithstanding its nonapplication, or misapplication, to the work at issue. This Article is the first to delve into this underexamined, extrastatutory revenue stream that seeks to quite literally make something out of nothing.[8] Like the hopelessly vain emperor in the classic Hans Christian Andersen tale, *The Emperor's New Clothes*, some platforms and rightsholders are claiming to don the golden robe of copyright protection while actually wearing nothing at all.[9] Meanwhile, haplessly confused users and consumers avert their eyes and exclaim approval for fear of the dreaded accusation of copyright infringement. The result is a system mired in power disparities and distributive concerns, often at odds with congressional and statutory intent.

It's worth noting that while the revenues discussed herein are accurately described as extrastatutory, there is nothing intrinsically bad about extrastatutory revenues. Indeed, most are earned via rational self-interest and without violating the letter of the law. This Article is concerned only with the subset of extrastatutory earnings that amount to mere rent seeking, transgress congressional intent, or worsen inequalities in the copyright industries.

In order to appreciate the nature of the extrastatutory revenues that are the subject of this Article, it is helpful to first understand the statutory options. Rightsholders typically earn money from their copyrighted works in one of three ways. One way is through a statutory license, such as the one governing public performance royalties.[10] The second is through a negotiated license, such as a sync license or a publishing contract. The third is through recovery of actual or statutory damages owing to a successful suit for copyright infringement.[11] All of these income streams are made possible by statutory rights explicitly granted to, or reserved for, rightsholders in the Copyright Act of 1976 ("Copyright Act").[12]

Through a series of contemporary examples, this Article identifies and defines two relatively new, often overlapping, extrastatutory income streams herein referred to as faux copyright and monetized noninfringement. While both faux copyright and monetized noninfringement depend on the existence of copyright law, they have no actual connection to the statute. Some instances of faux copyright and monetized noninfringement stem from the abuse or misuse of

[8] To be sure, copyright law has seen its share of parties attempting to claim rights that do not exist. In their work on the fringes of intellectual property, Jeanne Fromer and Amy Adler described the creators of works like tattoos, jokes, and magic tricks as "assert[ing] extralegal norms within a tight-knit community" through shaming, reclaiming, and social norms. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1457 (2019). The primary distinction between those examples and the ones described herein is governmental buy-in, tacit or otherwise.

[9] *See* HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (1837), *reprinted in* HANS ANDERSEN: HIS CLASSIC FAIRY TALES 119-24 (Erik Haugaard trans., 1978).

[10] 17 U.S.C. § 114.

[11] *Id.* § 504.

[12] *Id.* §§ 101-1332.

statutory rights, both incidental and intentional, or from outright chicanery.[13] Some examples of monetized noninfringement involve platforms, such as YouTube, using their size and influence to effectively override statutory law via private policymaking.[14] Still other examples of faux copyright and monetized noninfringement owe to private parties wielding market power in order to close perceived gaps in the statutory law in their favor, without regard to the greater societal good.[15] Some of these examples involve no copyrighted work at all. The emperor has no clothes.

In all cases, the purported rightsholder derives extrastatutory revenue in the name of copyright while potentially threatening the statute's purported goal of incentivization. The examples of these practices discussed herein are made possible by two simultaneous conditions. The first condition is an asymmetry in power, information, or both. Power dynamics play a significant role in both the promulgation and application of copyright law. As with some other areas of the law, copyright is not immune to regulatory capture by large, well-funded industry lobbyists.[16] As discussed further herein, the marked power disparity between content owners and content users can also lead to a skewed application of extant doctrine.[17] The second condition is the existence of exploitable ambiguities in the statute and its application. The Copyright Act is rife with uncertainty.[18] Sometimes, this uncertainty couples with a penalty default condition to result in more efficient private ordering.[19] Other times, it allows for manipulation and abuse.[20]

Acknowledgement of monetized noninfringement and faux copyright serves several important purposes. First, it recognizes the potential for some platforms and powerful individuals (or categories of individuals) to serve in the role of legislator, for better or for worse (i.e., better for them but worse for others) in

[13] *See infra* Section II.C.

[14] *See, e.g.*, Paul Resnikoff, *99.5% of All Infringing Music Videos Are Resolved by Content ID, YouTube Claims*, DIGIT. MUSIC NEWS (Aug. 8, 2016), https://www.digitalmusicnews.com/2016/08/08/copyright-problems-resolved-content-id/ (discussing how YouTube's Content ID system resolves vast majority of copyright claims related to sound recordings).

[15] *See infra* Section II.B.1.

[16] *See* JESSICA LITMAN, DIGITAL COPYRIGHT 23-25 (2d ed. 2006) (describing history of copyright legislation in United States).

[17] *See infra* Section III.C.1.

[18] *See, e.g.*, Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1846-49 (2009) [hereinafter Depoorter, *Uncertainty*] (positing loop of uncertainty, self-help, judicial deference, and conflicting norms that exemplify current state of copyright law).

[19] *See* Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1170 (2014) [hereinafter García, *Penalty Defaults*] (arguing bounded uncertainty, when coupled with undesirable alternative, can encourage greater efficiency).

[20] *See* Kristelia A. García, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 238-40 (2019) [hereinafter García, *Copyright Arbitrage*] (suggesting regulatory arbitrage in copyright is not necessarily harmless).

their respective ecosystems.[21] To be clear, there is nothing inherently bad about self-serving dealmaking. In some cases, as detailed herein, private ordering that diverges from the status quo may provide useful information about gaps and inequities to lawmakers.[22] In other cases, it may serve only to exacerbate existing inequalities. Second, whether done in the absence of statutory rights or in misuse of them, faux copyright and monetized noninfringement may result in inefficiency, including rent seeking.[23] Finally, the existence of faux copyright and monetized noninfringement highlights the peculiar nature of copyright and its propensity for abuse and misuse. By falsely claiming or overclaiming copyright protection, these practices remove from play works that might serve as raw material for other works, introduce disparate treatment of similarly situated creators, and unfairly modify the market for copyrighted works. In doing so, these practices contravene copyright's explicit goal of incentivizing creation, and the public's interest in benefiting from that creation.

In this tale, the government plays the role of complicit advisor through a combination of delegation, abdication, and enforcement forbearance. As explained herein, lawmakers' decisions about whether and when to utilize regulation to correct certain misuses of copyright are not neutral in effect. Through their ambiguity, ability to be circumvented, or both, some regulations invite manipulation and undercut legislative intent.[24] Importantly, these same regulations may elevate and reinforce the most powerful entities at the expense of the least powerful.[25] As a result, less powerful users and consumers are relegated to the role of hapless townspeople who play along for fear of repercussion—namely, for fear of the dreaded claim of copyright infringement.

This Article addresses these concerns as follows: Part I describes the conventional revenue streams made available to rightsholders under federal copyright law. Through a series of contemporary examples, Part II introduces the concepts of faux copyright and monetized noninfringement and describes several (often overlapping) categories of these practices. Part III discusses the normative implications of monetized noninfringement and faux copyright—

[21] *See, e.g.*, Dodgson, *supra* note 3; *see also* Dan Rys, *Clear Channel Inks Second Radio Royalties Label Deal, This Time with Glassnote*, BILLBOARD (Sept. 27, 2012), https://www.billboard.com/music/music-news/clear-channel-inks-second-radio-royalties-label-deal-this-time-with-1083625/ [https://perma.cc/6ZRE-2E8L] (discussing radio royalties deal struck between Taylor Swift's label and Clear Channel).

[22] *See, e.g.*, Chris Eggertsen, *House Legislation To Get Artists & Labels Paid for Radio Airplay Gets Companion Bill in U.S. Senate*, BILLBOARD (Sept. 22, 2022), https://www.billboard.com/pro/american-music-fairness-act-senate-bill-radio-performance-royalties/ [https://perma.cc/C52M-93H9] (discussing legislation that would require payment of royalties for radio airplay).

[23] *See infra* Section III.C.2.

[24] *See, e.g.*, John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1830 (2013) (discussing how powerful copyright owners manipulate legal ambiguities to win copyright battles).

[25] *Id.*

namely, the perpetration of power imbalances, the propensity to counter copyright's purported goal of incentivization, the tendency toward inefficiency, and other exploitable ambiguities unique to copyright law. Finally, Part IV considers the government's role in the creation and perpetration of these problematic practices and offers some options for mitigating the most harmful potential outcomes.

I. STATUTORY REVENUE IN COPYRIGHT

In order to situate faux copyright and monetized noninfringement practices within the universe of rightsholders' earnings, this Part offers a brief overview of three primary revenue streams made possible by statute: royalties from compulsory licenses, fees from negotiated licenses, and awards from successful litigation (or settlement) of copyright infringement claims. All of these revenue streams are explicitly contemplated in, or made possible by, the Copyright Act.

A. *Compulsory Licensing*

One source of statutorily derived income for some rightsholders, such as composers and recording artists, is royalties made possible by statutory, or compulsory, licenses. The current Copyright Act codifies six compulsory licenses covering uses ranging from satellite transmissions to cover songs.[26] These statutory licenses allow for different uses of a copyrighted work under specific circumstances without permission of the copyright owner, so long as the statutory terms are met and the statutory royalties are paid. The statutory rates for these compulsory uses are set by the Copyright Royalty Board ("CRB"), a panel of three administrative judges appointed by the Librarian of Congress.[27]

Compulsory licenses govern many common transactions in copyright. For example, the statutory license in § 111 allows cable companies to retransmit copyrighted, over-the-air content to subscribers without securing permission from, nor striking a deal with, the content owner.[28] The statutory license sets a rate for retransmission, and the cable company pays it. Similarly, the compulsory license in § 115—commonly known as the "cover license"—allows a musician to record and distribute a cover version of an existing, copyrighted song so long as the original song has already been publicly distributed.[29] In that case, the statute sets a royalty rate that is paid by the covering artist or their representative to the owner of the copyright on the original composition.

B. *Negotiated Licensing*

[26] *See* 17 U.S.C. § 111 (cable transmissions); *id.* § 112 (ephemeral recordings); *id.* § 114 (public performance of sound recordings); *id.* § 115 (making and distributing phonorecords); *id.* § 119 (secondary transmissions for satellite carriers); *id.* § 122 (secondary transmissions by satellite carriers for local retransmissions).

[27] *Id.* § 801.

[28] *Id.* § 111.

[29] *Id.* § 115.

Of course, not all potential uses of copyrighted works are covered by a statutory license. In addition, the untailored—or, one-size-fits-all—nature of the Copyright Act's compulsory licenses sometimes renders them unsuitable, or undesirable, for certain uses.[30] In these cases, licensees and licensors may engage in private dealmaking driven by the exclusive rights granted in § 106 of the statute.[31] These include the exclusive right to copy, create derivative works, and distribute, display, or otherwise perform a copyrighted work.[32]

Some privately negotiated licenses are so common that industry norms and customs develop around terms and pricing. One example is the synchronization license, or sync license—a privately negotiated agreement to license the use of a sound recording (and its underlying musical composition) for use in a film, commercial, or other audiovisual work.[33] For example, if Netflix wants to use a Kid Cudi track as the introductory music for a new, original series, the series' music supervisor would reach out to the corresponding department at Universal/Republic, Cudi's record label, to strike a deal. As repeat players in the world of sync licensing, both parties have a sense of the license's expected price range and duration going into the negotiation.[34]

Some of the most common privately negotiated licenses stem from statutorily contemplated rights, such as the public performance right in § 106(4) of the Copyright Act.[35] These rights are often administered in bulk by collective rights organizations such as the Association of Songwriters, Composers and Publishers ("ASCAP").[36] For example, a restaurant that plays a popular Pandora radio station in its dining room will (hopefully) have negotiated with ASCAP for a so-called "blanket license" covering public performance royalties for all of the tracks in the collective's repertoire.[37] ASCAP collects the licensing fee from the

[30] *See* Kristelia García, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 303-04 (2020) [hereinafter García, *Monetizing*].

[31] 17 U.S.C. § 106.

[32] *Id.*

[33] *Synchronization License*, SONGTRUST: MUSIC PUBL'G GLOSSARY, https://www.songtrust.com/music-publishing-glossary/glossary-syncronization-license [https://perma.cc/MYR7-9YE6] (last visited Mar. 17, 2023). Every song has two distinct copyrights—one on the sound recording (what you hear when you listen to a song) and one on the musical composition, or the "sheet music" or comparable deposit. These copyrights are not always (or even usually) held by the same parties. Most noncompulsory uses of a song require a license for both.

[34] *See* Shannon L. Bowen, *How Pop Stars Are Benefiting from the Netflix Boom*, HOLLYWOOD REP. (Aug. 9, 2019, 5:45 AM), https://www.hollywoodreporter.com/news/general-news/how-pop-stars-are-benefiting-netflix-boom-1229762/ [https://perma.cc/YJ79-UEKR] (describing sync licensing opportunities for music artists as Netflix popularity grows).

[35] 17 U.S.C. § 106(4).

[36] *About Us*, ASCAP, https://www.ascap.com/about-us [https://perma.cc/8FW5-9QP8] (last visited Mar. 17, 2023).

[37] *See ASCAP Licensing: Frequently Asked Questions*, ASCAP, https://www.ascap.com/help/ascap-licensing#2BA890AD-EA7F-414E-BB11-0CC82DDBCC87 [https://perma.cc/7S77-PRVH] (last visited Mar. 17, 2023).

restaurant (and many other businesses), and then pays out monies collected to rightsholders on a pro rata basis by tracking usage across thousands of venues.[38]

C. *Damage Awards and Settlements*

The third statutorily derived source of revenue is the recovery of actual or statutory damages owing to a successful suit for copyright infringement. Section 504 of the Copyright Act allows a successful copyright infringement claimant to elect either actual or statutory damages.[39] Statutory damages for copyright infringement range from $750 to $30,000 per infringed work,[40] jumping to $150,000 per work in the case of willful infringement.[41] Settlement monies stemming from threatened litigation are also arguably statutorily derived because the very steep damages contemplated for willful infringement in the Copyright Act lead many prospective infringement defendants to be more likely to settle.[42]

> *They set up a loom and acted as if they were weaving, but the loom was empty.*
>
> —Hans Christian Andersen[43]

II. EXTRASTATUTORY REVENUE

Despite being extrastatutory, revenues earned via faux copyright and monetized noninfringement are also arguably made possible by the Copyright Act insofar as the statute establishes the existence of copyright law, and these practices operate under its guise. Current copyright law—a messy, complicated, inconsistent, and sometimes counterintuitive set of doctrines—serves as the perfect backdrop for confusion and bamboozling. This Part introduces the concepts of faux copyright and monetized noninfringement, and describes them

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[38] *See ASCAP Payment System*, ASCAP, https://www.ascap.com/help/royalties-and-payment/payment [https://perma.cc/ZD6Z-DBXG] (last visited Mar. 17, 2023).

[39] 17 U.S.C. § 504.

[40] *Id.* § 504(c)(1).

[41] *Id.* § 504(c)(2). Recent empirical work suggests that these numbers have little to do with actual harm, and everything to do with deterrence. *See, e.g.*, Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. REV. 400, 407 (2019) [hereinafter Depoorter, *Digital Age*] (finding that despite plaintiffs seeking enhanced damages for willful infringement in majority of all copyright disputes, courts awarded enhanced damages "in less than 2 percent of all cases," thereby undermining "credibility of the nearly ubiquitous claims of willful infringement by plaintiffs"). For further critique, see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) ("Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.").

[42] *See* Depoorter, *Digital Age*, *supra* note 41, at 428 ("Lawsuits that involve a claim for willful statutory damages settle more often (29 percent) than suits in which the plaintiff requests regular statutory damages (22 percent).").

[43] ANDERSEN, *supra* note 9, at 119.

as falling into three (often overlapping) categories: (1) faux copyright and monetized noninfringement stemming from the abuse or misuse of statutory rights, both incidental and intentional, or from outright chicanery; (2) monetized noninfringement made possible by powerful platforms, such as YouTube, wielding their size and influence to effectively override statutory law via private policymaking; and (3) faux copyright and monetized noninfringement occurring when powerful individuals (or groups of individuals) wield their market power in order to close perceived gaps in the statutory law in their favor.

In the first and most intuitive category, we see parties abusing their rights, claiming (or at least not disclaiming) rights they don't have, and generally extracting copyright rents where they don't exist.[44] The parties engaging in this category of practices are not necessarily exploiting a power dynamic—though they may—so much as they are exploiting information asymmetry. Several of the examples in this category involve no copyrighted work at all.

The latter two categories describe parties overreaching on an existing right. These examples involve a powerful entity or individual(s) rationally using their position and influence to secure a better deal for themselves, without regard for the greater social good or congressional and statutory intent.[45] These deals prompt the question of how we should think about cases in which parties agree to license uses that do not require licensing under the statute. This question goes beyond freedom of contract and strikes at the very heart of the incentive-access paradigm that seeks to balance individuals' incentive to create content with the public's interest in accessing that content.[46]

In all of the examples described, the rightsholder derives extrastatutory revenue in the name of copyright while potentially thwarting copyright's purported goal of incentivizing content creation, and with it, the public interest in the fruits of that protection.

A. *Statutory Abuse, Misuse, and Other Shenanigans*

Some instances of faux copyright and monetized noninfringement stem from abuse or misuse of statutory rights, or from outright chicanery. Some of these examples involve no copyrighted work at all. The ability to ostensibly convince others that they nonetheless do, owes—in large part—to some of copyright's

[44] *See, e.g.*, Jeffrey Antonelli, *Torrent Wars: Copyright Trolls, Legitimate IP Rights, and the Need for New Rules Vetting Evidence and To Amend the Copyright Act*, ILL. STATE BAR ASS'N: INTELL. PROP., Oct. 2013, at 1, 3 (describing incidents where "innocent individuals and families [have been] targeted by copyright troll attorneys").

