

The Nirvana Fallacy in Fair Use Reform

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I. INTRODUCTION

This Article is about finding the right venue for fair use reform, a subject it approaches through a critique of recent legislative reform proposals. Fair use is possibly the most important doctrine in all of copyright. As such, it has attracted a large volume of critical commentary. Some of the commentary is in the familiar tradition of doctrinal scholarship—advising judges how best to interpret the fair use doctrine. But there is

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also another trend, increasingly prominent, that focuses on legislative reforms. This school of scholarship criticizes the fair use doctrine for providing too little certainty to users of copyrighted works and second-generation creators. To reduce this uncertainty it proposes a variety of solutions, such as promulgating rules to replace the governing standard or setting up special purpose administrative entities that would require congressional action. This Article criticizes proposed legislative reforms of fair use for being unrealistic. It argues that these proposals often contrast the present state of the law with a vision of the ideal state of affairs, but pay no attention to whether this nirvana vision has any chance of realization. They ignore real-world constraints, such as institutional dynamics that bear on the feasibility and desirability of their proposed reforms. Because they bear no relation to the reality of copyright legislation, the legislative solutions are destined to fail. My aim is not to dispute the desirability of the critics' ultimate objectives but rather to show, assuming the ends are desirable, that the critics' proposed means are either futile or counterproductive. I argue that the federal courts are more hospitable than Congress to pro-user fair use reform, and that doctrinal scholarship is more fruitful than proposing ideal-type legislation.

The section following this introduction reviews some common critiques and proposed reforms of fair use. Section III situates the reform proposals within the broader discourse about rules versus standards, highlighting the role of institutions. I then analyze some of the important real-world considerations that are absent from many reform proposals, focusing in particular on public choice problems in Congress. This section demonstrates that the same institutional dynamics that make a mess out of current copyright law would prevent Congress from enacting any of the reformists' proposals for fixing fair use.

Section V discusses two considerations that could qualify the conclusion that the fair use critics' reform proposals are practically hopeless. Namely, I consider whether fair use constitutes one of the few pockets of resistance to copyright expansion, and whether the recent defeat of the Stop Online

Piracy Act (SOPA)¹ and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA)² heralds a fundamental shift in the balance of power. These considerations, I conclude, do not change the basic conclusion that scholarly efforts to find legislative solutions to fair use problems have been misguided.

Having concluded that the project of proposing legislative solutions is futile, I proceed in Section VI to consider more productive ways of reforming fair use. I review a variety of non-legislative avenues of reform, focusing in particular on the federal courts. There are many commonsense practical strategies and tactics—already employed by certain public interest organizations and law professors—for improving fair use through litigation. On a scholarly level, I suggest that good old doctrinal scholarship is more promising than scholars' proposals for legislation. That promise becomes brighter still when one considers that recent Supreme Court caselaw, though mostly a setback to advocates of copyright reform, leaves the door open to useful and innovative scholarship by allowing that fair use is of constitutional import. The suggestion to pursue reform through litigation is not likely to be uncontroversial. So I discuss philosophical and practical objections to extensive judicial rulemaking in copyright, particularly on a constitutional level, but I find them wanting.

Because this Article often adopts a critical attitude, it is important to note that its criticism is not all-encompassing or unqualified. The efforts of copyright scholars, on both the academic and advocacy fronts, should be credited for raising public awareness of the sorry state of copyright law and occasionally for helping to bring about better outcomes on the ground. Nor does the present critique apply to all forms of fair use scholarship. It targets only one school of fair use criticism—but a school prominent enough, I think, to be worthy of separate discussion. Ultimately, the hope is that a critical examination of the work of scholars, most of whom share the same priorities in seeking to improve fair use law, can help to

1. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); *see infra* Part V.B.

2. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011); *see discussion infra* Part V.B.

sharpen our understanding of the role of three institutions—the legislature, the courts, and the academy—in copyright reform.

II. FAIR USE AND ITS CRITICS

Fair use is a judge-made doctrine, usually traced to Justice Story's opinion in the 1841 case of *Folsom v. Marsh*,³ and codified since 1976 in § 107 of the Copyright Act.⁴ It says that a "fair" use of a copyrighted work, as defined by reference to four statutory factors and a preamble, does not constitute copyright infringement.⁵ The burden is on the defendant to prove that his use was fair.⁶ Fair use is applicable across the board in

3. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). The origins in English law go further back. See Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1372–73 (2011). The tendency to credit *Folsom* for creating fair use has been criticized. See, e.g., L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431 (1998) (calling it a "myth" that "*Folsom* created fair use"). My concern here, however, is not with tracing fair use's history or historiography but rather with rehearsing some basic common ground about what the doctrine is and where it comes from.

4. The 1976 Copyright Act, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 107 (2012)).

5. The provision, 17 U.S.C. § 107, reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

6. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (describing fair use as an affirmative defense).

copyright, and plays a critical role in balancing the interests of copyrightholders and users.⁷ As such, fair use has attracted an enormous volume of commentary.⁸

One prominent strand in this commentary accuses fair use of being too vague.⁹ It argues that the principle of fairness is so diffuse, the four non-exclusive factors are so unhelpful, and the caselaw is so all over the place that a would-be user can form no accurate idea of whether his contemplated use is fair.¹⁰ This lack of predictability is anathema to the purpose of copyright in

7. *E.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 479 (1984) (“The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.”).

8. *See, e.g.*, Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249 (1992); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990). Other works are cited throughout.

9. *See, e.g.*, NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 66 (2008) (noting that fair use’s “open-ended, case-specific cast and inconsistent application [make it] exceedingly difficult to predict whether a given use in a given case will qualify . . .”).

10. *See id.*; *see also* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1087 (2007) (“The doctrine’s context sensitivity renders it of little value to those who require reasonable ex ante certainty about the legality of a proposed use.”); Fisher, *supra* note 8, at 1693 (“[T]he disarray of the doctrine impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly.”); Leval, *supra* note 8, at 1107 (“Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes.”); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 395 (2009) (“[T]he fair use law fails to give individuals sufficiently clear guidance to determine in advance whether their uses of copyrighted works are fair and therefore noninfringing.”); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1483 (2007) (“[T]he application of the law has become so unpredictable that would-be fair-users can rarely rely on the doctrine with any significant level of confidence.”); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 91 (2010) (“[T]he uncertainty that shrouds fair use and the proliferation of technological protection measures undermine the doctrine and its role in copyright policy.”).

promoting the progress of knowledge, argue the critics, because it results in a chilling of creative activity. Risk-averse users, apprehensive of copyright bullies and steeped in a “clearance culture”¹¹ that fosters the preclearance of any use, would rather not use and re-create at all than do so and risk liability.¹²

In line with the foregoing criticisms, fair use has been bestowed with epithets such as “disarray,”¹³ “in bad shape,”¹⁴ “notoriously vague,”¹⁵ “nobody knows,”¹⁶ “great white whale of American copyright law,”¹⁷ “protean,”¹⁸ “difficult—some say impossible—to define,”¹⁹ “confusion,”²⁰ “guess and pray,”²¹ “mysterious,”²² “disorderly basket of exceptions,”²³ “precarious,”²⁴ “nearly impossible to predict,”²⁵ “as vague as possible,”²⁶ “more fickle than fair,”²⁷ and “astonishingly bad.”²⁸ One well-known commentator has even quipped that “had Congress legislated a dartboard rather than the particular four

11. Carroll, *supra* note 10, at 1096.

12. See, e.g., *id.* (describing how the emerging “clearance culture” may effectively “nullify] the rights that copyright law expressly grants users to use another’s work without clearance.”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 151–53 (2009) (describing “justifiably” risk-averse users in the face of the “muddy character” of fair use); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887–98 (2007); Mazzone, *supra* note 10, at 405–12; Parchomovsky & Goldman, *supra* note 10, at 1484–1502.