[45] *See, e.g.*, John Paul Titlow, *How YouTube Is Fixing Its Most Controversial Feature*, FAST CO. (Sept. 13, 2016), https://www.fastcompany.com/3062494/how-youtube-is-fixing-its-most-controversial-feature (explaining YouTube's decision to alter Content ID system that gave "preferential treatment to copyright claimants").

[46] For a comprehensive explanation of the incentive-access paradigm in copyright, see Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996) (discussing trade-off between incentivizing content creation and granting access to created works that occurs when broadening or limiting scope of copyright).

peculiarities as discussed further in Section III.D below. To begin, this Section offers some examples to demonstrate the wide range of transactions that constitute this category.

1. Inducing Infringement and Copyright Misuse

One popular abuse of the exclusive rights granted by § 106 of the Copyright Act is perpetrated by copyright trolls. A copyright troll is "an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest."[47] The approach of a paradigmatic copyright troll might be best described as a set up in which content owners and/or their unethical lawyers use "unprofessional tactics to 'shake down' and harass alleged infringers—many of whom [are] actually innocent."[48] Importantly, many copyright trolls, such as the infamous Prenda Law firm, have been found seeding (i.e., uploading content to) the very torrent sites that they then sue downloaders for using.[49]

The usual tactic used by copyright trolls to threaten potential defendants is not unauthorized download, but rather the more serious charge of unauthorized distribution.[50] This tactic works because of how most torrent sites work—namely, by allowing a user to download content in exchange for uploading and making available their own content.[51] A claim for unauthorized distribution is likely to fail, however, if the plaintiff themself was arguably the source.[52] Of course, the troll doesn't care much about succeeding on the merits. The move is to monetize noninfringement by wrangling a settlement out of a wary and confused downloader (typically of potentially compromising content).[53]

This practice looks a lot like copyright misuse, an affirmative defense to a claim for copyright infringement that may be available when "copyright . . . holders assert their rights, not to protect from market harm to their protected works, but to protect other aspects of their market by using the

[47] Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 732 (2013).

[48] Antonelli, *supra* note 44, at 3 (footnote omitted).

[49] *See, e.g.*, *id*. (noting Prenda would "provid[e] the copyrighted content online for BitTorrent distribution in order to induce copyright infringement"); *see also* Iain Thomson, *Comcast Court Docs Show Prenda Copyright Trolls Seeded Smut Then Sued*, REGISTER (Aug. 20, 2013, 1:45 PM), https://www.theregister.com/2013/08/20/ip_address_search_shows_prenda_copyright_trolls_seeded_smut_then_sued/ [https://perma.cc/GPX3-SWK7].

[50] *See* Tim Worstall, *Quite Amazing, Prenda Law Was Seeding the Torrent Sites It Then Sues People for Downloading from*, FORBES (Aug. 21, 2013, 10:10 AM), https://www.forbes.com/sites/timworstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from/?sh=bd85ac921a07 (remarking Prenda's seeding tactic is "astonishing in its chutzpah altogether").

[51] *See id.*

[52] *See id.* (noting Prenda's tactics might make them lose).

[53] The original, and still most popular, target of the copyright troll is pornography. *See id.* (noting some people are embarrassed to admit they watched pornography regardless of whether they downloaded it illegally).

protected work."[54] In the Prenda case, the other aspects include the firm's shadow business model of shaking down targeted users.

The courts have broadened the doctrine of copyright misuse to deny claims of copyright infringement when they're brought for anticompetitive means. For example, the Ninth Circuit in *Omega S.A. v. Costco Wholesale Corp.*[55] denied Omega's claim for copyright infringement against Costco after determining that "Omega misused its copyright of the Omega Globe to expand its limited monopoly impermissibly."[56] In that case, Omega attempted to extend its right to control the import and distribution of its copyrighted Omega "Globe Design" beyond the first sale, a practice not contemplated by the Copyright Act.[57] Had they succeeded, this would have been a prime example of monetizing noninfringement.

A recent case out of the Northern District of California offers another good example of copyright misuse.[58] In that case, a Twitter user known only as @CallMeMoneyBags posted a series of photos criticizing private-equity billionaire Brian Sheth.[59] A few weeks later, Sheth allegedly formed an entity called Bayside Advisory LLC that promptly registered copyrights in the photos, and then petitioned Twitter to remove them under § 512(c) of the Digital Millennium Copyright Act ("DMCA").[60] In accordance with § 512(h) of the DMCA, the entity also served a subpoena on Twitter seeking to compel the company to disclose user @CallMeMoneyBags's true identity. Citing a lack of any conceivable market harm to a shell entity whose sole purpose was to (mis)use copyright for Sheth's personal purposes, Twitter's motion to quash the subpoena was granted by the court on June 21, 2022.[61]

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[54] Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 565 (2015). *See generally* Tom W. Bell, *Codifying Copyright's Misuse Defense*, 2007 UTAH L. REV. 573 (arguing misuse should be codified).

[55] 776 F.3d 692 (9th Cir. 2015) (affirming district court's award of attorney's fees to Costco).

[56] *Id.* at 694.

[57] *Id.* at 695 ("Omega's right to control importation and distribution of its copyrighted Omega Globe expired after [the] authorized first sale . . . ."). Copyright's first sale doctrine states that the owner of a legally obtained copy may resell that copy without further authorization from the copyright owner. 17 U.S.C. § 109(a). For further discussion of copyright's first sale doctrine, see *infra* Section II.B.3.

[58] *In re* DMCA § 512(h) Subpoena to Twitter, Inc., 608 F. Supp. 3d 868, 883 (N.D. Cal. 2022) (ruling in favor of defendant on equitable grounds without explicitly invoking misuse doctrine).

[59] *Id.* at 875 (noting tweets alluded to alleged extramarital affair).

[60] *Id.* at 882 (remarking "Court is left scratching its head" after Bayside denied association with Sheth but refused to reveal any details about its ownership). The DMCA is an amendment to the Copyright Act passed in 1998 that establishes a safe harbor from copyright infringement for platforms that meet certain requirements, including the acceptance and processing of takedown notices from copyright owners. 17 U.S.C. § 512.

[61] *In re DMCA*, 608 F. Supp. 3d at 883 (quashing subpoena "in a heartbeat").

2. Clearance Culture

Because litigation in general—and copyright infringement litigation in particular—is so costly and unpredictable, a culture of what some commentators describe as excessive risk aversion has cropped up in the entertainment industries. Sometimes referred to as clearance culture, this practice involves clearing music samples, book excerpts, film clips, and other media whose use most likely doesn't require licensing under the statute.[62] In other words, when you "[c]ombine . . . doctrinal gray areas and severe consequences with the risk aversion that pervades key copyright industries, . . . the result is a practice of securing copyright licenses even when none is needed. Better safe than sued."[63] Put differently, once there is an established market for licensing a particular use, a use that was fair in theory may cease to be fair in practice.

The literature defines clearance culture as "the set of norms and practices within the entertainment industry that mandates—whether or not the law actually requires it—that every scrap of copyrighted or trademarked material be cleared with the original rights-holder."[64] The idea that absolutely everything must be cleared has led to an entire industry of firms that purport to handle this clearance for, say, film and television scripts.[65] The impact of clearance culture is felt most acutely by small independent filmmakers, composers, and writers. These parties are least able to bear the risks and costs associated with determining which rights need to be cleared, clearing them, and/or defending against (potentially fraudulent) infringement claims. As a result, many of these creators end up cutting or rewriting scenes or lines, thereby impacting cultural output for everyone.[66]

Another of the fruits of clearance culture is the relatively new industry norm of songwriters and other creative professionals purchasing errors and omission

[62] *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 903-04 (2007) (observing clearance culture has "nearly obliterated fair use" in film, music, broadcasting, advertising, and publishing (quoting MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUST., WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 54 (2005))).

[63] *Id.* at 884.

[64] Daniel Nazer, *A Glance Inside the Clearance Culture*, STAN. L. SCH.: CTR. FOR INTERNET & SOC'Y BLOG (Apr. 26, 2012, 1:33 PM), http://cyberlaw.stanford.edu/blog/2012/04/glance-inside-clearance-culture [https://perma.cc/LS28-UQLE].

[65] A customer review on one of these firms' website exclaims: "We didn't even know we had to clear the clips we were using!" CLEARANCE UNLIMITED, https://www.clearanceunlimited.net/ [https://perma.cc/53EQ-ST8L] (last visited Mar. 17, 2023). Often, however, material can be used without clearance under the fair use doctrine. *See* Nazer, *supra* note 64 (noting clearance culture often goes beyond what is required by law).

[66] *See* PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 5, 7-28 (2004), https://web.archive.org/web/20210423225956/https://archive.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf (describing impact on small independent documentary filmmakers in particular and offering plethora of examples of copyright clearance culture hindering cultural output).

("E&O") insurance to protect themselves against claims of copyright infringement. What started as an abundance of caution is now mandatory in some instances. For example, an independent filmmaker hoping to get their film distributed by Netflix or Hulu is currently required to have E&O insurance to cover both themselves and the distributing platform against claims of copyright infringement, however unlikely such claims are to succeed on the merits.[67] Because small filmmakers are less likely to be able to afford such protection, they are systematically disadvantaged by such norms and requirements.

It's not only authors and creators who are impacted by clearance culture. Intermediary distributors such as book "publishers are notoriously risk averse" when it comes to clearing rights.[68] As such, they are more likely to require an author to cut a reference to a copyrighted work for which they are unable to clear a license than they are to include it and risk possible infringement litigation. This is true even in the case of uses that are most likely fair. In a blog post discussing his experience with clearance culture stemming, ironically, from his book on fair use in copyright, Paul Heald laments the "uber-respect" that publishers have for copyright, noting that it "ends up subverting a main goal of copyright: making works available to the public."[69]

Another example of clearance culture is the practice of licensing life rights in biopics. Following the theatrical release of the film *Hustlers* starring Jennifer Lopez, one of the strippers-turned-robbers upon whose life the film was based threatened to sue for violation of her life rights.[70] A life right is understood to encompass all of "the personal details and characteristics that make up someone's life, such as their image, name, likeness and experiences."[71] A quick web search reveals numerous firms ready to help secure those rights for an aspiring biopic producer. After all, "[g]etting permission to tell another person's story is important."[72]

Once again, the problem posed by life rights is that they don't exist as a matter of law. Under extant law, "'no one owns the facts that make up the narrative of their life.' A writer is free to use any publicly known facts about an event or

[67] *See id.* at 9 (noting E&O insurance both required for broadcast and increasingly expensive).

[68] Paul J. Heald, *It's Not the Press's Fault (Much)!*, STAN. UNIV. PRESS BLOG (Jan. 27, 2021), https://stanfordpress.typepad.com/blog/2021/01/its-not-the-presss-fault-much-.html [https://perma.cc/33XK-2XFM] (noting publishers' business model relies on enforcement of copyright law).

[69] *Id.*

[70] *See* Gene Maddaus, *STX Defends Artistic Freedom as Inspiration for 'Hustlers' Ramona Threatens Suit*, VARIETY (Sept. 23, 2019, 4:37 PM), https://variety.com/2019/biz/news/hustlers-lawsuit-samantha-barbash-ramona-jennifer-lopez-stx-1203346645/ [https://perma.cc/77AM-442P] (reporting individual turned down offer for life rights that was "less than the cost of a Hermes bag").

[71] Carlianna Dengel & Liesl Eschbach, *Life Rights Agreements—What You Need To Know*, ROMANO L. (May 24, 2022), https://www.romanolaw.com/2020/10/29/life-rights-agreements-need-know/ [https://perma.cc/6NVF-V65S].

[72] *Id.*

person."[73] Despite this incontrovertible truth, a norm has developed in Hollywood requiring these nonexistent rights be licensed. Failure to do so is a major disadvantage for a scriptwriter looking to sell a script to a production company or studio, now that most routinely require licensing of life rights.[74] If this were limited to only the private entities involved in overlicensing, we might be less concerned. The fact that the practice excludes creators with fewer resources, and therefore denies the public its works, is cause for concern.

3. Shenanigans

a. *AI-Created Works*

A company called Boomy is the latest in a long line of music composition technologies powered by artificial intelligence ("AI").[75] Like many AI-assisted sites, Boomy invites, but does not require, users to supply certain inputs—genre, style, influences, among others—that its AI then utilizes to "compose" an original song. Boomy then allows users to add their own vocals, and even to engage in production editing and mixing, before finalizing the recording.[76] According to Boomy's Terms of Use, "[a]ny track generated by or in connection with your use of the Service, including the composition therein and the sound recording thereof, is solely owned by Boomy."[77]

Can an AI-created work be copyrighted? Under United States law, it is unclear,[78] though most indications to date point toward the answer being no. Courts have consistently rejected nonhuman copyright ownership in situations

[73] Chris O'Falt, *'Hustlers': When Does a Film Based on True Events Need Its Subject's Life Rights?*, INDIEWIRE (Sept. 25, 2019, 12:00 PM), https://www.indiewire.com/2019/09/hustlers-life-rights-hollywood-legal-based-on-true-events-1202176296/ [https://perma.cc/429B-MHF4] (noting liability only arises with deliberate falsifications with intent to harm).

[74] *See id.* ("For a writer, life rights are a major competitive advantage when trying to attach a star or sell a script. When a larger production company, studio, or distributor become [sic] involved, the business side will often demand the acquisition of life rights.").

[75] BOOMY, https://boomy.com/ [https://perma.cc/8M4A-MWAL] (last visited Mar. 17, 2023) (advertising that users can create songs even if they have no music experience).

[76] *Id.*

[77] *BOOMY Terms of Use*, BOOMY, https://boomy.com/terms [https://perma.cc/X69J-MSQC] (last visited Mar. 17, 2023). The license agreement gives users the option to purchase the full rights to their creations for a fee determined by Boomy. *Id.* Interestingly, Boomy's former terms of service claimed that any song created on the service would be a work-made-for-hire. *Boomy End User License Agreement*, BOOMY (Jan. 7, 2022), https://web.archive.org/web/20220405035853/https://boomy.com/eula. That claim is false on its face, as such a work does not meet the statutory definition of a work-made-for-hire. 17 U.S.C. § 101.

[78] *See* Edward Klaris & Alexia Bedat, *Copyright Laws and Artificial Intelligence*, L. TECH. TODAY (Nov. 16, 2017), https://www.lawtechnologytoday.org/2017/11/copyright-artificial-intelligence%e2%80%8a/ [https://perma.cc/KBV5-HPWF] ("[C]ourts may decide that works created without human input belong in the public domain with no protection. Or, they may grant copyright . . . .").

ranging from selfie photographs taken by monkeys[79] to books written by "divine beings."[80] And recently, the CRB formally rejected an application to register a copyright in a picture created by an algorithm. In reviewing the initial rejection, the CRB cited the Copyright Office's Compendium of Copyright Practices[81] in holding that it "has long mandated human authorship for registration."[82]

It's one thing for Boomy to own the copyright on its AI software (it does);[83] it's another thing for the company to claim ownership over any and all outputs produced by the AI (it most likely does not). By structuring its terms of service to assign the company ownership that it then requires users to purchase,[84] Boomy has literally made something out of nothing. In doing so, Boomy relies on little more than apathy and a complex copyright system to make users believe that something they've created does not belong to them until they buy it. This stands in direct contravention of copyright's incentivization goals and the public interest.

b. *Conceptual Art*

Conceptual art is commonly understood as "art for which the idea (or concept) behind the work is more important than the finished art object."[85] Some recent examples include an invisible sculpture sold at auction for $18,000,[86] a banana duct-taped to a wall and priced at $120,000,[87] and a colorful pile of individually

[79] *See* Naruto v. Slater, No. 15-CV-04324, 2016 WL 362231, at *4 (N.D. Cal. Jan. 28, 2016), *aff'd*, 888 F.3d 418 (9th Cir. 2018) (denying authorship to nonhuman "[i]n light of the plain language of the Copyright Act, past judicial interpretations of the Act's authorship requirement, and guidance from the Copyright Office").

[80] *See* Urantia Found. v. Maaherra, 114 F.3d 955, 957-59 (9th Cir. 1997) (rejecting registration on basis that "it is not creations of divine beings that the copyright laws were intended to protect").

[81] *See* U.S. COPYRIGHT OFF., COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 202.02(b) (2d ed. 1984) ("The term 'authorship' implies that, for a work to be copyrightable, it must owe its origin to a human being.").

[82] Letter from Shira Perlmutter, Reg. of Copyrights, U.S. Copyright Off. Rev. Bd., Suzanne Wilson, Gen. Couns. & Assoc. Reg. of Copyrights, U.S. Copyright Off. Rev. Bd., and Kimberley Isbell, Deputy Dir. of Pol'y & Int'l Affs., U.S. Copyright Off. Rev. Bd., to Ryan Abbott, Esquire, Brown, Neri, Smith & Khan, LLP (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [https://perma.cc/RDG8-TUZM].

[83] *See BOOMY Terms of Use*, *supra* note 77.

[84] *See id.* ("If you wish to purchase ownership of a Track from Boomy, you may contact us at legal@boomy.com.").

[85] *Conceptual Art*, TATE, https://www.tate.org.uk/art/art-terms/c/conceptual-art [https://perma.cc/86MH-8JQN] (last visited Mar. 17, 2023).

[86] Hirwani, *supra* note 2.

[87] *See* Rory Sullivan, *A-peeling Offer? Duct-Taped Banana Work Selling for $120,000 at Art Basel Miami*, CNN: STYLE (Dec. 6, 2019), https://www.cnn.com/style/article/art-basel-miami-maurizio-cattelan-banana-scli-intl/index.html [https://perma.cc/W2XZ-RCQN]. While two prior editions of the banana work sold, the third was not so lucky. Before a buyer could be secured, another artist, David Datuna, unceremoniously pulled it off the wall and ate

wrapped candies that museum guests are invited to enjoy.[88] One challenge for conceptual artists who wish to sell their works is that copyright protection does not extend to ideas,[89] and without it, the value proposition for buyers of conceptual art is shaky at best.

What exactly does a buyer of a conceptual artwork own? According to Guy Rub, "absolutely nothing."[90] The recent case of an installation titled *Take the Money and Run*—in which the artist accepted $84,000 for a commissioned piece and instead delivered two blank canvases—is a timely example in support of Rub's assertion. By way of explanation, the artist behind the installation offered: "The work is that I have taken their money."[91]

Some scholars have put forth robust arguments in favor of extending copyright law to conceptual art,[92] but others—like Rub—insist this extension is not needed because social norms in the art world provide conceptual artists with the incentives that copyright does not.[93] Rub notes, for example, that fine art publications describe conceptual artworks as being "*located* at" a particular gallery, museums enter into agreements under which conceptual artworks are "on extended *loan*" from private collectors, and, importantly, conceptual artworks are "*sold*" to buyers, sometimes for millions of dollars.[94] All of these verbs suggest that we are dealing with legal property, despite the fact that we are

it, calling his act "art performance." Rob Picheta, *Someone Ate a $120,000 Banana That an Artist Had Taped to a Wall*, CNN: STYLE (Dec. 9, 2019), https://www.cnn.com/style/article/banana-artwork-eaten-scli-intl/index.html [https://perma.cc/HU6K-WXJE]; *see* Alaa Elassar, *Man Who Ate the $120,000 Banana Art Installation Says He Isn't Sorry and Did It To Create Art*, CNN: STYLE (Dec. 9, 2019), https://www.cnn.com/style/article/david-datuna-banana-art-basel-trnd/index.html [https://perma.cc/CQ2K-DDB6] (quoting Datuna as saying, "It wasn't vandalism, it was art performance from me and absolutely I am not sorry").

[88] *See* Jasmin Mazarine De Waele, *An Untitled Pile of Symbolic Candy (Also Known as "Ross in L.A.")*, MEDIUM: DAILY DOSE D'ART (Jan. 20, 2019), https://medium.com/daily-dose-dart/an-untitled-pile-of-symbolic-candy-also-known-as-ross-in-l-a-f06cb194e024 [https://perma.cc/GXJ9-U6QR].

[89] *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . .").

[90] Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 BYU L. REV. 1147, 1149.

[91] *See* Bill Chappell, *For $84,000, an Artist Returned Two Blank Canvasses Titled 'Take the Money and Run*,*'* NPR (Sept. 29, 2021, 11:53 AM), https://www.npr.org/2021/09/29/1041492941/jens-haaning-kunsten-take-the-money-and-run-art-denmark-blank [https://perma.cc/KQ39-RVZL].

[92] *See, e.g.*, Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 337 (2016) (arguing that denying conceptual art copyright protection on basis of fixation contradicts case law interpreting fixation as extending to works that may change but are "sufficiently repetitive to be deemed permanent").

[93] Rub, *supra* note 90, at 1180 ("[S]ocial norms create a scheme that, in many respects, resembles the core framework of the legal protection of creativity."); *cf.* Brian L. Frye, *Conceptual Copyright*, 66 S.D. L. REV. 183, 198 (2021) (concluding conceptual art market "doesn't seem to need copyright in order to function" because it relies on scarcity).

[94] Rub, *supra* note 90, at 1147.

emphatically not. As Rub explains, these norms establish "pseudo personal property rights" in the conceptual art that allows the industry to carry on as if they are dealing with a legally protected object.[95] In other words, social norms in the conceptual art world serve as a substitute for copyright protection. These norms are the invisible robe, if you will.

Museumgoers' and art collectors' willingness to overlook the absence of copyright protection stems, I suggest, from the unfounded, and erroneous, assumption that copyright protection extends to conceptual artworks. Gallery owners, artists, and collectors are accustomed to copyright protection for conventional artworks such as paintings, sculptures and photographs.[96] Without awareness or understanding of copyright law's fixation requirement, these parties can be forgiven for assuming that the same protection would extend to conceptual art. This assumption explains their assignment of conventional IP properties—including the exclusive right to copy, disseminate, and display the work—to what Rub describes as "nothingness."[97] In the end, however, the conceptual art industry arguably relies upon information asymmetry between sellers and buyers to sustain a market in faux copyrights.

c. *Nonfungible Copyright*

At the intersection of two equally intriguing and bewildering concepts—blockchain and copyright—sellers of NFTs on copyrighted works claim to sell unique copies of digital works. In a recent transaction that made Mike Winkelmann (also known as "Beeple") the third-highest-grossing living artist, fine art auction house Christie's sold an NFT of his digital collage, *EVERYDAYS: THE FIRST 5000 DAYS* ("*Everydays*"), for $69,346,250.00.[98] And what, exactly, did the buyer get for their millions? The short answer is that they fared about as well as the buyer of Gonzalez-Torres's $8 million pile of half-eaten candy.[99] The long answer is, well, longer.

NFTs are intended to represent a guarantee of authenticity. According to Christie's, the buyer of *Everydays* would receive the digital collage "directly from Beeple . . . , accompanied by a unique NFT encrypted with the artist's

[95] *Id.* at 1154, 1179-80.

[96] *See id.* at 1187 ("[M]y interviewees did not question the copyright-like terminology that they were used to applying.").

[97] *Id.* at 1150.

[98] *Beeple (b. 1981) EVERYDAYS: THE FIRST 5000 DAYS*, CHRISTIE'S, https://onlineonly.christies.com/s/first-open-beeple/beeple-b-1981-1/112924 (last visited Mar. 17, 2023); Abram Brown, *Beeple NFT Sells for $69.3 Million, Becoming Most-Expensive Ever*, FORBES (Mar. 11, 2021, 10:03 AM), https://www.forbes.com/sites/abrambrown/2021/03/11/beeple-art-sells-for-693-million-becoming-most-expensive-nft-ever/?sh=14341ed32448 ("It is the third-most expensive work from a living artist ever sold at auction.").

[99] *See* Mazarine De Waele, *supra* note 88.

unforgeable signature and uniquely identified on the blockchain."[100] In plain English, this means the buyer will receive a digital file containing a digital copy of the collage, and a digital token certifying that the delivered copy is the authentic, original copy.

But can the NFT possibly do what it claims to do? The computer from which Beeple sent the copy necessarily also has a copy. Each time the buyer themselves opens the file, a new copy is rendered. Innumerable copies of the work circulate freely on the Internet.[101] Importantly, all of these copies are identical to the so-called "original" copy—this is, after all, the hallmark of a digital work.[102]

Nonetheless, by putting nonfungible in the name, the sellers of NFTs on digital works want buyers to believe that the tokens signify something unique, authentic, and perhaps—hopefully!—protected by copyright, as many other works of art are.[103] The sleight of hand here is that the term nonfungible in NFT refers to the token, not to the artwork. It is the *token* that is recorded to the blockchain and therefore verifiable, *not* the underlying digital work.[104]

In a recent explainer, Kal Raustiala and Christopher Sprigman describe NFTs as consisting of nothing more than "a 'hash' of the artwork as part of the code that makes up the NFT."[105] This "hash" is generated by inputting the data from the digital work into an algorithm. If the same data from multiple copies of a digital work are fed through the same hash algorithm, as they are, they will all have *exactly the same hash*.[106]

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[100] *Beeple's Opus*, CHRISTIE'S, https://www.christies.com/features/Monumental-collage-by-Beeple-is-first-purely-digital-artwork-NFT-to-come-to-auction-11510-7.aspx (last visited Mar. 17, 2023).

[101] The reader is invited to conduct their own internet search or get a sampling of available copies by simply going to https://www.google.com, clicking "Images" to perform an images search, typing "beeple everydays the first 5000 days" into the search box, and clicking enter.

[102] *See* Kal Raustiala & Christopher Jon Sprigman, *The One Redeeming Quality of NFTs Might Not Even Exist*, SLATE: FUTURE TENSE (Apr. 14, 2021, 4:59 PM), https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html [https://perma.cc/C2KS-4XQM] ("The hallmark of any digital work is that it can be replicated—perfectly, endlessly, and virtually without cost.").

[103] *See* James Grimmelmann, Yan Ji & Tyler Kell, *The Tangled Truth About NFTs and Copyright*, VERGE (June 8, 2022, 8:30 AM), https://www.theverge.com/23139793/nft-crypto-copyright-ownership-primer-cornell-ic3 [https://perma.cc/KD3Z-WGV7] ("Our survey of some existing NFT projects and their licenses reveals that very few of them take all of the necessary steps needed to make NFT copyrights behave the way that people expect.").

[104] *See, e.g.*, Jaime B. Herren & Matt E. Kirk, *Money Is Fungible. NFTs Are Not.*, HOLLAND & KNIGHT (Oct. 13, 2022), https://www.hklaw.com/en/insights/publications/2022/10/money-is-fungible-nfts-are-not [https://perma.cc/4L7L-S6KY] ("'NFTs' are non-fungible tokens that represent an underlying but disassociated asset to which the NFT owner may or may not have rights.").

[105] Raustiala & Sprigman, *supra* note 102.

[106] *See id.* ("[An] NFT does not identify a particular copy at all. All it does is tell you whether *any* particular putative copy . . . contains the same data as the file from which the hash was originally generated.").

As Raustiala and Sprigman explain, this means that for the *Everydays* sale, "[t]he NFT's code contains the hash for the *Everydays* file, Beeple's cryptocurrency wallet address, and the address for a smart contract that governs how transactions in the token will take place. And that's basically it."[107] This means that "the NFT Christie's auctioned is useless to identify an 'authentic' copy of *Everydays*, assuming we can even agree which copy of *Everydays* is the authentic one."[108]

In other words, the buyer of an NFT on a digital work is effectively buying a hash registered to the blockchain coupled with a smart contract. Importantly, they are not buying the artwork itself.[109] Because copyright law reserves the right to make copies of a work to the owner of the copyright,[110] Beeple could, in theory, go on to make an NFT on a different copy of *Everydays* and sell it at auction. And so on. If the buyer of the first *Everydays* NFT then sued the buyer of the second *Everydays* NFT for copyright infringement and succeeded in at least wrangling a settlement from the wary follow-on buyer, they would be monetizing a situation in which there was no infringement, given that neither buyer actually owns a copyrightable work. They might also kick off a norm that owners of NFTs on art works have an ownership claim to the underlying artwork despite the fact that they emphatically do not.[111]

And herein lies the rub. Despite the media's continued conflation of NFTs with copyright, the former are not covered by the latter. Examples of this confusion—even amongst parties who should know better—abound. A recent suit brought by film studio Miramax against screenwriter and director Quentin Tarantino in the wake of his announced sale of an NFT that purportedly includes "the original script from a single iconic scene [from the cult classic film *Pulp Fiction*], as well as personalized audio commentary"[112] alleges, among other things, copyright infringement.[113] That claim should fail because, as other commentators have noted, Tarantino's claim that the NFT contains images and

[107] *Id.*

[108] *Id.*

[109] *See id.* ("Christie's hasn't sold the artwork *Everydays*. Nor has it sold a unique copy of *Everydays*. Nor has it sold a piece of technology that is capable of identifying a unique copy of *Everydays*. It's simply sold an NFT.").

[110] *See* 17 U.S.C. § 106 ("[T]he owner of copyright under this title has the exclusive rights to . . . reproduce the copyrighted work in copies . . . .").

[111] *See* Grimmelmann et al., *supra* note 103 ("Copyright law does not give an NFT owner any rights unless the creator takes affirmative steps to make sure that it does . . . ."); *see also* Rub, *supra* note 90, at 1179-1201 (discussing power of social norms in conceptual art world).

[112] *The Tarantino NFT Collection*, TARANTINO NFTS, https://tarantinonfts.com/ (last visited Mar. 17, 2023).

[113] *See* Alex Weprin, *Miramax Sues Quentin Tarantino over 'Pulp Fiction' NFTs*, HOLLYWOOD REP. (Nov. 16, 2021, 12:20 PM), https://www.hollywoodreporter.com/movies/movie-news/quentin-tarantino-sued-pulp-fiction-nft-1235048725/ [https://perma.cc/8SKH-NVC6] (noting Miramax wrote that "Tarantino's conduct has forced Miramax to bring this lawsuit against a valued collaborator in order to enforce, preserve, and protect its contractual and intellectual property rights").

audio is plainly false.[114] As we've seen, an NFT contains nothing more than hash code—it does not, and cannot, contain copyrightable images or audio.[115] It is difficult to imagine, then, how an NFT of any copyrighted work could constitute infringement of that work. Brian Frye has recently tested this notion by selling his own NFT of *Pulp Fiction*.[116] According to the documentation, the successful bidder will own "certain secret and confidential thoughts I created about the movie *Pulp Fiction* (1994), which was directed by Quentin Tarantino."[117] It remains to be seen whether Miramax will sue Frye, but if they do, the case for copyright infringement would be exceedingly weak, not least of all because an NFT of a copyrighted work does not infringe that work.[118] For the avoidance of doubt, an NFT on a copyrighted work does not infringe the copyright on that work because an NFT *is not a copy of a work*, it's just a piece of hash code pointing to a work that exists somewhere.[119] Pointing at copyrighted works, physically or conceptually, is not prohibited. Perhaps due to the complexity of the product, or perhaps due to intentional misrepresentation, this fact continues to elude buyers and artists alike.[120]

Another recent example demonstrating this confusion involves rapper Jay-Z's celebrated first album, *Reasonable Doubt*. Originally released in June 1996, the album celebrated its twenty-fifth anniversary in June 2021.[121] In purported celebration of this fact, Roc-A-Fella cofounder Damon Dash announced that he would be selling a share of the album as an NFT. Specifically, "Dash was

[114] *See* Kal Raustiala & Chris Sprigman, *Guest Column: Tarantino vs. Miramax—Behind the NFT 'Pulp Fiction' Case, and Who Holds the Advantage*, HOLLYWOOD REP. (Nov. 24, 2021, 6:55 AM), https://www.hollywoodreporter.com/business/digital/tarantino-miramax-pulp-fiction-nft-1235052378/ [https://perma.cc/5GY6-ZT3R] ("Tarantino's claim that the NFTs 'consist' of the images and audio commentary is misleading. NFTs don't actually incorporate images or sound.").

[115] *See* Raustiala & Sprigman, *supra* note 102.

[116] *See* Brian L. Frye, *Secret Pulp Fiction NFT*, OPENSEA, https://opensea.io/assets/0x495f947276749ce646f68ac8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287745205943664641/ (last visited Mar. 17, 2023).

[117] *See id.*

[118] *See* Raustiala & Sprigman, *supra* note 102 ("Making an NFT doesn't involve copying, distributing, or displaying the artwork itself, and so copyright law is not implicated.").

[119] *See id.*

[120] *See, e.g.*, Kevin Collier, *NFT Art Sales Are Booming. Just Without Some Artists' Permission.*, NBC NEWS (Jan. 10, 2022, 3:53 PM), https://www.nbcnews.com/tech/security/nft-art-sales-are-booming-just-artists-permission-rcna10798?cid=sm_npd_nn_tw_ma [https://perma.cc/V7MZ-8KSY] (describing various artists lamenting "theft" of their work by NFT creators); Eric Ravenscraft, *NFTs Don't Work the Way You Might Think They Do*, WIRED (Mar. 12, 2022, 8:00 AM), https://www.wired.com/story/nfts-dont-work-the-way-you-think-they-do/ ("Enthusiasts frequently claim that since NFTs are fundamentally unique and live on a trustless blockchain, this constitutes proof that you 'own' a digital asset.").

[121] I refuse to believe this alleged timeline, as I still have the album on CD in my Discman™.

planning to work with NFT platform SuperFarm to host an online auction . . . for the copyright to *Reasonable Doubt*."[122]

Unlike the digital file in the Beeple example, Dash's announced plans purport to offer an NFT on something tangible and certifiably unique—the sole copyright (or portion thereof) in a recorded album. Shortly after Dash's announcement, Roc-A-Fella Records convinced a judge to temporarily halt the auction, alleging that Dash doesn't own the rights he was purporting to sell.[123] This may be true as to what Dash purported to be selling, but it doesn't apply to what he was actually selling. As we've seen, the sale of an NFT is nothing more than the sale of a digital token composed of hash code created by inputting data from a digital work into an algorithm.[124] Perhaps it claims to point at a work; perhaps not. Either way, there is nothing of a copyright to be found. The emperor has no clothes.[125] On this basis, the matter was settled by the parties in June 2022.[126]

This fact has not stopped Jay-Z and Roc-A-Fella from releasing their own celebratory NFT via Sotheby's. According to the auction site, *Heir to the Throne*, a digital animation created by artist Derrick Adams, "reinterprets and recontextualizes the album cover to create a new contemporary take on a portrait that defined an era—as a comment and reminder that *Reasonable Doubt* remains

[122] Murray Stassen, *Damon Dash Insists He's Entitled To Sell Share of Jay Z's Reasonable Doubt as NFT—Despite Being Sued by Roc-A-Fella Records*, MUSIC BUS. WORLDWIDE (June 22, 2021), https://www.musicbusinessworldwide.com/damon-dash-insists-hes-entitled-to-sell-share-of-jay-zs-reasonable-doubt-as-nft-despite-being-sued-over-plan/ [https://perma.cc/AP6U-H4Q2].