13. Fisher, *supra* note 8, at 1693.

14. *Id.* at 1794.

15. Mazzone, *supra* note 10, at 400.

16. *Id.*

17. Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008).

18. *Id.*

19. Sag, *supra* note 3, at 1371.

20. Leval, *supra* note 8, at 1107.

21. *Id.*

22. *Id.*

23. *Id.*

24. Parchomovsky & Weiser, *supra* note 10, at 91.

25. *Id.* at 93.

26. *Id.*

27. Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should Not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), <http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime/>.

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

fair use factors embodied in the Copyright Act, it appears that the upshot would be the same” as the current jurisprudence.²⁹

I have serious doubts about such common claims that fair use is unpredictable and that potential fair users are risk-averse.³⁰ But I will set aside these doubts for present purposes. The question I intend to explore instead is whether, assuming the critics are right in diagnosing that fair use is unpredictable,

29. David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003).

30. There has been no systematic empirical demonstration of the complaint that fair use is vague and unpredictable. To the contrary, recent empirical scholarship has demonstrated a good deal of consistency in fair use caselaw, showing that certain factors can predict case outcomes. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009). Indeed, to the extent these empirical studies are limited to written opinions, they would tend to understate the degree of predictability. *E.g.*, Beebe, *supra*, at 577–80, 586. This is because we would expect easier cases to settle rather than proceed to decision on a dispositive motion. In easier cases, the parties’ expectations about the legal judgment are less likely to diverge (i.e., informational asymmetries are reduced), so settlement is more likely. See generally STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401–07 (2004); Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 414 (1984). It might be that the doctrine is predictable for the knowledgeable scholar but not for the potential fair user in the field who, being risk-averse, might shy away from legitimate uses for fear of liability. But even the common claim about risk aversion is questionable. First, to the extent that innovative activity is often considered risky and even uncertain, one wonders whether second-generation creators (as opposed to mere users of copyrighted works) are truly as risk-averse as the fair use critics paint them to be. Second, behavioral economics, prospect theory in particular, has shown in a variety of contexts that people are risk-averse (i.e., exhibit decreasing marginal utility) with respect to gains but risk-loving (i.e., exhibit decreasing marginal disutility) with respect to losses. See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al., eds., 1982); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979). So to the extent the uncertainty surrounding the application of fair use is understood as an uncertainty about the extent of losses that might accrue as a result of copyright liability, it is not the kind of uncertainty that would have a significant chilling effect. See Steven J. Horowitz, *Copyright’s Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331 (2012) (arguing that copyright law’s asymmetric allocation of uncertainty—certain for copyright holders but uncertain for users—is efficient in light of behavioral economic insights on decision making under uncertainty, but criticizing the law on other grounds).

their proposed reforms are the appropriate cure. One strand of scholarship offers treatments in the nature of reconceptualizing fair use, arguing what fair use is or should be “really about,” and advising judges about how best to implement the doctrine—of this kind are the famous articles by Professor Gordon and Judge Leval.³¹ I am not concerned here with these commentaries. My focus, instead, is on proposed solutions that would require congressional action.

In order to reduce the purported uncertainty surrounding fair use, commentators have proposed replacing the current fair use standard with rules, which would require congressional action; or creating special-purpose administrative entities, which would require congressional action and subsequent bureaucratic action; or a combination of the two. For example, Michael Carroll has advocated that Congress create a Fair Use Board.³² This Board would have the power—after receiving a petition from a to-be user and providing the copyright owner with notice and an opportunity to challenge the petition—to declare that a proposed use is fair.³³ Such a declaration would have the force of a private letter ruling from the Internal Revenue Service (IRS) or a no-action letter from the Securities and Exchange Commission (SEC).³⁴ That is, it would immunize the petitioner, but no one else, from copyright infringement.³⁵ The Fair Use Board’s rulings would be subject to administrative review in the Copyright Office and judicial review in the Circuit Courts of Appeal.³⁶ Carroll is opposed to replacing the fair use standard with rules.³⁷

Gideon Parchomovsky and Kevin Goldman, on the other hand, advocate just such rules in the form of “fair use harbors.”³⁸ They propose rules declaring that, at a minimum, certain uses are presumptively legal (other uses would remain

31. Gordon, *supra* note 8, at 1605 (conceptualizing fair use as a device to remedy market failures in licensing); Leval, *supra* note 8, at 1111 (arguing that in adjudicating fair use cases judges should pay great attention to whether the complained-of use is transformative). Both articles have been influential, as documented by Netanel, *supra* note 30, at 734–35.

32. Carroll, *supra* note 10, at 1123–43.

33. *Id.* at 1123, 1125–27.

34. *Id.* at 1090 & nn.16–17.

35. *Id.* at 1090, 1123 & nn.16–17.

36. *Id.* at 1123–28.

37. *Id.* at 1147–48.

38. Parchomovsky & Goldman, *supra* note 10, at 1502–18.

subject to the four-factor test).³⁹ For example, “for any literary work consisting of at least one hundred words, the lesser of fifteen percent or three hundred words may be copied without the permission of the copyright holder.”⁴⁰ Similar thresholds are specified for other kinds of works, including a required right of access under the Digital Millennium Copyright Act.⁴¹ These rules would make significant changes to existing law and would therefore require congressional action.⁴²

David Fagundes has combined some features of the Carroll and Parchomovsky-Goldman proposals.⁴³ He has endorsed Parchomovsky and Goldman’s suggestion to establish fair use noninfringement floors,⁴⁴ as well as Carroll’s suggestion to create “infringement boards” to render presumptive fair use rulings on “easy cases of infringement or noninfringement.”⁴⁵ The infringement boards could make one of three findings—“probably infringing, probably not infringing, or no opinion”—the first two of which would create rebuttable presumptions in any litigation that might ensue.⁴⁶

Jason Mazzone likewise has advocated that Congress create an administrative agency to deal with fair use.⁴⁷ This agency would enforce new congressional legislation prohibiting a copyright holder’s interference with fair use, issue regulations that have the force of law, bring enforcement actions against those who interfere with fair use, adjudicate disputes via administrative law judges (ALJs), and be subject to limited judicial review under *Chevron* deference.⁴⁸ Alternatively, the agency could be created in the mold of the Equal Employment Opportunity Commission (EEOC), whereby plaintiffs in copyright infringement actions would be required to go through the agency before bringing suit in court, and the agency’s

39. *Id.* at 1510–24.

40. *Id.* at 1511.

41. *Id.* at 1512–18, 1521–24.

42. *Id.* at 1510 (calling for “unilateral action by Congress”).

43. Fagundes, *supra* note 12, at 175–76, 183–84.

44. *Id.* at 175–76.

45. *Id.* at 183–84.

46. *Id.* at 184.