[123] *See Damon Dash Jay-Z Album NFT Sale Blocked . . . Roc-A-Fella Gets Legal Win*, TMZ (June 22, 2021, 8:33 AM), https://www.tmz.com/2021/06/22/damon-dash-cant-sell-reasonable-doubt-nft-jay-z-roc-a-fella-wins/ [https://perma.cc/S5D5-8AXQ] ("A source close to the case tells us the court ruled in favor of Roc-A-Fella Tuesday by ruling Damon's prohibited from selling the NFT of Jay's debut studio album, and any planned auctions to do so must be halted.").

[124] *See* Raustiala & Sprigman, *supra* note 102.

[125] For an example of media confusion/misdirection, see Murray Stassen, *Nas To Let Fans Buy Shares in Streaming Royalties via NFTs on Music Investment Platform Royal*, MUSIC BUS. WORLDWIDE (Jan. 6, 2022), https://www.musicbusinessworldwide.com/nas-to-let-fans-buy-shares-in-streaming-royalties-via-nfts-on-music-investment-platform-royal13456/ [https://perma.cc/NAP5-VVMA], which inaccurately describes the sale of a share of royalties as a sale of NFTs.

[126] *See* Jon Blistein, *Reasonable Accord: Jay-Z and Dame Dash Settle 'Reasonable Doubt' NFT Lawsuit*, ROLLING STONE (June 13, 2022), https://www.rollingstone.com/music/music-news/jay-z-dame-dash-settle-reasonable-doubt-nft-lawsuit-1367623/ ("[L]awyers for the two parties announced an agreement that stipulated Dash could sell his one-third stake in Roc-A-Fella Records, but he could not 'in any way dispose of any property interest in *Reasonable Doubt*.'").

vital and new today."[127] Interested readers can obtain their own free digital copy of the work online.[128] The token affiliated with it, however, will cost you.

d. *State Resistance*

A final, glaring example of faux copyright owes, regrettably, to the resistance of several state governments to accept a recent Supreme Court ruling confirming that government work product—statutes, regulations, session notes and the like—is not subject to copyright protection. In *Georgia v. Public.Resource.Org, Inc.*,[129] the Supreme Court considered a case brought by the state of Georgia's Code Revision Commission against a nonprofit that sought to publish its edicts for public consumption.[130] In an opinion finding for the nonprofit, the Supreme Court clarified that the annotations in Georgia's official state code are not eligible for copyright protection because legislators—like judges—"cannot be authors of—and therefore cannot copyright—the works they create in the course of their official duties" as public servants.[131]

The implications of this holding are straightforward: states may not claim a copyright in their annotated codes going forward, and states that may have previously claimed a copyright in their annotated codes need to disclaim them.[132] In practice, however, things have not proceeded smoothly. In a recently filed petition to the Federal Trade Commission ("FTC"), nonprofit organization Public.Resource.Org, Inc. (the appellant from the *Public.Resource.Org* case) reports that since the ruling,

> several states have continued to assert copyright, and—in collaboration with Lexis and West—have . . . continued to assert falsely that the materials are subject to copyright, and have taken a variety of actions to limit access, including sending takedown notices to organizations who try to republish the materials, lobbying state governments to enforce

[127] *See Heir to the Throne: An NFT in Celebration of Jay-Z's Reasonable Doubt 25th Anniversary by Derrick Adams*, SOTHEBY'S, https://www.sothebys.com/en/digital-catalogues/heir-to-the-throne (last visited Mar. 17, 2023) ("From 25 June - 2 July, Sotheby's and Roc Nation will celebrate the 25th anniversary of *Reasonable Doubt* with *Heir to the Throne* . . . .").

[128] *See, e.g.*, Roc Nation, *Jay-Z x Sotheby's x Derrick Adams 'Heir to the Throne' 6.25.96 #ReasonableDoubt*, FACEBOOK (June 25, 2021, 9:01 AM), https://www.facebook.com/RocNation/videos/jay-z-x-sothebys-x-derrick-adams-heir-to-the-throne-62596-reasonabledoubt-rocnat/953581532158685/ (posting of artwork by Jay-Z's official agency).

[129] 140 S. Ct. 1498 (2020).

[130] *Id.* at 1505.

[131] *Id.* at 1504. The same is true, incidentally, of privately drafted codes that are later incorporated into, or adopted as, law. *See, e.g.*, Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 796 (2002) ("'[T]he law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright." (citing Banks v. Manchester, 128 U.S. 244 (1888))).

[132] *See Public.Resource.Org*, 140 S. Ct. at 1513 (stating legislative documents have never received copyright protection under U.S. legal framework).

> nonexistent copyrights, and limiting the ability of third parties to access, download and disseminate copies of official versions of state codes.[133]

As the federal agency with jurisdiction over both unfair competition and false and deceptive practices, the FTC is best positioned to investigate and enforce the Supreme Court's holding in *Public.Resource.Org*.[134] Whether it will do so remains to be seen. Until then, some states will continue to claim faux copyright in these works, thereby removing them from public consumption in direct contravention of statutory intent.

B. *Platforms as Private Policymakers*

Monetized noninfringement is made possible by powerful platforms such as YouTube, or mobile apps such as UppstArt, using their market position to override statutory law via private ordering that effectively makes new policy for content owners and content users alike. This Section offers several examples of what this phenomenon looks like in practice.

1. Monetizing Fair Use

At the end of 2016, gamer, vlogger, and YouTube sensation PewDiePie (also known as Felix Kjellberg)[135] received a customized Ruby Play Button from YouTube to commemorate his then-unprecedented 50 million subscribers on the platform.[136] Four years later, Kjellberg took to Instagram to call out YouTube for, in his words, their "bullshit."[137] By this, he refers to YouTube's practice of allowing some content owners to automatically claim the revenues earned on a third party's video by merely alleging—but not necessarily proving—copyright infringement.[138]

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[133] LISL DUNLOP, JOHN O'TOOLE & SAM SHERMAN, SUBMISSION TO FEDERAL TRADE COMMISSION ON BEHALF OF PUBLIC.RESOURCE.ORG 4 (2021), https://law.resource.org/pub/us/case/ftc/Public%20Resource%20FTC%20Submission.pdf [https://perma.cc/8M2X-CXLK].

[134] *See* 15 U.S.C. § 45(a)(1) (providing enforcement authority for FTC).

[135] PewDiePie, YOUTUBE, https://www.youtube.com/user/PewDiePie (last visited Mar. 17, 2023). Kjellberg's rise to fame has been mired in controversy. *See, e.g.*, Rolfe Winkler, Jack Nicas & Ben Fritz, *Disney Severs Ties with YouTube Star PewDiePie After Anti-Semitic Posts*, WALL ST. J. (Feb. 14, 2017, 12:28 AM), https://www.wsj.com/articles/disney-severs-ties-with-youtube-star-pewdiepie-after-anti-semitic-posts-1487034533 (describing some of purported behavior and language that led to dissolution of Kjellberg's sponsorship deal with Disney). If these reports are true, he would seem to be a terrible person. The use of his case as an example here should in no way be interpreted as an endorsement of him or any of his views, apart from his view that YouTube deprived him of revenues earned on a fair use.

[136] Joshua Cohen, *YouTube Sends PewDiePie Custom Ruby Play Button To Commemorate 50 Million Subscribers*, TUBEFILTER (Dec. 19, 2016), https://www.tubefilter.com/2016/12/19/pewdiepie-ruby-play-button-youtube-50-million-subscribers/ [https://perma.cc/5J47-V7TU].

[137] Dodgson, *supra* note 3.

[138] *Id.* (discussing creators' view that "YouTube automatically sides with the claimant and assumes the breach is real" after a video is flagged by its copyright system Content ID).

Many of these automated claims are presumably legitimate. Indeed, YouTube created Content ID specifically to deal with crippling levels of copyright infringement on the site.[139] Exactly how many claims are legitimate is difficult to quantify because YouTube publishes only the percentage of claims that are challenged, a figure which may or may not accurately reflect how many of those claims are legitimate.[140]

The problem with automated claiming, according to some users like Kjellberg, is that it makes the content owner the sole arbiter of whether infringement has occurred.[141] This allows some content owners to claim infringement where there is none, thereby appropriating revenue from noninfringing users; specifically, users who may be engaging in fair use of the content.

In Kjellberg's case, a thirty-minute meme review video posted to YouTube was flagged by Sony Music for infringement of Celine Dion's 1997 hit song "My Heart Will Go On."[142] The claim stemmed from an obvious parody performed in the last few seconds of the video in which Kjellberg and his cohost claim that they are going to cover Dion's song using a recorder and an alpine horn, respectively.[143] In the absence of this forewarning, there is no musical similarity between the two works.[144] Indeed, even with the commentary, it is wholly unclear that the vlog hosts are attempting to cover *any* song, much less the song at issue. Finally, the rendition, such as it were, is inarguably parodic, as any and all recorder-and-alpine horn duets must be. All this is to say that the alleged copying by Kjellberg falls squarely into the realm of fair use, a statutory exception to copyright infringement.[145]

In other words, Sony has a legitimate copyright in Celine Dion's song, but Kjellberg's use of it does not infringe that copyright. In *Sony Corp. v. Universal*

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[139] For more on the history leading up to the development of Content ID, see Geraldine Fabrikant & Saul Hansell, *Viacom Asks YouTube To Remove Clips*, N.Y. TIMES (Feb. 2, 2007), https://www.nytimes.com/2007/02/02/technology/02cnd-tube.html (noting Viacom's demand that YouTube remove over 100,000 infringing videos in 2007 alone).

[140] *Transparency Report: Content Delistings Due to Copyright*, GOOGLE, https://transparencyreport.google.com/copyright/overview (last visited Mar. 17, 2023) (showcasing number of URLs requested to be delisted, specified domains, copyright owners, and reporting organizations for Google, parent company of YouTube).

[141] *See* Dodgson, *supra* note 3.

[142] PewDiePie, *Reviewing Memes With KSI [MEME REVIEW]* 👏👏*#86*, YOUTUBE (Nov. 22, 2020), https://www.youtube.com/watch?v=xl125ZovpAA.

[143] *Id.*

[144] I am not a musicologist, but I do have ears and (most of) my hearing intact. Unfortunately for this Article—but fortunately for all other intents and purposes—the original duet has been replaced online with inoffensive stock music at the YouTube link above. Masochist readers can hear the original "cover" here, however: Dream Team Best Moments, *PewDiePie and KSI Play Celine Dion's My Heart Will Go On*, YOUTUBE (Nov. 22, 2020), https://www.youtube.com/watch?v=6149A89MiFU.

[145] Critisism or comment, including parody, is fair use under § 107.

City Studios, Inc.,[146] the Supreme Court held that anyone "who makes a fair use of the work is not an infringer of the copyright with respect to such use."[147] More recently, the Ninth Circuit in *Lenz v. Universal Music Corp.*[148] corrected a long-standing misapplication of the fair use doctrine as an affirmative defense, confirming instead that fair use is *not* copyright infringement: "[T]he fair use of a copyrighted work is permissible because it is a non-infringing use."[149] Finally, and importantly for these purposes, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*[150] established that "parody has an obvious claim to transformative value" because it provides social benefit by creating new works as it spotlights earlier works.[151] Consequently, the Court held that "parody, like other comment or criticism, may claim fair use under § 107."[152]

As the creator of a parody, Kjellberg is a fair user.[153] As such, he is entitled to his use of Dion's song (if indeed there was one) and also to the advertising revenues earned from the video on his very popular and highly trafficked page.[154] At least, this would be the case under federal copyright law. Under Content ID—YouTube's private arrangement with select copyright owners—however, the result is different.

By signing on to the Content ID agreement, participating content owners eschew copyright law—specifically, the safe harbor provided by § 512(c)—in favor of an automated content claiming program. Participating content owners provide YouTube copies of their catalog to be inputted into the Content ID bot for identification and automated takedown/claiming.[155] In this way, both content owners and YouTube avoid the costly, and questionably effective, notice-and-takedown regime prescribed by the statute.[156] Because most content owners elect

[146] 464 U.S. 417 (1984).

[147] *Id.* at 433.

[148] 801 F.3d 1126 (9th Cir. 2015), *amended and superseded on denial of reh'g*, 815 F.3d 1145 (9th Cir. 2016).

[149] *Id.* at 1132.

[150] 510 U.S. 569 (1994).

[151] *Id.* at 579.

[152] *Id.* In his concurrence, Justice Anthony Kennedy cautions that "[m]ore than arguable parodic content should be required to deem a would be parody a fair use . . . [lest we] weaken the protection of copyright." *Id.* at 599 (Kennedy, J., concurring). While this is true as far as it goes, the conventional understanding of parody as fair use is quite broad in practice.

[153] *See* 17 U.S.C. § 107.

[154] For the avoidance of doubt, federal law gives fair users the right to create and distribute their works. It could be argued that this does not encompass a right to *monetize* those works, such that the mere posting of those works—even where the ad revenues are claimed away—does not violate the letter of the statutory exception. Of course, it might also be argued that it does violate the *spirit* of the exception.

[155] *Content Verification Program*, GOOGLE: YOUTUBE HELP, https://support.google.com/youtube/answer/6005923?hl=en&ref_topic=9282364 [https://perma.cc/NN5T-KRFG] (last visited Mar. 17, 2023).

[156] Readers interested in learning more about the arguments in favor of, and against, § 512's notice-and-takedown procedure can read the Copyright Office's 2020 § 512 Report.

to automatically claim all videos containing their works—infringing or not—users are also opted out of the statute, despite their not being party to the agreement.[157]

According to YouTube, "copyright owners can find material they think is infringing and give YouTube sufficient info to find and remove it."[158] And how are these matches identified? Again, per the platform, "[v]ideos uploaded to YouTube are scanned against a database of audio and visual content that have been submitted to YouTube by copyright owners."[159] Once Content ID identifies a match, the burden shifts. Instead of requiring content owners to conduct a fair use analysis on the potential infringement, as required by federal copyright law, YouTube tells users that "[c]opyright owners are the ones who decide whether other people can reuse their copyright-protected content."[160] Because it ignores fair use, this is not a statement of law, but rather of YouTube policy.

Nonetheless, the platform goes on to advise the user who seeks to dispute a claim to "learn more about public domain and copyright exceptions like fair use or fair dealing" and "[i]f you're not sure what to do, you may want to seek legal advice before you dispute."[161] Given that 99.5% of copyright conflicts arising on YouTube are settled automatically via Content ID—as opposed to through copyright law's statutory notice-and-takedown system—it appears that few users are taking them up on this offer.[162] And why would they? By its own terms, Content ID deems content owners both judge and jury, leaving nothing for a lawyer to do in any case. Instead, the content owners who are party to YouTube's Content ID agreement use it to monetize, among other uses, noninfringing uses of their content.

How have these content owners managed this feat in the face of clear statutory and case law? While the law post-*Lenz* requires a fair use analysis before a video

U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17, at 1 (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf [https://perma.cc/6PDH-V626] (determining that, in midst of online service providers' insistence that safe harbor is "success" and rightsholders' lamenting "whack-a-mole" problem of reappearance of infringing content, system's "intended balance has been tilted askew").

[157] The ability for YouTube to act unilaterally appears to be preserved by YouTube's Terms of Service. *See Terms of Service*, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/static?template=terms [https://perma.cc/DU7X-W6BN] (stating that if YouTube reasonably believes that any "[c]ontent (1) is in breach of [its] Agreement or (2) may cause harm to YouTube, [its] users, or third parties, [YouTube] reserve[s] the right to remove or take down some or all of such Content in [its] discretion").

[158] *Content Verification Program*, *supra* note 155.

[159] *Id.*

[160] *Learn About Content ID Claims*, GOOGLE: YOUTUBE HELP, https://support.google.com/youtube/answer/6013276 [https://perma.cc/KM7H-BGJG] (last visited Mar. 17, 2023).

[161] *Dispute a Content ID Claim*, GOOGLE: YOUTUBE HELP, https://support.google.com/youtube/answer/2797454?hl=en&ref_topic=9282678 [https://perma.cc/43D4-46K7] (last visited Mar. 17, 2023).

[162] Resnikoff, *supra* note 14.

is taken down under § 512,[163] it says nothing about leaving a video up and claiming the revenue around it. This is something that YouTube and its Content ID partners accomplish via contract and terms of service. The law says that fair use is not an infringement, and so requires no payment to the content owner, but YouTube's Content ID says it will make those payments anyway using monies taken from (potentially fair) users.[164] Importantly, Content ID's practice of claiming advertising revenues from fair uses effectively strips the copyright from the rightful owner—in this case, the fair user, who would arguably be granted an (admittedly thin) copyright in their own work. Many of these user-creators have spent years having their videos taken down under the statute, such that they may not miss anything when their ad revenues accrue elsewhere.[165] In this way, the Content ID partners don the invisible robe of copyright to monetize noninfringing uses of their content and rely on users to avert their eyes and play along.

Notably, the existence (and success) of Content ID does more than redistribute small creators' earnings and further disadvantage small content owners. It also demonstrates the complete and utter failure of both fair use in the User-Generated Content ("UGC") context and the § 512 safe harbor. Lawmakers would be well-advised to look to private ordering of this type as a sort of blueprint for amending the statute.