47. Mazzone, *supra* note 10, at 395–99, 415–30 (“An administrative agency can, and should, regulate fair use.”).

48. *Id.* at 415–18 & n.84.

findings under its own regulations would be entitled to judicial deference.⁴⁹ The agency could be a new entity, or it could be formed by expanding the present remit of the Copyright Office.⁵⁰

In another article, Parchomovsky and Weiser advocate that Congress establish a new system of “user privileges” that would require copyright owners to “dramatically increase the access and use opportunities granted to users.”⁵¹ Under this proposal, Congress would first require that copyright owners establish measures to facilitate access to digital content and provide clear notice of these measures for the benefit of users.⁵² This mandate would be open-ended and leave the details of how to enhance access to the copyright owners themselves.⁵³ But if copyright holders fail to establish adequate user privileges, Congress would move in and, using the experience gained from the first stage of the mandate, legislate more specific requirements for user access.⁵⁴ The Federal Trade Commission (FTC) would be tasked with enforcing the regulatory regime.⁵⁵

All of these (and similar other)⁵⁶ proposals, with the exception of Carroll’s, would replace or supplement the prevailing fair use standard with a regime of rules.⁵⁷ All of them, without exception, would require congressional action (and often executive and administrative action on top of that).⁵⁸ In other words, they would require a change in the form of laws from standards to rules, as well as a change in the identity of the lawmaking institution from the judiciary, which currently develops fair use doctrine, to Congress and administrative

49. *Id.* at 419–21.

50. *Id.* at 427–30.

51. Parchomovsky & Weiser, *supra* note 10, at 91; *see also id.* at 95–96.

52. *Id.* at 96.

53. *Id.*

54. *Id.* at 96–97.

55. *Id.* at 95–97, 126–36 (discussing the role of the FTC in the proposed regime and its role historically in the privacy policy context).

56. *See, e.g.*, JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 185–210 (2011); WILLIAM PATRY, HOW TO FIX COPYRIGHT 49–74 (2012).

57. *See supra* text accompanying note 37.

58. Carroll, *supra* note 10, at 1123; Fagundes, *supra* note 12, at 183–84; Mazzone, *supra* note 10, at 395–96; Parchomovsky & Goldman, *supra* note 10, at 1510; Parchomovsky & Weiser, *supra* note 10, at 126.

agencies. Assessing these proposals accordingly demands that we compare rules with standards and different institutions with one another.

III. RULES, STANDARDS, AND INSTITUTIONS

The comparison between rules and standards is ubiquitous in the law.⁵⁹ By common definition, rules are precise commands that specify the obligation and the consequences of noncompliance *ex ante*; standards articulate the norm more generally and leave the decision maker more leeway to decide whether conduct is in compliance *ex post*.⁶⁰ For example, the current regime, under which the fair use decision is made by reference to the purpose and character of the use, the nature of

59. For general reflections on rules and standards, see Frank Cross et al., *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

60. Kaplow, *supra* note 59, at 559–60; *see also, e.g.*, MindGames, Inc. v. West Pub. Co., Inc., 218 F.3d 652, 656–67 (7th Cir. 2000) (“A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard’s rationale.”); Cross et al., *supra* note 59, at 15–18; Schlag, *supra* note 59, at 382–83. It might be worth noting a definitional subtlety. Louis Kaplow points out that in comparing rules and standards commentators often conflate two distinct dimensions—namely, (1) whether the law is given content *ex ante* or *ex post*, and (2) how complex the law is. Kaplow, *supra* note 59, at 586–96. He argues that these dimensions should be kept separate; only the former is properly defining of ruleness or standardness, and complexity should be captured by a separate concept. *Id.* Otherwise, we would risk attributing a benefit or cost to the law’s ruleness or standardness when that benefit or cost is properly attributable to the law’s degree of complexity. In Kaplow’s framework, every standard has its “rule equivalent,” and every rule its “standard equivalent,” with the same degree of complexity. *Id.* at 586. So we could have complex rules, simple rules, complex standards, and simple standards, not just simple rules and complex standards as commonly assumed. *Id.* at 586–96. For further discussion of complexity, see Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995). To what extent Kaplow’s distinction is theoretically defensible, and to what extent it makes a practical difference, are discussions for another day. I have avoided the conflation that Kaplow has in mind, and the point is not otherwise material for present purposes.

the original work, the amount of material taken from the original work, and the use's impact on the market for the original work,⁶¹ is a standard. By contrast, a law declaring that borrowing less than ten percent of a written work constitutes fair use would be a rule.

These contrasting approaches have tradeoffs. Rules are costlier to enact but cheaper to enforce; standards are cheaper to enact but costlier to enforce.⁶² Rules are clearer and more predictable, so they facilitate planning.⁶³ On the other hand, rules are inflexible,⁶⁴ so they might miss the mark in individual cases by privileging technical compliance over the substantive aims of the law. Standards are flexible, keep eyes on the underlying norm, and allow judgments to be informed by lessons learned from real controversies, but make the law harder to predict and planning more difficult.⁶⁵

These tradeoffs are well-known and do not require more elaboration. But there is one more point that bears notice: the choice between rules and standards often amounts to a choice between different institutions as lawmakers.⁶⁶ In the United States, legislation is generally entrusted to the Congress, in collaboration with the President.⁶⁷ Courts do, of course, make law, notwithstanding slogans about “merely applying the law” and “taking the law as we find it.” But the kind of lawmaking that courts undertake in the course of deciding cases is usually context-specific and incremental; it usually does not amount to general legislation. In light of this division of responsibilities (or separation of powers), opting for rules or standards usually means choosing the legislature or the courts, respectively, as lawmakers.⁶⁸ Or, to put it more accurately, the courts' share of

61. See 17 U.S.C. § 107 (2012).

62. See Kaplow, *supra* note 59, at 562–63.

63. See Schlag, *supra* note 59, at 384–85.

64. *Id.* at 400.

65. See, e.g., *id.* at 384–85; *MindGames*, 218 F.3d at 657 (“Standards are flexible, but vague and open-ended; they make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate—and yet when based on lay intuition they may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be.”).

66. See Kaplow, *supra* note 59, at 608–11.

67. U.S. CONST. art. I, § 7 (outlining Congress' legislative power and the President's veto power).

68. See Kaplow, *supra* note 59, at 568, 608.

lawmaking activity vis-à-vis the legislature is smaller for rules than for standards. Rules require precise specification *ex ante* and are thus made by Congress; standards leave room to mold the law in light of existing controversies and thus give courts a larger role.⁶⁹ The current fair use regime, for example, leaves the bulk of lawmaking to courts. But a rule specifying hard percentages that can be lawfully taken from a copyrighted work would have to be promulgated by Congress and, once promulgated, would be applied in fairly mechanical fashion with little additional lawmaking by courts.⁷⁰

It follows that each of the abovementioned proposals to change fair use would require a change not only in the content of the law but also in the lawmaking institution. This is true, as the reform advocates acknowledge, of all the proposals summarized above (whether or not they advocate rules, which all but one of them do).⁷¹ But the potential significance of this institutional change is given no serious consideration in the fair use critics' proposals. Although some of these articles do compare and contrast different lawmaking institutions,⁷² the comparisons are *idealized*. They focus only on institutional *competencies*, not *interests*. They discuss what would happen if Congress were to act just as the scholars would like them to act, not how Congress would actually act. In particular, these analyses generally compare the present fair use standard with

69. *See id.* at 608–11. The foregoing discussion of the allocation of lawmaking powers between courts and Congress ignores the possible use of administrative agencies as lawmaking institutions. This simplification does not pose a problem for present purposes, however, because the point here is that some fair use critics advocate reforms that would require congressional action without adequately considering the institutional dynamics prevailing in Congress. This point is unaffected by the possible role of administrative agencies. The creation of an agency to administer fair use would obviously require congressional action.