2. Monetizing Public Domain Works

Another popular source of found money for content owners on YouTube is public domain works (i.e., works whose copyright protection has expired, and which everyone is free to use without permission or restriction).[166] Because Content ID takes content owners at their word that the material they submit is rightfully theirs, submitted material that includes noncopyrighted work sometimes slides in under the radar (or, in the case of Content ID, under the complete absence of a radar). Take for example *The Daily Show with Trevor Noah*. A recent episode of the nightly news show included a clip of a NASA shuttle launch that was pulled from the public domain.[167] When Viacom, the owner of *The Daily Show*, submitted the episode in its entirety to Content ID, the public domain shuttle clip was included, uploaded to the bot, and used to

[163] *See* Lenz v. Universal Music Corp., 815 F.3d 1145, 1148 (9th Cir. 2016) (holding "statute requires copyright holders to consider fair use before sending a takedown notification").

[164] *Learn About Content ID Claims*, *supra* note 160 (explaining ability to share revenue).

[165] *See, e.g.*, Resnikoff, *supra* note 14 (noting extensive use of Content ID program).

[166] *Definitions*, COPYRIGHT.GOV, https://www.copyright.gov/help/faq-definitions.html [https://perma.cc/7DJQ-4WYF] (last visited Mar. 17, 2023).

[167] Section 105 of the Copyright Act excludes all works of the U.S. government from copyright protection. 17 U.S.C. § 105(a). Because NASA is a federal agency, its work product is likewise in the public domain upon creation. *See id.*

identify infringing content.[168] When third parties posted their own videos to YouTube that included the public domain shuttle clip—but no portion of *The Daily Show*'s original, copyrighted material—Content ID's bot nonetheless matched them to Viacom's submitted material and claimed those revenues for Viacom.[169] This allows Viacom to monetize use of public domain content under the guise of copyright law, when the law itself aims for precisely the opposite result—namely, the free and open use of such material.

Another common attempt to falsely claim a copyright in public domain works is seen in the reissuance of public domain sheet music—especially church hymnals and other choral music. It is easy enough to slap a copyright symbol on what is effectively a verbatim reprint of a public domain work in hopes of extracting a licensing fee from a hapless choir director.[170] In both of these examples—just two among many—because there is no remedy for falsely claiming copyright in public domain materials, there is little incentive to refrain from trying to make money on something that is free to everyone.[171]

3. Monetizing Subsequent Sales

New mobile apps like Adappcity Inc.'s UppstArt create private contractual obligations that contravene rights granted (or in this case, withheld) by the copyright statute, allowing content owners to monetize uses of their work for which users have no statutory obligation to pay.[172] UppstArt, for example, uses blockchain technology to enable visual artists to track their sold works of art, such that if and when the work is later resold, the artist can collect a so-called "resale royalty."[173] This resale royalty is an automatic, predetermined payment made by a subsequent purchaser to the artist who created the work. This payment is made in addition to whatever price the subsequent purchaser pays to the seller of the work.[174]

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[168] vlogbrothers, *We Have Destroyed Copyright Law*, YOUTUBE (Feb. 1, 2019), https://www.youtube.com/watch?v=BL829Uf2lzI (explaining that because NASA is in public domain, many people may not understand how to dispute copyright infringement claim).

[169] *Id.*

[170] For more on this practice, see Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 242-43 (1996).

[171] 17 U.S.C. § 506(c) comes closest to setting up a penalty for faux copyrights, but its language focused on "a notice" renders it too narrow to reach the examples discussed herein. Prosecutions under this section are also rare. *See* JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 11 (2011) (noting that because public domain works are free for anyone to use, some people attempt to monetize from them by adding false copyright marks).

[172] *UppstArt App Pays Resale Royalties To Emerging Artists with Blockchain Technology*, *supra* note 4.

[173] *Id.* (stating option to receive resale royalty gives artists resale rights that ninety-three countries, besides United States and Canada, afford artists).

[174] *Id.*

When a work is first sold, the app issues a digital certificate of authenticity that records and preserves information about the work's authorship and price history.[175] When the work is later resold, this record goes with it, and the artist is automatically paid a resale royalty.[176] In other words, a subsequent purchaser agrees to terms that include a resale royalty and the app automatically enforces this term.[177]

There are two interesting things at play here. First, § 109 of the Copyright Act establishes what is commonly known as the first sale doctrine.[178] This doctrine allows any lawful owner of a copyrighted work to resell the work without fear of infringing the copyright.[179] It is the first sale doctrine, for example, that allows for the trade in used (physical) books.[180] In *Kirtsaeng v. John Wiley & Sons, Inc.*,[181] the Supreme Court upheld the first sale doctrine, and clarified that it applied to all lawful (physical) copies, wherever made or manufactured.[182]

Second, UppstArt, and apps like it, impose a royalty on a right—in this case, a resale right—that doesn't exist in the Copyright Act.[183] Most recently, the Ninth Circuit struck down California's Resale Royalty Act—legislation that would have allowed artists to collect five percent of all secondary market sales

[175] *Id.* ("When artwork is purchased on UppstArt directly from artists, a digital certificate of authenticity is generated which forever records the artwork's provenance information, price history and image on the blockchain so collectors have an easier time reselling their art in the future and artists have a permanent registry of the art they create.").

[176] *Id.*

[177] *Id.* ("When art is resold, the provenance history of the art is immutably recorded on the blockchain and the artist automatically receives a resale royalty.").

[178] *See* 17 U.S.C. § 109; Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 523 (2013) (describing contours of first sale doctrine as set forth in § 109(a)).

[179] *Kirtsaeng*, 568 U.S. at 523.

[180] *Id.* at 524 (explaining how first sale doctrine allows owners of lawfully transferred goods to dispose of lawfully acquired goods as they wish, thereby enabling existence of used book market).

[181] *Kirtsaeng*, 568 U.S. 519.

[182] *Id.* at 525 ("We hold that the 'first sale' doctrine applies to copies of a copyrighted work lawfully made abroad."). While the first sale doctrine has not technically been held *not* to extend to digital copies, there has also not yet been a scenario in which such legal distribution would not necessarily involve an illegal copy. *See* Capitol Records, LLC v. ReDigi, Inc., 910 F.3d 649, 656 (2d Cir. 2018) (holding, in context of reselling MP3s, that "phonorecord has been reproduced in a manner that violates the Plaintiffs' exclusive control of *reproduction* under § 106(1); [and that] being unlawful reproductions, [the MP3s] are not subject to the resale right established by § 109(a), which applies solely to a 'particular . . . phonorecord . . . lawfully made'" (quoting 17 U.S.C. § 109(a))).

[183] Not for a lack of trying. Previous bills introducing a resale royalty include the American Royalties Too ("ART") Act of 2015, H.R. 1881, 114th Cong. (2015); the Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011); the Visual Artists Rights Act of 1987, H.R. 3221, 100th Cong. (1987); the Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); and the Visual Artists' Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978).

of their work conducted either in California or by a California-based company—as expressly preempted by the Copyright Act.[184]

In other words, UppstArt enables content owners to monetize a right that Congress has made clear it will not recognize, meaning this monetized noninfringement derives entirely from private contract. Put differently, UppstArt creates a private right (in this case, to a subsequent sales royalty), a phenomenon discussed in Section II.C. In so doing, it explicitly contravenes the congressional intent embodied in the first sale doctrine.

C. *Using Market Power To Create Private Rights*

As in the previous Section, the examples of monetized noninfringement and faux copyright in this Section also exploit power disparities, but here the exploitation is perpetrated by individuals working to close perceived gaps in the statutory law in their favor.

1. Terrestrial Performance Royalties

A quintessential example of market power creating private rights is Taylor Swift, recording artist extraordinaire, convincing a multimedia conglomerate to pay her a terrestrial (i.e., radio) performance royalty in exchange for, among other things, a lower digital performance royalty rate.[185] The most striking feature of this arrangement is that the former royalty—for terrestrial performance—does not exist in the Copyright Act. The latter is set by statute, but can be privately contracted around, as happened in this case.[186]

The impetus for the Swift deal was an oft-lamented quirk of copyright law that pays songwriters, but not recording artists, for the same performance. The Copyright Act excludes recording artists from the public performance royalty paid to composers by radio stations who play their songs.[187] As a result, recording artists aren't paid at all when their songs are played on terrestrial radio. Songwriters, in contrast, are paid the statutory rate.

In 2012, Swift privately negotiated a deal with broadcasting conglomerate iHeartMusic (formerly Clear Channel) in which the latter agreed to pay Swift a recording performance royalty for terrestrial spins in exchange for the right to pay a lower-than-statutory rate on digital plays, as well as a certain number of exclusives per year.[188] This arrangement effectively created a new, extrastatutory IP right. To accomplish this, Swift used her superstar market

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[184] Close v. Sotheby's, Inc., 894 F.3d 1061, 1072 (9th Cir. 2018).

[185] Larissa Anderson, *Taylor Swift Caps Her Royalties from Digital Radio*, MARKETPLACE (June 6, 2012), https://www.marketplace.org/2012/06/06/taylor-swift-caps-her-royalties-digital-radio/ [https://perma.cc/W46B-7BZH].

[186] *See* 17 U.S.C. § 114(g).

[187] *Id.* § 114(a) ("The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).").

[188] *See* Anderson, *supra* note 185.

power to create a faux copyright in the terrestrial performance of her sound recordings. Her bargaining chip—accepting a lower digital rate—derived directly from the ability to circumvent the statutory digital royalty. Unfortunately for all recording artists who are not Taylor Swift, their terrestrial performance royalty is still gratis.[189] In other words, private dealmaking that circumvents the statute may benefit the parties involved without benefiting (and at times even to the detriment of) the public from whom those benefits are derived.

As with the Content ID example above, Swift's negotiation of a terrestrial performance royalty for herself exposes a failure of the status quo; in this case, an inequity between the royalties paid to composers and recording artists for public performances. The proposed American Music Fairness Act[190] would rectify this imbalance, putting these two types of creators on an even playing field by requiring radio broadcasters to pay terrestrial royalties to artists and music creators.[191] If passed, this would be a stellar example of private ordering's ability to positively influence lawmaking.

2. Interpolation Credits

The same disparate treatment of songwriters and recording artists vis-à-vis radio performance that motivated Swift has also played a role in the proliferation of so-called interpolation credits in the music industry. Unlike a traditional songwriting credit, an interpolation credit is one offered by the songwriter(s) or other copyright holder to a third-party songwriter who did not participate in the composition process in any meaningful way.[192] Interpolation credits are privately negotiated, and often stem from an ask (read: demand) on the part of a recording artist or their management.

The ask may come before a song is recorded, or after a song has been released. In the case of an anticipatory ask, the recording of the song is often conditioned upon the issuance of an interpolation credit.[193] This is a clear exercise of market power on the part of the recording industry.

Historically, the impetus behind the anticipatory ask was twofold. The first explanation owes not to statutory rules, but to Grammy Awards rules. The

[189] It is possible that if, in the future, Congress considers establishing a statutory digital performance royalty, Swift's rate could be presented as a market rate. Whether it would survive challenge as a superstar rate remains to be seen.

[190] H.R. 4130, 117th Cong. (2021).

[191] Jem Aswad, *Senators Introduce American Music Fairness Act, Which Would Require Radio To Pay Royalties to Musicians*, VARIETY (Sept. 22, 2022, 5:57 AM) [hereinafter Aswad, *American Music Fairness Act*], https://variety.com/2022/music/news/senators-american-music-fairness-act-radio-royalties-1235380037/ [https://perma.cc/7V6V-KBCU].

[192] *See* Elias Leight, *Why You're Hearing More Borrowed Lyrics and Melodies on Pop Radio*, ROLLING STONE (July 5, 2018), https://www.rollingstone.com/music/music-news/why-youre-hearing-more-borrowing-on-pop-radio-627837/ [https://perma.cc/BH89-Q237].

[193] *See id.* (discussing threat of lawsuits if interpolations are not properly credited and reporting increase in crediting interpolations in pop music).

Recording Academy is a nonprofit organization that organizes and hosts the annual Grammy Awards for music.[194] In doing so, the Recording Academy follows a series of rules whose promulgation and amendment are followed closely by the music industry.[195] Among them, the rule for Album of the Year is arguably the most important. Traditionally, that rule required that in order to be nominated for Album of the Year, an artist, feature artist, songwriter, producer, mixer or engineer had to be credited with at least thirty-three percent of an album's total play time.[196] This led to the popular industry mantra "change a word, get a third," referring to the practice of making de minimis, nonsubstantive changes to a composition in exchange for a thirty-three percent share in the composition royalties.[197] In May 2021, the Recording Academy removed the thirty-three percent requirement, allowing for all credited parties to be eligible to be nominated and to win in the Album of the Year category.[198] While it's too early to know for sure, this change is likely to ameliorate at least one of the long-term impetuses behind interpolation credits.

The second impetus stems from the traditionally disparate treatment of performance royalties at radio, under which an interpolation credit serves as a means of leveling up, or raising the recording artist's share of revenues from radio play (to make up for royalties they are not making on terrestrial performance).[199] Despite the rise of streaming—a platform on which, ironically, recording artists fare better than songwriters—radio play remains a substantial source of income today. Performance royalties from radio are far and away the largest portion of income for the average songwriter.[200] A single radio hit can earn a songwriter upwards of half a million dollars.[201] It's no surprise, then, that

[194] *About the Recording Academy*, RECORDING ACAD., https://www.recordingacademy.com/about [https://perma.cc/USD4-K283] (last visited Mar. 17, 2023).

[195] *See* RECORDING ACAD., 65TH GRAMMY AWARDS RULES AND GUIDELINES 2 (2022), https://naras.a.bigcontent.io/v1/static/RulesAndGuidelines_2022 [https://perma.cc/VYK6-L98Y].

[196] *See* Kristin Robinson, *What Does the End of the '33% Rule' Mean for the 2022 Grammys?*, BILLBOARD (Oct. 22, 2021), https://www.billboard.com/music/awards/grammys-33-percent-rule-end-meaning-analysis-9648795/ [https://perma.cc/26UD-UECZ].

[197] David Mellor, *This One Simple Mistake Will Lose You a Third of Your Songwriting Royalties*, AUDIO MASTERCLASS: ADVENTURES IN AUDIO (Mar. 8, 2017), https://www.audiomasterclass.com/blog/this-one-simple-mistake-will-lose-you-a-third-of-your-songwriting-royalties-with-video [https://perma.cc/AR3K-BNU8].

[198] *See* RECORDING ACAD., *supra* note 195, at 38.

[199] *See, e.g.*, Nilay Patel, *Good 4 Who? How Music Copyright Has Gone Too Far*, VERGE (Sept. 15, 2021, 10:00 AM), https://www.theverge.com/22672704/olivia-rodrigo-switched-on-pop-charlie-harding-music-copyright [https://perma.cc/WC72-NM6C] (discussing how negotiating interpolation credits is financial decision).

[200] *See How 10 Major Songwriters Make Big Money*, ROLLING STONE (Jan. 19, 2012), https://www.rollingstone.com/music/music-lists/how-10-major-songwriters-make-big-money-11935/. A privately negotiated sync license with a major film or television program can also prove lucrative but is not typically a reliable source of income.

[201] *See id.* (citing royalty earnings for top hits).

recording artists excluded from those earnings by the Copyright Act are eager to get a piece of the radio pie, even if through the backdoor of interpolation credits.

The practice of anticipatory interpolation credits is not new. One of the most famous accounts is from 1974, when Elvis Presley's management team approached Dolly Parton about recording her then-newly written song "I Will Always Love You."[202] According to Parton, the deal fell through when she refused to agree to Elvis's demand for fifty percent of publishing (despite his having contributed nothing to the composition of the song).[203] Instead, she recorded the song herself (as did Whitney Houston some years later), and the song went on to be a massive hit.[204] Today, the practice of anticipatory interpolation credits has become so widespread (and disfavored, at least by songwriters on the receiving end of the ask) that a group of high-profile songwriters have established a formal petition called The Pact that has now garnered over one thousand signatories disavowing the practice.[205]

Postrelease interpolation credits are a newer phenomenon and are typically issued defensively (i.e., in the shadow of a threatened or pending lawsuit for copyright infringement).[206] Sometimes the arrangement is handled quietly, other times it makes front page news. The recent scuttle involving pop star Olivia Rodrigo's hit song "Good 4 U" is an example of the latter.[207] As is unfortunately all too common today, Rodrigo's breakout success has proven to be a mixed bag. The popularity of her lead single rapidly led fans and observers to note (or deny) a similarity to alt-pop band Paramore's 2007 hit "Misery Business." As the mash-ups proliferated across social media,[208] an interpolation credit was quickly and quietly issued to Paramore's publisher (and owner of the composition

[202] *See* Annabel Nugent, *Dolly Parton 'Cried All Night' over Recording Dispute with Elvis Presley*, INDEPENDENT (Nov. 30, 2020, 8:52 AM), https://www.independent.co.uk/arts-entertainment/music/news/dolly-parton-elvis-presley-i-will-always-love-you-b1763771.html.

[203] *See* Yasmin Garaad, *Dolly Parton Says Elvis Presley Never Recorded 'I Will Always Love You' Because His Manager Demanded Half the Publishing Rights*, INSIDER (Oct. 6, 2021, 5:46 PM), https://www.insider.com/dolly-parton-why-elvis-never-recorded-i-will-always-love-you-royalties-2021-10.

[204] *See* Nugent, *supra* note 202.