70. *Cf.* Kaplow, *supra* note 59, at 621.

71. *See* Carroll, *supra* note 10, at 1123; Fagundes, *supra* note 12, at 183–84; Mazzone, *supra* note 10, at 395–96; Parchomovsky & Goldman, *supra* note 10, at 1510; Parchomovsky & Weiser, *supra* note 10, at 126.

72. *See, e.g.*, Mazzone, *supra* note 10, at 430–37 (discussing the benefits of agency administration); Parchomovsky & Weiser, *supra* note 10, at 94–97, 106–14, 126–36 (discussing the benefits of congressional regulation that leaves room for marketplace innovation, as opposed to agency administration and other proposals).

an ideal proposed rule, but do not ask how good a rule we would be likely to get if we were to ask Congress to enact one.

The proposals, in short, fail to contemplate the possibility that the same real-world constraints that produced the present problems with the fair use standard might impede the enactment of an ideal rule. But although considering ideal rules might be helpful, comparison of present doctrine with an ideal rule is sterile without some consideration of the ideal's chance of realization. Not just sterile, but dangerous: proposals that do not take account of real-world constraints may well produce cures that are worse than the disease.

The present critique underlines a problem that Harold Demsetz dubbed the "nirvana approach."⁷³ "The view that now pervades much public policy economics," he wrote, "implicitly presents the relevant choice as between an ideal norm and an existing 'imperfect' institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements."⁷⁴

Public choice theory similarly emphasizes that, because politicians are self-interested, the political system is subject to many of the same inefficiencies that characterize the market system.⁷⁵ So it would be naïve to assume that the solution to every market failure is government intervention. James Buchanan, one of the founders of public choice, summed up the contribution thus:

[T]he prevailing mind-set of social scientists and philosophers at midcentury . . . supported by the . . . research program [of] "theoretical welfare economics," . . . concentrated on the identification of the failures of observed markets to meet idealized standards. In sum, this branch of inquiry offered theories of market failure. But failure by comparison with what? The implicit presumption was always that politicized corrections for market failures would work perfectly. In other words, market failures were set against an idealized politics. Public choice then came along and provided analyses of politics, of the behavior of persons in public

73. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969).

74. *Id.*

75. JAMES M. BUCHANAN, CTR. FOR STUDY OF PUB. CHOICE, PUBLIC CHOICE: THE ORIGINS AND DEVELOPMENT OF A RESEARCH PROGRAM 8 (2003), available at <http://www.gmu.edu/centers/publicchoice/pdf%20links/Booklet.pdf>; see also Charles Wolf, *A Theory of Nonmarket Failure: Framework for Implementation Analysis*, 22 J.L. & ECON. 107 (1979).

choosing roles[,] whether these be voters, politicians, or bureaucrats, that were on all fours with those applied to markets and to the behavior of persons as participants in markets. These analyses necessarily exposed the essentially false comparison that had described so much of both scientific and public attitudes. In a very real sense, public choice became a set of theories of governmental failures, as an offset to the theories of market failures that had previously emerged from theoretical welfare economics.⁷⁶

One need not accept all of public choice's predictions and analyses, nor share Buchanan's pro-market orientation, to appreciate this basic insight about the limitations of ideal-type analysis. The insight I wish to highlight is not about substantive public policy; it is methodological. Indeed, Einer Elhauge deployed the same argument *against* those legal scholars who had relied on public choice theory to support more robust judicial review.⁷⁷ Those scholars, Elhauge claimed, erred in contrasting a real-world description of democratic politics with an idealized description of the judicial process.⁷⁸ Other legal scholars have also employed varieties of the same criticism.⁷⁹

This criticism reveals a lacuna in the structure of present fair use "fixes." Namely, they fail to consider the political realities and institutional dynamics that would determine the proposals' practical chances of realization, as well their desirability. How big a problem this failure will turn out to be depends on how different the prevailing political dynamics in Congress are from what the scholars have imagined them to be. To learn this we must inquire into the real world of copyright legislation, a subject that has received substantial scholarly treatment. The following section turns to this task.

76. BUCHANAN, *supra* note 75; *see also* Wolf, *supra* note 75.

77. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

78. *Id.* at 34 ("[E]ven if interest group theory succeeds in demonstrating defects in the political process, that would not justify the leap to the conclusion that more intrusive judicial review would improve lawmaking. The litigation process cannot be treated as exogenous to interest group theory because that process is also subject to forms of interest group influence that would be exacerbated if judicial review became more intrusive.").

79. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745–46 (2013) (lamenting the "inside/outside fallacy" whereby a legal scholar employs an external perspective to diagnose the problems attendant to the system but then switches to an internal perspective to advocate a public-spirited solution).

IV. COPYRIGHT IN THE REAL WORLD

[P]ublic domain means nobody really cares because nobody owns it.

— Jack Valenti, President, Motion
Picture Association of America⁸⁰

In considering the legislative political economy of copyright, the insights of public choice theory are instructive. Public choice, as one of its founders was fond of saying, is “politics without romance.”⁸¹ It proceeds on the assumption that politicians, like everyone else, are motivated primarily by self-interest, as opposed to a desire to promote the public good.⁸² This way of looking at things is of course nothing new; it was the worldview of Machiavelli, Hobbes, the American Founders, and countless others.⁸³ Nor is it likely to be found a shocking revelation—not in this age of dismal Congressional approval ratings anyway.⁸⁴ But the public choice theorists’ contributions lay in positing a more precise framing of politics as a process of supplying and demanding, or selling and buying,

80. *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 41 (1995) [hereinafter *September 1995 Senate Hearings*].

81. BUCHANAN, *supra* note 75.

82. *See id.* at 9.

83. *Id.* at 11–12 (“Public choice did not emerge from some profoundly new insight, some new discovery, some social science miracle. Public choice, in its basic insights into the workings of politics, incorporates a presupposition about human nature that differs little, if at all, from that which informed the thinking of James Madison at the American founding [and t]he essential scientific wisdom of the 18th century, of Adam Smith and classical political economy . . .”); Gordon Tullock, *Public Choice*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 723 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (“The only surprising thing about the above propositions [regarding the self-interestedness of politicians] is that they have not traditionally been orthodox either in economics or political science. Writers who did hold them, like Machiavelli in parts of *The Prince*, were regarded as morally suspect and tended to be held up as bad examples rather than as profound analysts.”).

84. *See, e.g., Congressional Performance*, RASMUSSEN REPS. (Dec. 26, 2014), http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance (finding that “just seven percent (7%) of Likely U.S. Voters rate Congress’s performance as good or excellent”).

power and legislation, and in a more rigorous application of the analytical tools of economics to this framework.⁸⁵

This analysis has yielded a number of insights, two of which are particularly pertinent. First, contrary to what one might assume, larger groups are not systematically more successful at advocating for their members' interests and pushing their agendas.⁸⁶ The reason for this, as fleshed out famously by Mancur Olson, is as follows. Groups form to provide common benefits for their members.⁸⁷ These benefits are in the form of "public goods," meaning they must be

85. For the standard one-volume survey of public choice literature, see DENNIS MUELLER, *PUBLIC CHOICE III* (2003). In addition, the following readings (some of which may not, under a strict definition, fall within the "public choice" umbrella) provide background: KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* (1993); JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); ANTHONY DOWNS, *AN ECONOMIC ANALYSIS OF DEMOCRACY* (1957); WILLAM A. NISKANEN JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962); *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* (Daniel Carpenter & David A. Moss eds., 2013); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Works more focused on the law include: DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX L. REV. 873 (1987) [hereinafter Farber & Frickey, *Jurisprudence of Public Choice*]; Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TULANE L. REV. 849 (1980). Many of the important contributions to the scholarship of public choice and the law are gathered in: *PUBLIC CHOICE AND PUBLIC LAW* (Daniel A. Farber ed., 2007); *PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY* (Maxwell L. Stearns ed., 1997); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

86. What follows is a simplified version of the argument made with more rigor and detail in OLSON, *supra* note 85, at 5–36. There might also be other reasons why small groups perform better—for example being more conducive to the development of norms—but I will keep to Olson's classic account.