[205] *See* @_the_pact, INSTAGRAM (Mar. 30, 2021), https://www.instagram.com/p/CNXnQnnB3E-/?igshid=YmMyMTA2M2Y%3D.

[206] The end result is similar to that reached by an artist who purchases errors and omissions insurance specifically to settle claims for copyright infringement. *See supra* note 67 and accompanying text.

[207] *See* Jem Aswad, *Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4 U,'* VARIETY (Aug. 25, 2021, 7:38 AM) [hereinafter Aswad, *Olivia Rodrigo*], https://variety.com/2021/music/news/olivia-rodrigo-paramore-good-4-u-misery-business-1235048791/ [https://perma.cc/R35E-DKMJ].

[208] *See, e.g.*, Adamusic, *Olivia Rodrigo, Paramore—good 4 ur misery business (Mashup)*, YOUTUBE (May 14, 2021), https://www.youtube.com/watch?v=YB-rn6f--XY.

copyright in the song), Warner Chappell, who was later described by Paramore's lead singer, Hayley Williams, as "wildin rn."[209]

Rightly so. After all, Warner Chappell arguably used the existence of copyright law to secure for itself a revenue stream that it is not owed. An interpolation credit is not an acknowledgement of actual copying (the act prohibited by the Copyright Act), but rather an acknowledgment of "the borrowing of melodies and lyrics to create a new tune that sounds . . . familiar."[210] In other words, interpolation credits are a nod to influences, and to songs with an arguably similar groove or feel. Notably, the Copyright Act explicitly rejects the protection of "feel" and instead protects only fixed expression.[211] Because they monetize the copying of ideas, and not expression, interpolation credits effectively monetize a use that does not amount to copyright infringement.

When Beyoncé removed her interpolation of Kelis' track from her latest album, the threat of copyright infringement was not the real (or at least not the most significant) motivating factor. So what was? Most likely, Kelis's public accusations of "thievery" and disrespect.[212] Often, artists who issue interpolation credits are acting in compliance with industry norms of propriety, and to protect their reputations, not necessarily to avoid litigation. Nonetheless, an extralegal norm of crediting influences can disadvantage smaller artists with fewer resources who simply can't afford to pay off all comers. This may discourage these artists from creating music in the first place, to society's detriment.

III. NORMATIVE IMPLICATIONS

[209] For readers of a certain age, "rn" is shorthand for "right now." *See* Aswad, *Olivia Rodrigo*, *supra* note 207. Paramore were not the only artists to secure interpolation credits from Rodrigo on her debut album. Taylor Swift also took an interpolation credit on "deja vu." *Id.* To his credit, Elvis Costello, another artist from which Rodrigo has allegedly borrowed, has disavowed any claim to an interpolation credit, stating, "This is fine by me. It's how rock & roll works . . . . You take the broken pieces of another thrill and make a brand new toy. That's what I did." Aisha Rimi, *Elvis Costello Had the Best Response to Olivia Rodrigo Plagiarism Claims*, BUSTLE (June 30, 2021), https://www.bustle.com/entertainment/elvis-costello-responds-to-olivia-rodrigo-plagiarism-debate [https://perma.cc/PG44-RPPA].

[210] *What's "Interpolating", and How Did It Force Olivia Rodrigo To Share Deja Vu Writing Credits with Taylor Swift?*, TRIPLE J (July 13, 2021), https://www.abc.net.au/triplej/news/musicnews/olivia-rodrigo-taylor-swift-deja-vu-interpolation/13443342 [https://perma.cc/8M9D-B66X].

[211] *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[212] *See, e.g.*, Sian Cain, *Beyoncé Removes Kelis Interpolation from Song After Milkshake Singer Complains*, GUARDIAN (Aug. 3, 2022, 3:04 AM), https://www.theguardian.com/music/2022/aug/03/beyonce-removes-kelis-interpolation-from-song-after-milkshake-singer-complains [https://perma.cc/VA2J-LJKB].

The examples presented herein are made possible by two simultaneous conditions. The first is an asymmetry in power, information, or both. A platform like YouTube is in an inarguably more powerful position than one of its millions of users. And unlike a user, YouTube knows the terms of its private Content ID agreement with select content owners. Information asymmetry also lends power, for example, to the copyright troll who understands that seeding its own content on torrent sites negates its ability to bring a claim for infringing distribution, while the troll's victim does not.

The second is the existence of exploitable ambiguities in the statute and its application. If fair use worked like a posted speed limit, where both the driver and the traffic officer know whether it is being exceeded, rightsholders would face a greater challenge in claiming the advertising revenue of users, like PewDiePie, because all parties would be equally knowledgeable about whether or not the use at issue is infringing. Likewise, if all parties were equally knowledgeable as to which uses need to be licensed and which don't, filmmakers wouldn't need to employ specialist middlemen to overclear incidental, noninfringing artwork or architecture in the background of every scene.[213] This extra, and often significant, cost is antithetical to copyright's goal of incentivizing creation. Without such additional and needless licensing costs, more small-budget films might be made and distributed, thereby enhancing public welfare.

Acknowledgement of faux copyright and monetized noninfringement serves several important purposes. First, it recognizes the potential for some platforms and powerful individual(s) to set self-serving rules for their respective ecosystems. As a coup for the owners of some sound recordings, interpolation credits reinforce and magnify extant power disparities between composers and recording artists. Likewise, Content ID's deference to content owners further subordinates small creators and users.

Second, whether done in the absence of statutory rights or in misuse of them, monetized noninfringement and faux copyright often result in inefficiency. Content owners who participate in YouTube's Content ID program engage in rent seeking when they earn revenue from advertising run around fair use content without creating anything new. Apps like UppstArt allow the government to claim to protect consumers by passing laws like the first sale doctrine, while in practice allowing circumvention to the detriment of those same consumers.[214]

Finally, both monetized noninfringement and faux copyright may remove from play works that might serve as raw material for other works, introduce disparate treatment of similarly situated creators, or unfairly modify the market

[213] Indeed, 17 U.S.C. § 120 exempts images of architecture, so long as publicly visible, from a claim for copyright infringement. To the extent that a middleman claims to be clearing use of a building, this is just faux copyright.

[214] Section 1201 of the Copyright Act is another good example of this. On its face, the section prohibits users from circumventing antipiracy measures taken by copyright owners. Exceptions to this requirement—largely in the context of disability or library use—render it effectively a rights rebalancing act. 17 U.S.C. § 1201.

for copyrighted works. All of these outcomes contravene copyright's explicit goal of incentivizing creation and work to lower social welfare. This Part discusses these concerns in turn.

A. *Power Disparities and Distributive Concerns*

The current content distribution regime in the U.S. is characterized by a handful of powerful entities on one side—movie studios, record labels, social media platforms—and a dispersed, largely anonymous, and innumerable group of users and consumers on the other. At the same time, the market for content creation is widely considered to be a winner-take-all market.[215] This means that in any given content market, there tends to be a handful of superstars who enjoy incredible commercial success, while everyone else toils in relative obscurity.[216] This leaves powerful content owners, platforms, and artists to successfully negotiate terms and conditions that benefit them to the detriment of differently situated, less powerful parties. Many contemporary copyright analyses ignore these distributive concerns, to their peril.[217]

The potential concern here lies not with platforms and content owners engaging in private ordering—particularly where the parties are able to reach a more efficient arrangement than that afforded under copyright law—but rather with the resulting impact of those private deals on comparatively less powerful and less knowledgeable third parties who were not party to the agreement in question. Users, for example, are not a party to YouTube's Content ID deal. Neither are smaller, less powerful content creators. Yet the impacts of Content ID are felt by, and act directly upon, these parties, as demonstrated by a recent lawsuit filed against YouTube by a collection of smaller content creators alleging that by denying them access to Content ID, they are left with "vastly

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[215] *See* Kristelia A. García & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351, 386-87 (2019).

[216] For further discussion of the winner-take-all market phenomenon and its inefficiencies, see *id.*

[217] A notable exception is Molly Shaffer Van Houweling's work on the topic. She makes the case for copyright's distributive function, citing, among other things, its subsidization of would-be creators; its limiting doctrines, such as fair use, that allow creators with fewer resources to build upon extant works; and the traditionally infrequent persecution of creators too poor to pay for the use of copyrighted works. *See generally* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005). Other scholars have also discussed the distributive value of copyright. *See, e.g.*, Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, *in* EGIRLS, ECITIZENS 385, 401-02 (Jane Bailey & Valerie Steeves eds., 2015) (discussing transformative impact of fair use on fanwork creators, especially young women); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 564 (2016) (analyzing impact of copyright system on distribution of wealth in our society); Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice*, 53 HOUS. L. REV. 459, 483-84 (2015) (discussing how digital information technology can increase participation of marginalized groups in IP communities).

inferior and time-consuming manual means" of dealing with infringing content.[218] By "vastly inferior . . . means," they refer, of course, to the Copyright's Act § 512 safe harbor.[219]

As with most contracts, the terms of privately negotiated deals like Content ID aren't publicly available. Instead, our understanding about how these deals work must be gathered from publicly available reporting, and by reviewing terms of service that we presume to reflect at least portions of the private agreement.[220] This lack of transparency makes private deals difficult to challenge, even when they exhibit observable negative impact on third parties.

And because these deals often circumvent the statute—like Content ID does with § 512—we also lose the accountability that a platform would otherwise be held to in accordance with the terms and requirements of the relevant statutory section. For example, when a user's YouTube post is claimed by a content owner under Content ID, as opposed to being taken down under § 512(c), the user is not protected by the statutory safe harbor's safeguards. YouTube's terms of service may allow a user to protest a Content ID claim, but the logistics behind what—if anything—happens then are both unknown and unknowable, at least to the user and the public at large. What private ordering may gain comparatively powerful platforms, content owners, and creators in terms of revenue, it in turn costs users, consumers, and smaller entities in terms of transparency and accountability.[221]

Even in cases in which participation is ostensibly voluntary, asymmetrical knowledge of the law casts doubt on the full and open exercise of volition. Take for example UppstArt. We might say that if a buyer of a painting wants to pay a resale royalty, we should let them. Before ascribing to this view, I propose that we first need to know whether the buyer understands the payment of the resale royalty to be voluntary or not. The same inquiry applies, for example, to a buyer of an NFT on an artwork that the NFT seller does not own. Is the buyer aware of the fact that the NFT seller has no rights in the underlying work, and that therefore no rights to it can be conveyed? In a meaningful number of instances, the answer is no.[222]

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[218] First Amended Class Action Complaint at 4, Schneider v. YouTube, LLC, No. 20-CV-04423 (N.D. Cal. Nov. 17, 2021); *see* Bill Donahue, *YouTube Can't Shake Class Action Claiming Indies Get 'Vastly Inferior' Anti-Piracy Tools*, BILLBOARD (Aug. 3, 2022), https://www.billboard.com/pro/youtube-class-action-anti-piracy-tools-major-labels/ (discussing judge's denial of YouTube's motion to dismiss).

[219] First Amended Class Action Complaint, *supra* note 218, at 4; *see also* 17 U.S.C. § 512.

[220] *See, e.g.*, *Terms of Service*, *supra* note 157.

[221] Unfortunately, the power disparities revealed herein are not limited to these examples; indeed, they reflect a broader breakdown in civility. *See generally* JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE (2022) (writing about, among other themes, coercion and incumbency bias in intellectual property).

[222] The Twittersphere is rife with exasperated NFT purchasers revealing various degrees of miscomprehension as to what they actually own. *See, e.g.*, Adam Hollander

B. *Disincentivization*

In addition to creating a lack of transparency, accountability, and meaningful recourse, comparatively powerful and knowledgeable platforms, content owners, and creators may also promulgate rules whose effects conflict with congressional and statutory intent.[223] As the examples in Part II demonstrate, parties' ability to set their own rules—whether through private ordering, terms of service, or both—can lead to dramatically different outcomes than those intended by Congress and anticipated by the Copyright Act. For example, § 107's fair use exception to infringement is effectively neutralized by the combination of Content ID's private terms and YouTube's public-facing terms of service.[224] Likewise, UppstArt's resale-royalty app overrides § 109's first sale doctrine when it comes to pictorial, graphic, and sculptural works.[225]

According to the incentive theory of copyright, the law can encourage the production of creative works for public consumption by offering protections designed to result in financial rewards for creators.[226] Many of the examples of faux copyright and monetized noninfringement discussed herein work precisely against this goal. Far from being financially rewarded for his creativity, PewDiePie had his advertising revenues usurped by an opaque arrangement to which he was not a party.[227] Likewise, Elvis Presley's demand for a cut of Dolly Parton's songwriting royalties was never intended to reward her creative output, nor would her acquiescence have incentivized him to go forth and write a song.[228] Why create when you can freeride?

C. *Efficiency Costs*

Many of the most popular platforms today operate as two-sided (or even multisided) markets. The quintessential example of a two-sided market is the credit card market. On one side, credit card companies interface with credit card holders who apply for, and present, the company's cards to retailers. On the other side, these same companies interface with merchants, with whom they negotiate a fee and terms for accepting payment from the company's card holders. Many

(@HollanderAdam), TWITTER (Jan. 20, 2022, 2:30 PM), https://twitter.com/HollanderAdam/status/1484246971208642577 [https://perma.cc/VN45-HRBY] (lamenting that others can "right-click-save" image associated with his NFT, as if NFT gave him ownership of image itself; it does not).

[223] *See, e.g.*, *UppstArt App Pays Resale Royalties to Emerging Artists with Blockchain Technology*, *supra* note 4 (noting UppstArt creates new contract obligations for users that contravene copyrights granted or withheld from the statute).

[224] *See supra* Section II.B (detailing YouTube's Content ID automated claim system and its flaws).

[225] *See supra* Section II.B.3.

[226] *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[227] *See* Dodgson, *supra* note 3.

[228] *See* Nugent, *supra* note 202.

of these credit card companies offer their services for free to one side (usually the cardholders), and for a fee to the other side (usually the merchants).[229]

This same model is prevalent among platforms that utilize copyrighted content. While a user can purchase a monthly streaming subscription from a platform like Spotify, they can also opt for a free, ad-supported subscription in which they agree to be served advertisements in lieu of payment.[230] The latter is often referred to as a "freemium" (as opposed to paid) tier.[231] Regardless of a user's subscription tier—paid or freemium—Spotify, YouTube, and the like act as two-sided markets, collecting subscription payments (or ad revenues) from users on one side, and paying out royalties to content owners on the other side.

1. Skew

Notably, these two sides—users and content owners—have both disparate and divergent interests. Copyright law entitles the latter to payment for the use of its content. In order to operate legally, YouTube, for example, is required to pay two separate royalties on every song streamed.[232] The first is a statutory performance rate paid to the owners of compositions under § 115.[233] The second is a negotiated digital streaming rate paid to the owners of sound recordings.[234]

The law does not establish any comparable obligations owed by YouTube to its users. In addition, the number of YouTube users—210 million in the U.S. market alone[235]—is significantly larger than the number of major content owners—a mere handful in each of film, television, and music. This makes it

[229] *See* J. Gregory Sidak & Robert D. Willig, *Two-Sided Market Definition and Competitive Effects for Credit Cards After* United States v. American Express, 1 CRITERION J. ON INNOVATION 1301, 1303-05 (2016). Of course, credit card services are only free of charge to card holders who pay off their balances each month; otherwise, those balances incur interest. And some credit cards—typically those with more elaborate reward programs—charge card holders an annual fee regardless of balance. Amy Fontinelle, *Credit Cards: Should You Ever Pay an Annual Fee?*, INVESTOPEDIA (Feb. 27, 2023), https://www.investopedia.com/financial-edge/0711/credit-cards-should-you-ever-pay-an-annual-fee.aspx [https://perma.cc/ZZ3M-9L3A].

[230] In April 2019, Spotify reported 217 million active users worldwide, over 100 million of which were paid subscribers. *See* Jon Porter, *Spotify Is First to 100 Million Paid Subscribers*, VERGE (Apr. 29, 2019, 7:39 AM), https://www.theverge.com/2019/4/29/18522297/spotify-100-million-users-apple-music-podcasting-free-users-advertising-voice-speakers [https://perma.cc/G8FL-H95Z].

[231] *See, e.g.*, Kate Swanson, *A Case Study on Spotify: Exploring Perceptions of the Music Streaming Service*, J. MUSIC & ENT. INDUS. EDUCATORS ASS'N, 2013, at 207, 209 ("By offering a 'freemium' option, Spotify hopes to encourage free users to convert to paying users.").

[232] *See* Glenn Peoples, *Who Gets Paid for a Stream?*, BILLBOARD (Feb. 24, 2022), https://www.billboard.com/pro/music-streaming-royalty-payments-explained-song-profits/.

[233] 17 U.S.C. § 115.

[234] *See* Peoples, *supra* note 232.

[235] L. Ceci, *YouTube Viewers in the United States 2018 to 2022*, STATISTA (Aug. 23, 2021), https://www.statista.com/statistics/469152/number-youtube-viewers-united-states [https://perma.cc/A34B-X4HC].

much easier for the latter to organize for collective action. As a result, streaming platforms-as-legislators exhibit policy skew toward the interests of content owners. Content ID, with its blatant disregard for fair use—a policy that clearly favors content owners over content users—is a prime example of this.[236]

This is not to say that users have no influence, only that they tend to have less than their market counterparts, the content owners. One example of user impact on Content ID comes from the video game industry. Video game developers complained vociferously about Content ID's former policy of automatically redirecting all ad revenues to the content owner whose content was identified by the bot.[237] This meant that even users who successfully challenged the claim would lose ad shares in the intervening time period.[238] As a result of user complaints, YouTube began holding contested ad revenue stemming from video game content in escrow until a dispute is settled.[239] These user victories, however, are few and far between.[240]

2. Rent Seeking

Another concern raised by monetized noninfringement practices are their propensity to amount to nothing more than rent seeking. The classic definition of "[r]ent seeking is the socially costly pursuit of wealth transfers."[241] Instead of increasing productivity or output—conventionally efficient outcomes from an economic perspective—rent seeking is merely redistribution of extant wealth.[242]

And this is precisely what monetizing noninfringement does. Content ID, for example, allows content owners to claim royalties on noninfringing content posted by third parties to YouTube. Those same content owners are already

[236] *See supra* Section II.B.1.