87. *Id.*

provided to all members if they are to be provided at all.⁸⁸ But if the benefits will be shared by all members, it is in each member's individual interest not to bear the costs of obtaining these benefits; each would rather sit out, have other members bear the cost, and enjoy the benefits all the same.⁸⁹ In large groups this dynamic tends to prevent any member from acting in the group's collective interest, with the result that the collective good will not be provided at all.⁹⁰ In small groups, by contrast, the benefits to an individual member may be so large as to make it worthwhile to strive to obtain the public good, even if the member must individually bear all the costs of obtaining the good.⁹¹ So the collective good will be provided in small, but not in large, groups. In sum, the balance of power between large and small groups is systematically unlike what their numbers would suggest.⁹² All else being equal, small groups are actually *more* successful in overcoming collective action problems.⁹³

Second, and consequently, the likelihood of a given agenda's political success depends not only on the magnitude of its costs and benefits but also on their dispersion. Concentration is positively correlated with power.⁹⁴ In the two-by-two table representing a proposal's benefits and costs as being either concentrated or diffuse, a proposal that has concentrated benefits and diffuse costs is the most likely to succeed, and a proposal with diffuse benefits and concentrated costs is the most likely to fail.⁹⁵ This effect can be so large as to overwhelm the sheer magnitude of the benefit-cost gap: a proposal rich in costs and poor in benefits might nevertheless pass if the meager benefits are concentrated in a few people and the huge costs are divided among a large number (and vice versa).⁹⁶

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 366-72 (James Q. Wilson ed., 1980).

95. *Id.*

96. For discussion of the impact of the concentration of costs and benefits, see, for example, OLSON, *supra* note 85, at 29, 165-67; Wilson, *supra* note 94, at 366-72; Roger G. Noll & Bruce M. Owen, *The Political Economy of*

The extent to which these theoretical predictions actually describe the real world of democratic politics is subject to debate.⁹⁷ As applied to copyright, however, they are dead on. Scholars have documented that Congress often obliges the wishes of the copyright industry—that is, the few corporations who own the majority of lucrative copyrighted content—to the degree that it has delegated the very task of legislation to them. Jessica Litman’s study of the legislative history of the 1976 Copyright Act shows that the statute time and again enshrines, often verbatim, the compromises hatched out by affected interest groups.⁹⁸ Congress was often just a facilitator: it cajoled various affected interest groups to sit down together and hammer out a legislative solution.⁹⁹ Once a compromise was reached, Congress simply adopted it without so much as changing a comma.¹⁰⁰ There is no evidence that examining industry bills for their impact on the public interest, seeing if they actually “promote the progress of science” as required by the Constitution,¹⁰¹ entered into Congress’s work.

The situation has only gotten worse in recent years. William Patry, the former counsel to the House Judiciary Committee’s Subcommittee on Intellectual Property and Judicial Administration, describes the scene.

Copyright interest groups hold fund raisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and

Deregulation: An Overview, in THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS 41–43 (Roger G. Noll & Bruce M. Owen eds., 1983).

97. Compare Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 10 (1990) (stating that the usefulness of public choice theory, among other methods of social scientific prediction, is seriously limited), with Susannah Camic Tahk, *Public Choice Theory & Earmarked Taxes*, 68 TAX L. REV. (forthcoming 2015) (employing public choice theory to argue that how taxes distribute their costs and benefits is associated with the ability of these taxes to raise revenue over time).

98. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 871–77 (1987).

99. *Id.* at 867, 870–71 (“Indeed, the Copyright Office and interested parties hammered out the basic structure of the entire statute before including Congress in the legislative revision.”).

100. *Id.* at 860–62, 867, 868 (“Congress enacted the relevant provisions essentially without change.”).

101. U.S. CONST. art. I, § 8, cl. 8.

draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report. In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as *their* legislation and *their* committee report. With the 104th Congress we have . . . reached a point where . . . not even the hands of congressional staff have touched committee reports.¹⁰²

Patry relates that one industry lobbyist was disdainful of the House Intellectual Property Subcommittee Chairman because the latter “mistook his role as a member of Congress as actually involving making policy.”¹⁰³ The message from the industry was “we drafted it, the best thing for you to do is to enact it down to the commas.”¹⁰⁴ Sure enough, Congress did just that.¹⁰⁵ This view of copyright legislation is not peculiar to Litman or Patry; the conclusion that copyright regulators are “captured” by copyright holders is shared among many scholars of intellectual property law.¹⁰⁶

Whether such capture is a bad thing depends on the circumstances. Few would argue that government should not be responsive to the views of those who are impacted by governmental policy and who, being in the business, are knowledgeable about its likely ramifications. But the question in assessing the desirability of industry-drafted legislation is

102. William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996); see also Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 350 (2002) (“[O]ur copyright laws have been written not by Congress, not by Congressional staffers, not by the copyright office or by any public servant in the executive branch, but by copyright lobbyists negotiating complex deals among themselves in complicated multiparty negotiations.”).

103. Patry, *supra* note 102, at 141–42.

104. *Id.* at 142.

105. *Id.*

106. See, e.g., CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 133–38 (2012); see also WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 25 (2004); Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 744 (2001); Eli Dourado & Alex Tabarrok, *Public Choice and Bloomington School Perspectives on Intellectual Property* 5 (Mercatus Ctr., Working Paper No. 13–23, 2013); Paul J. Heald, *American Corporate Copyright: A Brilliant, Uncoordinated Plan*, 12 J. INTELL. PROP. L. 489, 489 (2005); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532–33 (2000); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 898 (2001).

whether the industry groups who did the drafting represented the full panoply of the legislation's benefits and costs. Public choice theory predicts that ramifications would be fully considered when both benefits and costs are concentrated, but that consideration of benefits and costs would be lopsided when one is concentrated and the other is diffuse, resulting in legislation that privileges special interests over the public at large.

These predictions are borne out with remarkable accuracy in the context of copyright legislation. Where a particular topic of legislation impacted a narrow set of well-organized interests on both the benefit and cost sides of the ledger, the resulting compromise was often balanced (though not necessarily optimal). The Copyright Act features many such compromises—including those between copyright holders and church groups,¹⁰⁷ the restaurant industry,¹⁰⁸ the hotel industry,¹⁰⁹ the cable industry,¹¹⁰ satellite television carriers,¹¹¹ author groups,¹¹² Internet service providers,¹¹³ and others.¹¹⁴ The end product in such cases of interest group compromise could perhaps benefit from more active congressional involvement, but it was at least defensible because both sides were well-represented.

On the other hand, where the interests on only one side of the benefit-cost ledger were concentrated, the resulting law was predictably one-sided. Such a concentrated-versus-diffuse interest group structure is most likely to obtain where the balance to be struck is between rightsholders on one side and the public domain on the other. Rightsholders are a small group with well-defined interests. Beneficiaries of the public domain, on the other hand, are a large and diffuse group—the general public that benefits from enjoying and building on literary and artistic works. And their interests, unlike those of the rightsholders, are not well-defined *a priori*. In other words,

107. See 17 U.S.C. § 110(3) (2012).

108. See *id.* at § 110(5).

109. See 17 U.S.C. § 111(a)(1) (2012).

110. See *id.* at § 111(a)(3).

111. See 17 U.S.C. § 119 (2012).

112. See 17 U.S.C. § 203 (2012).

113. See 17 U.S.C. § 512 (2012).

114. See *infra* Part V.

the owner of the Mickey Mouse character is sure that he would benefit immensely from preventing the rodent's accrual into the public domain, whereas few members of the general public are likely to know whether and how much the issue would impact them. Indeed, the future creator who would add to the store of American heritage by working off the Mickey Mouse character may not even be born yet. Public choice theory would accordingly predict an overall expansion of copyrights and contraction of the public domain.

This prediction is borne out. There are, as mentioned, narrowly crafted exceptions to the expansion of copyrights where it would harm concentrated interests.¹¹⁵ But such exceptions are the exception. The unmistakable trend of copyright legislation since the 1976 Act has been one of copyright expansion and public domain contraction. Thanks to the efforts of copyright industry lobbyists, the scope of copyrightable subject matter has greatly expanded;¹¹⁶ the copyright bundle of rights ("exclusive rights in copyrighted works") has multiplied;¹¹⁷ the duration of copyrights has been lengthened and lengthened;¹¹⁸ the public domain has been retroactively shrunk to "restore" copyright to public domain works that had never been copyrighted;¹¹⁹ the unauthorized recording of concerts and public performances has been banned;¹²⁰ criminal penalties for copyright infringement have increased;¹²¹ the 1909 Act's provision that statutory damages "shall not be regarded as a penalty"¹²² has been eliminated; statutory damage maximums have been increased;¹²³ plaintiffs have been given the right to elect statutory damages "any time

115. See *supra* text accompanying notes 107–13.

116. See 17 U.S.C. § 102 (2012); Bell, *supra* note 106, at 781 ("The subject matter covered by copyright has steadily expanded, too.").

117. See 17 U.S.C. § 106 (2012).

118. See 17 U.S.C. §§ 302–04 (2012).

119. 17 U.S.C. § 104A (2012); Bell, *supra* note 106, at 782 & nn.198–201 (discussing various retroactive grants of copyright extension and protection).

120. 17 U.S.C. § 1101 (2012).

121. 17 U.S.C. § 506 (2012).

122. 17 U.S.C. § 101(b) (1970) (repealed); see also Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (providing a thorough discussion of statutory damages).

123. 17 U.S.C. § 504(c) (2012).

before final judgment”;¹²⁴ additional remedies have been made available to copyright owners;¹²⁵ the circumvention of technological measures controlling access to copyrighted works has been banned,¹²⁶ doing business in products that could be used for such circumvention has been prohibited,¹²⁷ and criminal penalties have been set down for violations;¹²⁸ formalities have been eliminated;¹²⁹ the list goes on and on.¹³⁰

To be sure, not every single act of copyright expansion was necessarily detrimental to the public interest. But the overall effect has been the passage of laws favorable to special interests even when the aggregate magnitude of the costs far outweighed the benefits (as well as the non-passage of laws whose aggregate benefits would have outweighed the costs, though it is harder to inquire into the non-event).¹³¹

124. *Id.* at § 504(c)(1).

125. *E.g.*, 17 U.S.C. § 503 (2012) (providing for the impoundment or destruction of infringing copies or phonorecords); 17 U.S.C. § 505 (2012) (permitting awards of costs and attorney fees).

126. 17 U.S.C. § 1201(a) (2012).

127. *Id.* at § 1201(a)–(b).

128. 17 U.S.C. § 1204 (2012).

129. *See* 17 U.S.C. § 102 (2012) (providing that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression,” and doing away with any requirement to register, affix a © sign, renew a copyright, or take any other steps to obtain copyright protection); 17 U.S.C. § 408 (2012) (“[R]egistration is not a condition of copyright protection.”). For a discussion of the role of formalities in early copyright statutes and their weakening and elimination in the 1976 Act, see Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491–99 (2004).

130. *See, e.g.*, Bell, *supra* note 106, at 781–86 (detailing the expanding reach of copyright law in the United States); Dourado & Tabarrok, *supra* note 106, at 10–12 (discussing changes under the 1976 Copyright Act). In addition to observing these pro-rightsholder provisions, legislative expansion and interest group influence have also been gauged by other measures. Looking at the number of words in the statute, Landes and Posner have found a higher rate of expansion in copyright legislation than in other areas of federal law, particularly in the latter part of the Twentieth Century. LANDES & POSNER, *supra* note 106, at 2–4. Litman has shown that the prevalence of discrete, item-specific provisions in the Copyright Act, and records of legislative history, reflect interest group compromise. *See* Litman, *supra* note 98, at 859; Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 281 (1989); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 35–36 (1996).

131. One example of non-passage is that intellectual property protection in fashion designs is extremely limited. The lack of such a legal regime is probably attributable less to the fact that fashion protection would be a bad

Nowhere is the footprint of special interest influence more visible than in the Sonny Bono Copyright Term Extension Act of 1998 (CTEA), which extended the duration of copyrights by twenty years for all existing and future works.¹³² From a public interest point of view, the law was utterly nonsensical. The enormous monopoly deadweight loss imposed by a twenty-year extension of copyright on all existing and future works was counterbalanced by virtually zero benefits in the form of creative incentives. The creation of preexisting works could not possibly be incentivized because they were, well, preexisting. Nor was it plausible to think that the twenty-year extension would incentivize more creative activity in the future. Calculations by an intellectually diverse group of seventeen economists (including five Nobel Prize winners) showed that the present value of the added twenty years to a hypothetical author would amount to pennies.¹³³ Nor was there any evidence of public benefits in a form other than creative incentives—for example, incentives to disseminate, preserve, or otherwise make available copyrighted works.¹³⁴ So, in terms of the

idea—Congress implements lots of bad ideas in the copyright realm—than to the fact that retailers oppose it.

132. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (amending 17 U.S.C. §§ 302, 304). For most works, this meant that the copyright term was extended from the life of the author plus fifty years to the life of the author plus seventy years. See 17 U.S.C. § 302(a) (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

133. See Brief of George Akerlof et al. as Amici Curiae Supporting Petitioners at 5–6, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01–618); see also *Eldred*, 537 U.S. at 254–55 (Breyer, J., dissenting) (“[A] 1% likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.”). But see Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 435–36 (2005) (criticizing the economists’ brief).