[237] *See* Titlow, *supra* note 45.

[238] *See id.*

[239] *See id.*

[240] *See* Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*, ELEC. FRONTIER FOUND. (Dec. 10, 2020), https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online [https://perma.cc/VB8F-SMLT] ("Content ID is so unforgiving, so punishing, so byzantine that it results in a system where those who make videos—'YouTubers'—are so dependent on YouTube for audience access, and promotion by its suggestion algorithm, that they will avoid any action which would put their account in jeopardy.").

[241] Robert D. Tollison, *Rent Seeking*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 506, 506 (Dennis C. Mueller ed., 1997).

[242] *See, e.g.*, Jason Gordon, *Rent Seeking (Economics)—Explained*, BUS. PROFESSOR (Apr. 25, 2022), https://thebusinessprofessor.com/en_US/economic-analysis-monetary-policy/rent-seeking-definition [https://perma.cc/4JGW-JPSP] (defining rent seeking as aiming "to increase the existing wealths [sic] share but without creating a new one"). To be clear, while all rent seeking amounts to mere wealth redistribution, it does not necessarily follow that all rent seeking is socially suboptimal. We'd need to know, for example, how much UGC YouTube's users would produce without Content ID in order to compare that to the amount produced in a Content ID world.

entitled to, and receiving, the prescribed statutory and negotiated royalties.[243] The private Content ID agreement simply affords content owners an additional revenue stream without requiring them to produce anything new. Instead, content owners take the ad revenues arguably owed to the user engaged in fair use. This is not new wealth or output; it's just redistribution of existing advertising revenues.

The conventional harm from rent seeking lies in the diversion of resources away from productive activity—say, producing and distributing new music—to purely redistributive activity—in this example, to cornering all of the ad revenues on YouTube. Nothing of value is produced, for example, when someone settles with a copyright troll or buys an NFT on a digital artwork.[244] In addition, from an economic perspective, most of the examples of monetized noninfringement that we've seen are not Pareto-optimal; that is, they do not improve the state of the world without making someone (nearly always the less powerful or knowledgeable party) worse off.

D. *Copyright Conundrums*

The existence of faux copyright and monetized noninfringement highlights the peculiar nature of copyright law and its propensity for abuse and misuse in at least three broad areas. First, it demonstrates that much of copyright doctrine is sufficiently complex and uncertain in application, such that sweeping and vague references to copyright can be used to intimidate some users and creators.[245] Second, it lends support to the claim that the scope of copyright's one-size-fits-all protection is poorly calibrated for some types of works and some types of uses.[246] If it weren't, we wouldn't see so much private ordering in the space.[247] In addition, the ability of private parties to effectively override statutory protections allows lawmakers to engage in performative legislation. Finally, the phenomena of faux copyright and monetized noninfringement offer yet another example of the challenges presented by the Berne Convention's[248] prohibition on formalities. This Section discusses these implications in turn.

1. Uncertainty

[243] *See* Titlow, *supra* note 45.

[244] It might be argued, however, that for someone who values the status that an NFT relays, they are better off owning it than not. Likewise, the foolish emperor probably felt good about owning a golden robe until it was made obvious he owned nothing at all.

[245] *See* Trendacosta, *supra* note 240.

[246] *See* Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361, 1365 (2009).

[247] *See id.* at 1393.

[248] Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 1161 U.N.T.S. 3, 35 (as revised at Paris on July 24, 1971, and amended in 1979).

Discussions about uncertainty in copyright tend to be both vague and disapproving.[249] This Article is also critical of a particular type of uncertainty, while recognizing that there exist other types of uncertainty that may not be problematic.[250] Specifically, the concern here is with uncertainty borne from doctrinal complexity and inconsistent statutory application.

Copyright law is rife with objectively important doctrines, like fair use, whose abject subjectivity in application can render some case law more confounding than clarifying.[251] The Second Circuit's recent opinion in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,[252] a case involving the famous artist's use of one the defendant's Prince photographs, is illustrative of this concern. In that case, the Second Circuit sided with the appellant in finding the secondary work to not be transformative, despite acknowledging its different character, new expression, and new aesthetic. In doing so, the circuit court reversed nearly a decade of its own case law on the fair use doctrine's first factor—that is, the factor that considers the "purpose and character" of the use, commonly referred to as "transformativeness."[253]

The Second Circuit's 2013 decision in *Cariou v. Prince*[254] has been called the "high-water mark of [the] court's recognition of transformative works."[255] In *Cariou*, the Second Circuit compared photographer Cariou's photographs with Prince's artworks "side-by-side" and concluded that all but five of the works at issue "ha[d] a different character [and] . . . a new expression, and employ[ed] new aesthetics with [distinct] creative and communicative results," and were therefore transformative as a matter of law.[256] Based upon this holding, the district court in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*[257] understandably held that a secondary work is necessarily transformative as a matter of law "[i]f 'looking at the [works] side-by-side,' the secondary work 'ha[s] a different character, . . . a new expression, and employ[s] new aesthetics with [distinct] creative and communicative results.'"[258]

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[249] *See, e.g.*, Depoorter, *Uncertainty*, *supra* note 18, at 1862 (urging, in context of adapting copyright rules to changes in technology, initiatives that "undertake to reduce uncertainty and delay").

[250] *See, e.g.*, García, *Penalty Defaults*, *supra* note 19, at 1163-82 (discussing role for bounded uncertainty combined with penalty default in increasing efficiency).

[251] *Cf.* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009) (describing fair use cases as falling into "policy-relevant clusters" that make case law "more coherent and more predictable than many commentators seem to believe").

[252] 11 F.4th 26, 54 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

[253] *Id.* at 39.

[254] 714 F.3d 694 (2d Cir. 2013).

[255] TCA Television Corp. v. McCollum, 839 F.3d 168, 181 (2d Cir. 2016).

[256] *Cariou*, 714 F.3d at 707-08.

[257] 382 F. Supp. 3d 312 (S.D.N.Y. 2019), *rev'd in part, vacated in part*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

[258] *Id.* at 325-26 (quoting *Cariou*, 714 F.3d at 707-08).

According to the Second Circuit in *Andy Warhol*, this reading "stretches the decision too far."[259] Instead, the court maintains that although "new expression," "new aesthetics," and "different context" are "the *sine qua non* of transformativeness . . . [i]t does not follow . . . that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative."[260] It cites, by way of example, the five works in *Cariou* that were determined to add a "new aesthetic" but about which the court was nonetheless unable to "confidently . . . make a determination about their transformative nature as a matter of law."[261]

Unfortunately for creators and users everywhere, the Second Circuit stops its analysis there, offering no insight, clarification, or explanation as to what precisely made the court less confident about those five works.[262] Despite valiant efforts on the part of academics and other sympathetic organizations,[263] whether or not something qualifies as fair use remains an impenetrable mystery for many creators.[264] This type of uncertainty leads many YouTube creators, for example, to refrain from challenging a Content ID claim.[265]

Fair use isn't the only area in which copyright doctrine is unclear. The Supreme Court's convoluted decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*[266] effectively upended decades of established case law that held that when it comes to pictorial, graphic, or sculptural ("PGS") works, features that might be more appropriately protected by a design or utility patent should be filtered out and not subject to copyright protection.[267] This concept, known as the "useful articles" doctrine, was established by the Supreme Court in 1954,[268] and

[259] *Andy Warhol*, 11 F.4th at 38.

[260] *Id.* at 38-39.

[261] *Id.* at 39 (quoting *Cariou*, 714 F.3d at 711 (omission in original)).

[262] *See id.* Perhaps the Supreme Court will enlighten us when it takes up the case during the October 2022 session. I am not hopeful, least of all because the matter strikes me as a contract dispute.

[263] *See, e.g.*, *Best Practices in Fair Use*, AM. UNIV. WASH. COLL. OF L.: PROGRAM ON INFO. JUST. & INTELL. PROP., https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/best-practices-in-fair-use/ [https://perma.cc/5W22-DUNG] (last visited Mar. 17, 2023) (featuring guides on fair use for variety of creators); *see also* Linda Joy Kattwinkel, *Fair Use or Infringement?*, GRAPHIC ARTISTS GUILD (Jan. 24, 2004), https://graphicartistsguild.org/fair-use-or-infringement/ [https://perma.cc/FUH6-96MP].

[264] A brief perusal of results for the search "fair use youtube" on Reddit offers a glimpse into the fascinating world of myth and misinformation in this space. *See, e.g.*, *Can Someone Explain FAIR USE*, Post to *r/youtube*, REDDIT (July 16, 2019, 6:17 PM), https://www.reddit.com/r/youtube/comments/ce3yqo/can_someone_explain_fair_use/ [https://perma.cc/6T5V-25MV]. Spoiler: they cannot.

[265] *See* Trendacosta, *supra* note 240 (noting YouTube creators rarely challenge Content ID due to confusing policy and fear of legal action).

[266] 580 U.S. 405 (2017).

[267] *Id.* at 409.

[268] *See* Mazer v. Stein, 347 U.S. 201, 214-17 (1954).

incorporated into the statute with the Copyright Act, which defines PGS works as including

> works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.[269]

In adopting a test for separability that first asks whether the decision maker can identify a two- or three-dimensional element with PGS qualities; and second, whether those features can exist apart from the utilitarian elements of the work, whether or not such separation leaves behind a useful article, the Supreme Court has arguably "vitiate[d] the distinction that Congress established between useful and non-useful articles."[270] While it remains to be seen what impact this decision will ultimately have on the doctrine, the uncertainty has opened up another easy venue for claiming faux copyrights.

In addition to uncertainty in the case law, there is also uncertainty when it comes to statutory application. For example, a number of statutory sections allow for circumvention, but the lack of transparency in private ordering prevents third parties from knowing when and how this right to circumvent has been exercised. In the private deal between Swift and Clear Channel discussed in Section II.C.1, for example, the parties circumvented § 114 of the Copyright Act—the public performance right for sound recordings—in order to establish a new, nonstatutory terrestrial performance right.[271] This could allow Clear Channel, for example, to pressure third parties to accept a lower-than-statutory digital performance right—if it's good enough for Swift, after all—given that third parties might not understand that she gained an entire additional revenue stream in exchange for it.

On the one hand, statutory circumvention can afford much-needed flexibility in an otherwise one-size-fits-all statute and allows for potential efficiency gains via private ordering. For example, private ordering may allow for a negotiated rate tailored specifically to the content and use in question. This may better align incentives between the parties. And, unlike a statutory payment, a privately negotiated deal can be readily amended in response to technological developments and changing consumer preferences in real time. This may allow for greater experimentation in business models, potentially resulting in better products and services for users. In addition, private dealmaking takes market

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[269] 17 U.S.C. § 101.

[270] Christopher Buccafusco & Mark A. Lemley, *Functionality Screens*, 103 VA. L. REV. 1293, 1334 (2017).

[271] *See* 17 U.S.C. § 114 (dictating scope of exclusive rights for sound recordings); *see also supra* Section II.C.1.

valuations into account in a way that statutory payments cannot.[272] This may result in better pricing for consumers as well as better alignment of licensors' and licensees' incentives.[273]

On the other hand, statutory circumvention may lead to uncertainty for third parties as to whether a particular action is governed by the statute or whether it has been overridden by private agreement. In addition to the Swift example above, this brand of uncertainty might allow, for example, a user who receives a Content ID claim to mistake it for a statutory copyright strike (which it is not). This is because although Content ID effectively circumvents the § 512 safe harbor vis-à-vis content owners and YouTube, third party users might mistakenly understand themselves to operate under the statutory safe harbor that applies to all of the non-Content ID content on the same platform. In addition to having no way of knowing which content does and does not fall under the Content ID deal, third-party users are unlikely to appreciate the nuanced difference between a Content ID claim and a statutory copyright takedown, much less the divergent consequences of each.[274] In other words, statutory complexity in copyright brings both benefits and costs, and lawmakers could do more to get the balance right.

2. Tailoring

Like some other areas of intellectual property, copyright is largely a one-size-fits-all regime. This means that where it establishes a statutory royalty, for example, it does so for all relevant content, all relevant uses, and all relevant users across the board. The inability to tailor a license or rate to a particular use or to a particular user has long been a point of contention.[275] By allowing parties to opt out, or to work in the shadow, of the statute in various ways, monetized noninfringement and faux copyright lend support for the view that the scope of copyright's one-size-fits-all protection is poorly calibrated for some types of works and some types of uses such that some parties opt to operate outside of it.

The concern presented here is that not all parties are equally positioned to opt out of the statute. Generally, smaller parties with fewer resources do not enjoy the requisite flexibility or market power to engage in private ordering. In this way, tailoring-for-the-privileged—at least as represented by practices like faux copyright and monetized noninfringement—serves only to add to the extant inequalities in copyright.

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[272] *See* García, *Penalty Defaults*, *supra* note 19, at 1133 (explaining possible efficiency improvements achieved via private ordering).

[273] For more on the possible efficiency improvements achieved via private ordering, see *id.* at 1133-56.

[274] *See, e.g.*, Trendacosta, *supra* note 240 (noting confusion among YouTube users regarding Content ID claims).

[275] *See* Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231, 233 (2014) (discussing one-size-fits-all principle); Carroll, *supra* note 246, at 1366 (proposing, among other things, new framework for tailoring copyrights).

But might some of the concessions secured by powerful entities trickle down to less powerful ones? Not necessarily. Swift's deal with Clear Channel did not open the door to terrestrial performance rights for a single other artist, much less for artists as a whole. Paramore's ability to snag an interpolation credit from Rodrigo does not increase the odds of doing so for a lesser-known artist without Paramore's reputational clout. Even YouTube explicitly excludes smaller content creators from utilizing its Content ID bot.[276]

This is more than a fairness critique. Prior work has shown that inequality in copyright affects not only smaller, less powerful firms, but also consumers and society at large.[277] For example, YouTube currently enjoys the lion's share of all music-streaming consumers,[278] yet it pays the least of all the music streaming services.[279] This means less money for creators and intermediaries, in direct contravention of copyright's incentivization goals.[280] This reduction in income could have a significant, lasting impact on creative output to the detriment of consumers.

There is also a very real risk that if and when Congress decides to replace the § 512 safe harbor with a statutory license, for example, the only "market rate" it will have to look to—YouTube's—may be misrepresentative.[281] Repeat

[276] *See Terms of Service*, *supra* note 157.

[277] *See, e.g.*, Kristelia A. García, *Private Copyright Reform*, 20 MICH. TELECOMMS. & TECH. L. REV. 1, 7 (2013) (observing how emerging phenomenon of "private copyright reform" circumvents legislative intent and raises "serious distributive justice concerns by allowing for the reduction, and even circumvention, of royalties" to nonparties, resulting in negative impact on creative output and exacerbating market inequalities).

[278] *See, e.g.*, Hugh McIntyre, *Report: YouTube Is the Most Popular Site for On-Demand Music Streaming*, FORBES (Sept. 27, 2017, 8:45 AM), https://www.forbes.com/sites/hughmcintyre/2017/09/27/the-numbers-prove-it-the-world-is-listening-to-the-music-it-loves-on-youtube/?sh=2348f24d1614 ("[I]t is clear that despite huge advancements in the on-demand streaming industry, YouTube is still the preferred choice for millions (or billions) of people, and that lead isn't going to disappear anytime soon.").

[279] *See, e.g.*, *Updated! Streaming Price Bible w/ 2016 Rates: Spotify, Apple Music, YouTube, Tidal, Amazon, Pandora, Etc.*, TRICHORDIST (Jan. 16, 2017), https://thetrichordist.com/2017/01/16/updated-streaming-price-bible-w-2016-rates-spotify-apple-music-youtube-tidal-amazon-pandora-etc/ [https://perma.cc/7RUM-KTS6] ("[YouTube] generate[s] over 21% of all licensed audio streams, but less than 4% of revenue! By comparison Apple Music generates 7% of all streams and 13% of revenue."). See García, *Copyright Arbitrage*, *supra* note 20, at 233-37, for more on how YouTube came to enjoy this position.

[280] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[281] There is precedent for this possibility. In 2012, for example, digital music service DMX presented to the CRB the rate it had reached privately with music publisher Sony/ATV in 2007, and the CRB adopted this rate. What DMX failed to disclose, however, was a $2.7 million advance that accompanied the rate it reached with Sony/ATV. *See* Brief and Special Appendix for Petitioner-Appellant at 20-21, Broad. Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012) (No. 10-3429-cv) ("When DMX solicited direct licenses from smaller music publishers, it never told them about the advances it had committed to pay Sony. It nonetheless sought to induce publishers to enter into direct licenses that did not include those substantial

instances of private ordering among only large, well-funded industry players could also place smaller companies and prospective new entrants at a marked disadvantage by raising the barriers to entry, and by reducing consumer choice and access. Without competition from new entrants, the potential for collusive behavior among a handful of powerful players is increased, again to the detriment of smaller companies, users, and intermediaries.[282]

3. Shirking

An overarching concern presented by the uncertainty and tailoring inequities wrought by monetized noninfringement is that both arguably allow elected lawmakers to shirk—that is, to look like they're doing something when they're really not or to pass off their lawmaking responsibilities to private citizens whose preferences may not be representative of society at large.[283] Any regime that leaves some (but not all) rulemaking or enforcement to private parties—as faux copyright and monetized noninfringement do—allows Congress to pass laws that may, on their face, appease powerful parties and lobbyists, but that in practice are far less effective due to the inherent variability of private enforcement and the availability of workarounds. In their work on "big waiver," David Barron and Todd Rakoff note that this "shared enforcement" between public entities and private parties allows politicians to shirk.[284]

The literature has focused primarily on copyright's tendency to outsource enforcement to platforms via secondary liability.[285] An equally concerning proposition exemplified by the existence of monetized noninfringement is the outsourcing of copyright infringement enforcement to rightsholders themselves.[286] The replacement of the state with an individual platform or rightsholder as policymaker is concerning because the individual platform or rightsholder's interests may not reflect those of Congress. In other words, Congress's abdication of its enforcement authority allows private objectives to supplant public ones.[287] For example, automated claims effected under Content

payments by assuring them they would be treated the same as a sophisticated major publisher who had accepted the same deal." (emphasis removed) (citations omitted)); *see also Broad. Music*, 683 F.3d at 35 (affirming lower court's adoption of DMX's proposed rate over that of ASCAP and Broadcast Music, Inc.).

[282] For more on tacit collusion in the copyright industries, see Kristelia A. García, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 183 (2016) [hereinafter García, *Facilitating*] (suggesting parallel pricing and tacit collusion as two results of the industry's current oligopolistic structure).

[283] David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 310 (2013).

[284] *Id.*

[285] *See, e.g.*, Blevins, *supra* note 24, at 1824 ("[U]ncertainty 'outsources' enforcement costs to Internet platforms.").

[286] *See, e.g.*, García, *Monetizing*, *supra* note 30, at 330-31.

[287] Sarah L. Stafford, *Private Policing of Environmental Performance: Does It Further Public Goals?*, 39 B.C. ENV'T AFFS. L. REV. 73, 79-80 (2012) ("[P]rivate suits tend to act as a substitute for public enforcement rather than a complement. . . . To the extent that private

ID are more likely a substitute—and a poor one, at that—than a complement, to a copyright strike issued under § 512 of the Copyright Act.

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

> lacks sufficient measures to ensure that online intermediaries are held accountable for their actions, failures, and wrongdoings. . . . Algorithmic enforcement mechanisms are non-transparent in the way they exercise discretion over determining copyright infringement and fair use; they afford insufficient opportunities to challenge the decisions they make while failing to adequately secure due process; and they curtail the possibility of correcting errors in individual determinations of copyright infringement by impeding the opportunity for public oversight.[288]

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

> The defining feature of DMCA-plus arrangements is not that those choices are good or bad, but rather that they are choices made by rightsholders and platforms—not users, or Congress, or even courts. Not only are these choices private, they are often obscure, such that it is difficult to determine from the outside even what choices have been made.[289]

The practices described herein differ significantly from, for example, a Creative Commons license, in that the latter is explicit and preannounced with prescribed terms and limits.[290] The examples of faux copyright and monetized noninfringement described herein may be explicit, or may be implicit. They may be preannounced—like Boomy's claim of copyright in AI-created works[291]—or they may take place behind the scenes, or on a case-by-case basis—such as Content ID claims.[292] Whenever Congress leaves enforcement authority to (invariably powerful) rightsholders, there is the potential for misalignment of the public-private interest.

4. Formalities

Finally, the phenomena of monetized noninfringement and faux copyright offer yet another example of a difficulty owing, at least in part, to the Berne Convention's prohibition on formalities. The Berne Convention, a multilateral

suits take the place of public enforcement in certain sectors or geographic areas, the ability for private objectives to supplant public objectives is magnified.").

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

[289] Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 559 (2017) (footnote omitted).

[290] *About the Licenses*, CREATIVE COMMONS, https://creativecommons.org/licenses/ [https://perma.cc/V2EE-YMKW] (last visited Mar. 17, 2023).

[291] *See supra* Section II.A.3.a.

[292] *See supra* Section II.B.1.

agreement on copyright principles, was established in 1886.[293] The United States did not accede to the Convention, however, until 1989.[294] This reticence owes, in large part, to the Convention's prohibition on formalities that affect the "enjoyment and exercise" of copyright.[295]

Specifically, the "no formalities" rule promulgated under Berne means that in the United States, a work meeting the subject matter requirements of § 102 of the Copyright Act—that the work be original, fixed in a tangible medium, and perceivable for more than a transient duration[296]—is considered copyrighted upon creation. Unlike other areas of IP, copyright law encourages, but does not require, registration.[297] This can be problematic for a user trying to determine if the thing they're being asked to pay for is, indeed, a thing at all.

Take Boomy, for example. In a world in which the United States was not bound by the Berne Convention's prohibition on formalities, it might require registration in order to procure copyright protection. This would mean that a song created by a user using Boomy's AI would not be copyrighted unless and until a registration was applied for and approved by the Copyright Office. That application would require an assertion of ownership. Because an AI can't be an author, Boomy would be required to either present and defend its dubious copyright claim, or concede authorship (or joint authorship) to the user. This could serve as a check, at least, on meritless authorship claims, and might avoid a situation in which users are asked to pay for something that they already own (or, alternately, that no one owns, such that payment is not legally warranted either way).

To the extent that the lack of a registration requirement leads to a lack-of-notice problem, scholars have suggested various workarounds. Jane Ginsburg, for example, has pointed out that while the Berne Convention may prohibit the imposition of sanctions for failure to comply with formalities like registration,

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[293] Berne Convention for the Protection of Literary and Artistic Works, *supra* note 248, 1161 U.N.T.S. at 35; *see* Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC'Y U.S.A. 265, 267-70 (2000).

[294] *Berne Notification No. 121: Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG. (Nov. 17, 1988), https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html [https://perma.cc/BX3M-WC55]. The Paris Act, to which the United States acceded on March 1, 1989, is the currently effective version of the Berne Convention. *Id.*

[295] Berne Convention for the Protection of Literary and Artistic Works, *supra* note 248, 1161 U.N.T.S. at 35 ("The enjoyment and the exercise of these rights shall not be subject to any formality . . . .").

[296] 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

[297] *Copyright in General*, COPYRIGHT.GOV, https://www.copyright.gov/help/faq/faq-general.html [https://perma.cc/5Z8M-LN8M] (last visited Mar. 17, 2023) ("In general, registration is voluntary. Copyright exists from the moment the work is created.").

it doesn't prohibit the use of incentives.[298] She notes that both evidentiary advantages—such as equating registration with prima facie evidence of originality—and remedial advantages—such as allowing certain damages only to formally registered works—might serve to encourage copyright owners to register, thereby putting the public on notice of their claim.[299] Of course, for entities that rely on ambiguity, such as NFTs, the utility of these incentives is less clear.

IV. THE GOVERNMENT'S ROLE

In the classic tale of the hopelessly vain emperor who is duped into parading around in the buff, the loyal advisors who encourage and abet his charade play an important role.[300] Without them, the game is up—the entire illusion relies upon their nodding complicity. The same is true in the case of monetized noninfringement and faux copyright, where the government plays the role of complicit advisor through a combination of delegation, abdication, and enforcement forbearance. This Part discusses several moves—some low-hanging fruit, some more ambitious—that the government could make in order to rectify its complicity and better support copyright's goal of incentivizing creation for public consumption.

A. *Incremental Improvements*

By allowing some statutory sections to be circumvented, the Copyright Act implicitly delegates lawmaking to comparatively powerful and knowledgeable platforms, content owners, and individuals. In an effort to ameliorate the concerns presented by this scenario, Congress could instead make statutory licenses mandatory, thereby removing the opportunity for private ordering around the statute. This would improve stability and predictability, and could help to even the playing field between more and less powerful parties. It might also better ensure that Congress's goals (rather than private goals) are advanced, and would reintroduce transparency and accountability.

On the downside, the mandating of statutory licensing and removal of a private ordering option might further exacerbate copyright's tailoring problem. Parties would no longer be able to negotiate privately for uses and pricing that better fit their particular needs. This might also foreclose the opportunity for a true market to develop. This makes setting a statutory rate all the more challenging for lawmakers. A middle ground solution might introduce mandatory statutory licensing with an option to petition a regulatory body for

[298] Jane C. Ginsburg, *"With Untired Spirits and Formal Constancy": Berne Compatibility of Formal Declaratory Measures To Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1592 (2013) (urging approach that "substitute[s] carrots for sticks").

[299] *Id.* at 1592-97 (discussing evidentiary and remedial advantages allowed under Berne Convention).

[300] *See* ANDERSEN, *supra* note 9, at 120-21.

the right to circumvent.[301] The costs of implementing such a proposal are low, requiring only minimal amendment to the existing statute.[302]

Another approach might see Congress amend the Copyright Act to address inequalities that induce private ordering in the first place, thereby reducing the incentive for parties to try to monetize noninfringement or to claim faux copyright protection. Take the disparity between performance royalties paid to composers and those paid to recording artists for terrestrial plays, for example.[303] The currently proposed American Music Fairness Act would, among other things, establish once and for all a performance right for sound recordings on FM/AM radio, bringing the U.S. in line with all other developed nations' policy on the matter.[304]

A straightforward amendment of § 506 of the Copyright Act could introduce civil liability for copyright overreach and other forms of faux copyright.[305] Legislation prohibiting terms that contravene fair use, for example, could end lopsided practices like Content ID's selective claims automation.[306] In the absence of federal action, states could also introduce penalties for false copyright claims, or utilize state false advertising statutes to curb them.[307] Other proactive measures that Congress might take include the introduction and passage of antitrolling legislation, regulation of the NFT market as it relates to copyrighted works, and an amendment to the Copyright Act specifically addressing new technological innovations such as AI-driven composition software.

B. *Legislating Veracity and Disclosure*

An overarching drawback to the approaches outlined above is that each ultimately amounts to a piece of bubble gum in the proverbial dam. Every subsequent technological development will bring a new challenge, and present a new hole to be plugged. Regulation, as ever, is destined to trail behind innovation.

A longer-lasting solution borrows from the literature on power dynamics and the law. In her work on powerful speakers and the impact of their lies and

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[301] *See* García, *Facilitating*, *supra* note 282, at 253 (making such a proposal).

[302] *See id.* at 253 ("The remedial regulation model is cost-effective in that it requires only minimal statutory amendment to remove the non-mandatory default from existing statutory licenses.").

[303] *See supra* Section II.C.1.

[304] *See* Aswad, *American Music Fairness Act*, *supra* note 191.

[305] 17 U.S.C. § 506 establishes penalties for false copyright notices and false information in copyright registration, but falls short of establishing a penalty for false copyright claims.

[306] The Consumer Review Fairness Act might serve as a model for such legislation. The Act prohibits companies from, among other things, including a provision in a form contract that prevents consumers from leaving negative reviews. 15 U.S.C. § 45(b).

[307] For more on the possibility of introducing such liability, see Heald, *supra* note 170, at 262-74 (proposing four additional causes of action—including breach of warranty, unjust enrichment, fraud, and false advertising—that might prove viable against faux copyright claims).

misrepresentations on listeners, Helen Norton outlines several possible means through which the law might address the inequities wrought by this dynamic.[308] Two of these means are particularly applicable here. One option is for the government to prohibit the more powerful, or comparatively knowledgeable, party from lying, whether by misrepresentation or omission.[309] This might require a platform like UppstArt explicitly to inform users that absent their use of the app, the law would ensure that any subsequent sales of the work would be royalty-free. Or it might look like Boomy simply charging users for any song ultimately downloaded from the platform without dubious reference to copyright in AI-created works.

Another option is for the government to require truthful public disclosures from the comparatively powerful or knowledgeable party.[310] This might look like YouTube clearly stating in its terms of service that in posting content to the platform, a user explicitly waives their right to fair use. Or it might look like Christie's making clear to prospective buyers of an NFT that their purchase of an easily replicated digital token composed of nonunique hash code does not afford them ownership of, nor control over, the underlying work. A combination of both of these approaches—a prohibition on misrepresentation, and a requirement of truthful, public disclosure—would send a powerful message to would-be finaglers, while better aligning copyright with its policy goals.

C. *A "Dormant" Copyright Act?*

Several of the examples presented herein beg the question of what, if anything, should be done when private parties agree to license uses that the Copyright Act has deemed free.[311] An independent filmmaker who engages a clearance company and agrees to license a fair use enables the licensee to monetize a noninfringing use. The buyer of a painting sold under the UppstArt app's resale license agrees to pay a resale royalty for which there is no statutory obligation. A YouTube user who agrees to the platform's terms of service and

[308] Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 443-44 (2019) (advocating for listener-centered approach that promotes listeners' First Amendment interests).

[309] *Id.* at 451-52 (arguing law can protect listeners' First Amendment rights by permitting government to prohibit powerful speakers from making lies or misrepresentations).

[310] *Id.* at 453 ("[M]ore information—so long as it's accurate and material—is often better for listeners. A listener-centered approach thus understands the First Amendment to permit the government to require comparatively knowledgeable and powerful speakers to make accurate disclosures about certain matters, even if those speakers resist their discussion." (footnote omitted)).

[311] Prior work has addressed one offshoot of this question—namely, why some content owners forgo flexible liability rule protection in favor of a more rigid property rule protection. *See* Kristelia García, *Super-Statutory Contracting*, 95 WASH. L. REV. 1783, 1832 (2020) (explaining shift away from liability rules and toward property rules in current copyright regime is due to "diminishing import of consolidated bargaining power" and substantial reduction in transaction costs).

then uploads original content containing a clip of public domain material that is claimed under Content ID allows a content owner to monetize noninfringing, public domain material.

It is tempting to take a libertarian position in favor of free association and freedom of contract between rightsholders (or, in some cases, non-rightsholders) and prospective users. If an art buyer is willing to pay a resale royalty, what is the harm? If a YouTube user is willing to have the advertising revenues stemming from their fair use claimed by a content owner, why not let them? These microtransgressions, I suggest, overlook the impact that these transactions—taken *en masse*—have on copyright's ability to protect the public interest. If one YouTube user agrees to forgo their fair use rights, then another, then another, the social norm becomes "no fair use on YouTube"—a take-it-or-leave-it proposition for participation on the world's largest digital content platform. This directly conflicts with current law.

Because the goal of copyright is not to encourage creation for creation's sake, but rather to encourage creation for public consumption, copyright policy should care about the public interest concerns raised by these practices. To the extent that faux copyrights and monetized noninfringement reduce public welfare, which the examples cited in this Article suggest they do, it is worth Congress's time to address these practices regardless of private complicity or accord. Just as the Dormant Commerce Clause prohibits individual states from impeding interstate commercial activity, lawmakers seeking to return copyright to its public-facing mission might consider recognizing a "dormant copyright act" of sorts—one that would limit the ability of private entities to contravene or "excessively burden" extant copyright law.[312]

But he doesn't have anything on!

—Hans Christian Andersen[313]

CONCLUSION

Many of the examples described herein involve private parties circumventing the copyright statute and negotiating their own terms in the market. We've seen that this can lead to an exacerbation of inequalities, to greater inefficiency, or to both. In this way, this Article is as much about the limits of contract as it is about the limits of copyright. Whether private dealmaking is to be viewed as desirable or not in the copyright context largely depends on how we characterize copyright itself.

If viewed as a prescribed regime, private parties' circumvention of copyright law's tenets warrants greater scrutiny. In other words, if the Copyright Act lays

[312] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

[313] ANDERSEN, *supra* note 9, at 123.

out the regime that Congress has determined to be best, any deviation from that prescription raises questions of efficiency, fairness, and gamesmanship. If instead we view the copyright statute as a default (i.e., as a set of rules to apply only if parties do not reach another agreement) private ordering among parties with more and better information not only fails to raise the same concerns but may also offer guidance to Congress with respect to future legislative reforms.

Under either characterization, this Article has described an ascendant phenomenon in which the guise of copyright protection is used to elicit, command, or bilk payment for works that are not, in fact, legally entitled to it. In some instances, such as conceptual art, the ruse is perhaps harmless. If someone has millions of dollars lying about with which to buy a rotten banana, so be it.[314] For the avoidance of doubt, this Article in no way advocates for outlawing a museum's right to tape a banana to a wall, nor a buyer's right to purchase it.

There are other instances, however, such as copyright trolls' induction of infringement, where the potential for harm is more pronounced. Arguably, the misuse of copyright in all cases reduces its ability to protect and incentivize creation in service of the public good. For example, uneven and unpredictable application of fair use under Content ID reduces copyright doctrine's ability to adequately allow for and protect follow-on innovation. Likewise, the assignment of interpolation credits on the basis of nothing more than market power negates the ability of copyright to encourage recording artists to make a creative contribution to society. Because of the diversity of outcomes, the answer to the question of whether the government should "do something" about monetized noninfringement and faux copyright depends on the circumstances. One thing is clear, however—the emperor has been exposed, and we ought not simply continue "carrying the train that wasn't there" in the first place.[315]

[314] This may lend support, however, to the case for steeply progressive taxation. *See, e.g.*, Edward J. McCaffery & James R. Hines Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031, 1032 (2010) (arguing for spending tax as best way to return to significantly more progressive marginal tax rates and laying out "a welfarist and a fairness-based argument for progressive spending taxes").

[315] ANDERSEN, *supra* note 9, at 124.