134. Such incentives were part of the reasons offered by the Supreme Court in *Eldred*, 537 U.S. at 203, for upholding the CTEA against constitutional challenges, as well as in *Golan v. Holder*, for upholding the retroactive constriction of the public domain. *Golan v. Holder* 132 S. Ct. 873, 888–89 (2012). But the argument that the CTEA provided incentives to disseminate or preserve artistic works proceeded on the basis of the circular logic that any benefit to the copyright industry must perforce amount to a distributional incentive because the copyright industry is in the distribution business. Such reasoning contradicts elementary economic theory, which shows that monopoly results in increased prices and a deadweight loss. See, e.g., DAVID C. COLANDER, MICROECONOMICS 270–71 (4th ed. 2001) (elementary undergraduate demonstration of the static deadweight loss of monopoly); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and*

benefits and costs that count for purposes of the Copyright Clause, the CTEA (and certainly the retroactive part of the CTEA) was all cost and no benefit. And in terms of the aggregate balance, the CTEA produced a large sum of diffuse costs and a small sum of concentrated benefits.¹³⁵

Theft, 5 W. ECON. J. 224, 228 (1967) (underscoring the dynamic welfare costs of monopoly). Indeed, the available evidence shows that, as economic theory would predict, public domain works are more accessible. See Paul J. Heald, *Property Rights and the Efficient Exploitation of the Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 74–76 (Fiona Macmillan ed., 2007); Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 5–6 (2013); Paul J. Heald, *How Copyright Makes Books and Music Disappear 2–3* (Ill. Pub. Law, Working Paper No. 13-54, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181; Fiona Murray et al., *Of Mice and Academics: Examining the Effect of Openness on Innovation 3–4* (Nat'l Bureau of Econ. Research, Working Paper No. 14819, 2009), available at <http://www.nber.org/papers/w14819.pdf>. The Court's reasoning also reduces the Copyright Clause, which has long been held to embody "both a grant of power and a limitation," *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966), to meaninglessness. After all, by the Court's logic, any benefit to those in the copyright business would amount to an incentive to discriminate. See *Eldred*, 537 U.S. at 247. But this is the exact opposite of what the Copyright Clause's limitation on the monopoly grant requires. As Justice Breyer pointed out in dissent, the Copyright Clause "assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence." *Eldred*, 537 U.S. at 260 (Breyer, J., dissenting). For a more extensive discussion of the CTEA and *Eldred*, see Sepehr Shahshahani, *Toward a Constitutional Copyright Law* (unpublished LL.M. thesis in Legal Theory, New York University School of Law) (on file with author).

135. This is not just the conclusion of CTEA's challengers and likeminded folk. Even Justice Ginsburg, who resorted to all manner of logical distortion to uphold the Act, could not help but hint that it was probably "unwise." *Eldred*, 537 U.S. at 208 ("In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."). And the Register of Copyrights herself acknowledged that the CTEA was a "big mistake" (although, she hastened to add, "one that Congress can make"). See Cory Doctorow, *Copyright Office Head Denounces "Big Mistake" of Extending Copyright*, BOING BOING (Feb. 21, 2006, 9:02 AM), <http://boingboing.net/2006/02/21/copyright-office-hea.html> (quoting Marybeth Peters, then Register of Copyrights); see also Joe Mullin, *Head of US Copyright Office Wants to Shorten Terms, Just Barely*, ARS TECHNICA (Mar. 19, 2013, 4:50 PM), <http://arstechnica.com/tech-policy/2013/03/head-of-us-copyright-office-wants-to-shorten-terms-just-barely/> (reporting on the position of Maria Pallante, Marybeth Peters' successor as Register of Copyrights, that copyright terms should be shortened). Peters' compunctions, however, did not

This screwy outcome was the result of a screwy process. In considering the bills that eventually became the CTEA, Congress was responsive only to concentrated interests.¹³⁶ The impetus for the CTEA came from the Walt Disney Company, whose Mickey Mouse character was about to fall into the public domain under the old life-plus-fifty term.¹³⁷ Congress held eight days of committee hearings on the CTEA and related legislation, two of them in Pasadena and Nashville in homage to the film and music industries.¹³⁸ Having gone over the lengthy transcripts of all these hearings, I am struck by the one-sidedness of the debate among Congressmembers, executive-branch officials, and testifying witnesses.

prevent her from “wholeheartedly” and “strongly” supporting the copyright extension bill before the House and the Senate. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 232 (1995) [hereinafter *June-July 1995 Hearings*]; *September 1995 Senate Hearings*, *supra* note 80, at 30.

136. See Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 295–97 (2002).

137. *Id.* at 292. In addition to the Mickey Mouse copyright, Disney’s other divisions then earned billions in revenue from similarly copyrighted characters like Winnie-the-Pooh. *Id.*; see also Dourado & Tabarrok, *supra* note 106, at 12; Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW (Mar. 5, 2002), http://writ.news.findlaw.com/commentary/20020305_sprigman.html.

138. See *Music Licensing Practices of Performing Rights Societies: Hearings Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103rd Cong. (1994) [hereinafter *February 1994 Hearings*]; *June-July 1995 Hearings*, *supra* note 135, at 65 (describing that the hearings took place in Pasadena); *September 1995 Senate Hearings*, *supra* note 80, at 39, 186; *Music Licensing and Small Business: Hearing Before the H. Comm. on Small Bus.*, 104th Cong. (1996) [hereinafter *May 1996 Hearings*]; *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 1 (1997) [hereinafter *June 1997 Hearings*] (describing that the hearings took place in Nashville); *Musical Licensing in Restaurants and Retail and Other Establishments: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *July 1997 Hearings*]. Not all of these hearings involved discussion of the CTEA; the hearings in February 1994, May 1996, and July 1997 discussed only the Fairness in Music Licensing Act and other legislation that was considered in tandem with copyright extension. See *id.*; *May 1996 Hearings*, *supra*; *February 1994 Hearings*, *supra*.

Many Congressmembers spoke in favor of copyright term extension,¹³⁹ but not a single member stood up to speak against term extension and in favor of preserving the public domain. The very concept of the public domain was repeatedly ridiculed by Congressmembers and witnesses.¹⁴⁰ Jack Valenti, the famous film industry lobbyist and Motion Picture Association of America (MPAA) president, went so far as saying that the “public domain means nobody really cares because nobody owns it.”¹⁴¹ No one challenged him on that—signifying that the statement, though a flagrant misdescription of the normative economics, was an accurate representation of the positive politics. Indeed, Congressmembers joined industry witnesses in speaking of perpetual copyright.¹⁴²

The Clinton Administration also supported term extension, and sent a number of representatives to testify to that effect.¹⁴³ At one point, an Administration witness testified that the

139. *E.g.*, *September 1995 Senate Hearings*, *supra* note 80 (statements of Senators Orrin Hatch and Diane Feinstein); *June-July 1995 Hearings*, *supra* note 135, at 1 (statement of Rep. Carlos Moorhead).

140. A prominent attack involved holding up a copy of a Beethoven CD or Tolstoy book and comparing their prices to a Pearl Jam CD or John Grisham book, and using the fact that they have similar prices as proof that the public domain does not benefit consumers. *See, e.g.*, *June-July 1995 Hearings*, *supra* note 135, at 86, 235. This obvious fallacy seems to have been accepted by Congressmembers as “evidence” of the public domain’s uselessness. *E.g.*, *id.* at 224 (statement of Rep. Patricia Schroeder).

141. *September 1995 Senate Hearings*, *supra* note 80, at 41.

142. *See* 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono) (“Actually, Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution As you know, there is also Jack Valenti’s proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.”); *June-July 1995 Hearings*, *supra* note 135, at 230 (statement of Rep. Martin Hoke) (“We’re talking about some works that will have lasting impact. I mean, maybe the works of Gershwin may be considered to be like the works of Mozart in 200 years. Why 70 years? Why not forever? Why not 150 years?”); *id.* at 234 (statement of Quincy Jones) (“And I’m particularly fascinated with Representative Hoke’s statement. I found a whole new view of things there. He just mentioned, why not forever? I never thought of that before. That’s a good one.”).

143. *See June-July 1995 Hearings*, *supra* note 135, at 207–11 (testimony of Charlene Barshesky, Deputy U.S. Trade Rep.); *id.* at 212–20 (testimony of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks); *September 1995 Senate Hearings*, *supra* note 80, at 23–24 (testimony of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks).

President's views on term extension were so similar to Congress's that "if Government works were copyrighted, the administration's opening statement might be an infringement of the chairman's opening statement."¹⁴⁴

The witnesses Congress called to testify were also overwhelmingly pro-extension. In the June-July 1995 House hearings, eleven witnesses testified in favor of term extension and only two witnesses testified against.¹⁴⁵ Likewise, in the September 1995 Senate hearings, five witnesses testified in favor of term extension and only one witness testified against.¹⁴⁶ And for the June 1997 hearings, the House called six witnesses testifying in favor of copyright extension and did not call any opposing witnesses.¹⁴⁷

The few contrarian witnesses were not industry representatives with financial clout but university professors.¹⁴⁸ The witnesses on the other side, by contrast, were mostly industry representatives, lobbyists, and famous entertainers, and they were treated with frequent softball questions and buddy boy sentiments from Congressmembers.¹⁴⁹

144. *June-July 1995 Hearings*, *supra* note 135, at 212 (testimony of Bruce Lehman).

145. The two witnesses testifying against were John Belton, a professor of English and film at Rutgers University, and Dennis Karjala, a professor of law at Arizona State University. *See id.* at 312, 355. There were two additional witnesses—William Patry and Jerome Reichman, both law professors—whom I did not count as either for or against extension. *See id.* These witnesses were not opposed to copyright extension *per se* but had some reservations about how it would be achieved under the CTEA. *See id.* Namely, both Patry and Reichman wanted the additional twenty years to go to the creator rather than the copyright holder, and Reichman also opposed expanding the copyright term for works for hire. *Id.* at 312, 355.

146. The lone witness testifying against extension was Peter Jaszi, a professor of law at American University. *See September 1995 Senate Hearings*, *supra* note 80, at 71 (statement of Peter Jaszi).

147. I did not count the testimony of Julius Epstein, a screenwriter, and Jerome Reichman, a professor of law, as being either for or against extension. Both supported extension in principle but wanted the additional twenty years to go to authors rather than current copyright holders, and Reichman also opposed extension for works for hire. *See, e.g., June 1997 Hearings*, *supra* note 138, at 28, 48 (statements of Julius Epstein, Screenwriter and Member, Writers Guild of America, West, on Behalf of the Writers Guild of America, and Jerome Reichman, Professor Vanderbilt School of Law); *see also June-July 1995 Hearings*, *supra* note 135, at 77 n.19.

148. Ammori, *supra* note 136, at 293.

149. For example, Orrin Hatch, Chairman of the Senate Judiciary Committee, was full of love for famous lobbyist Jack Valenti:

(And these were the *public* deliberations.) There was no similar love fest for the professors testifying against. The one-sided nature of congressional hearings on the CTEA was well summed up by Representative Delahunt's statement that "there is near unanimity, with the exception—and I think [Representative Sensenbrenner] is expressing some reservations—of Professor Reichman, about the sensible and cogent argument that we ought to extend copyright."¹⁵⁰

This one-sided process stands in sharp contrast with the debate surrounding the Fairness in Music Licensing Act (FMLA), which expanded the exemption from the performance-

I have to say I have been fascinated myself. I am worried about when these new rules kick in whether we can still see some of those first-line movies down there at MPAA. So we will have to work that out. And the big reason that I like to do it is, frankly, just to be able to say hello to you on a regular basis, because you are an institution in this town; and whether people agree or disagree with you, I think most everybody has tremendous respect for you. And they should.

September 1995 Senate Hearings, supra note 80, at 42. And Representative John Conyers tried to best all other Representatives in praising Quincy Jones:

Could I, Mr. Chairman, could I add my welcome to Mr. Jones, our witness? . . . As one who may have known him as long as anybody in the Congress—we don't like to get into the numbers thing, but it's a real pleasure to have him come here. It was at some expense of his time to travel across the country, and it makes me feel very good because I've seen him in every part of our society except as a witness in Congress. [Laughter.] I don't know if you've been doing this a long time or not, but, Quincy, you are probably one of the last survivors of that part of the jazz era called 'bop,' and reviewing this in one of the documents about you, it made me remember that you tie—through you have come all the contacts with almost all the musicians—black, white, Latin, international, local, foreign, domestic, and everything else. And whenever I used to hear a good tune that I didn't know who did it, after about three or four times of finding out that it was you, I probably attributed tunes to you that maybe you didn't do, but it always fascinated me, that great variety in your repertoire that you could reach to it. So I'm very, very happy to have you here.

June-July 1995 Hearings, supra note 135, at 233; *see also id.* (statement of Rep. George Gekas) (bantering about with Quincy Jones); *September 1995 Senate Hearings, supra* note 80, at 95 (statement of Senator Fred Thompson) (praising his "good friend, Patrick Alger").

150. *June 1997 Hearings, supra* note 138, at 86.

license requirement enjoyed by bars and restaurants.¹⁵¹ Unlike the copyright extension bill, which pitted the concentrated interests of the copyright industry against the diffuse interests of public users, the music licensing bill pitted concentrated copyright owners against the concentrated hospitality industry, which was campaigning for a discrete benefit. The results panned out just as public choice theory would predict. With this bill, unlike the CTEA, there was a rough parity in the number of witnesses for and against.¹⁵² Congressmembers spoke passionately against as well as in favor of the bill,¹⁵³ and the Clinton Administration came out in opposition.¹⁵⁴ When there are concentrated interest groups on both sides of an issue, the battle does indeed heat up.

The same structure obtained when the issues of term extension and restaurant exemption came before the whole Congress. In both the House and the Senate, there was raging debate on the Fairness in Music Licensing bill, with proponents and opponents making impassioned statements¹⁵⁵ and calling

151. Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830-34 (codified as amended 17 U.S.C. §§ 101, 110, 504, and 17 U.S.C § 512 (2012)).

152. In the May 1996 hearings, there were three witnesses in favor of expanding the restaurant exemption and two witnesses against (and one witness who did not come out one way or the other); and in the July 1997 hearings there were four witnesses in favor and six witnesses against. *See generally July 1997 Hearings, supra* note 138; *May 1996 Hearings, supra* note 138.

153. *Compare, e.g., July 1997 Hearings, supra* note 138, at 3-5 (statement of Rep. Jim Sensenbrenner) (urging the expansion of the restaurant exemption and denouncing the performing rights organizations as the "coercive apparatus of a monopoly navigating with their platoons of lawyers . . ."), *with id.* at 63 (statement of Rep. Barney Frank) (ridiculing the supporters of expanding the restaurant exemption). Representative Bono went so far as to call Representative Sensenbrenner a "hypocrite." *Id.* at 7.

154. *See, e.g., July 1997 Hearings, supra* note 138, at 16 (testimony of Robert Stoll, Administrator of the Office of Legislative and International Affairs, U.S. Patent and Trademark Office).

155. As always, both sides said they were in favor of "small business." *Compare* 144 CONG. REC. H1457-58 (daily ed. Mar. 25, 1998) (statement of Rep. Scarborough) (speaking against the FMLA and claiming that it would apply to "struggling" artists who are not "rich and famous rock star types" and would "just gut their ability to earn a living"), *with* 144 CONG. REC. H1459 (daily ed. Mar. 25, 1998) (statement of Rep. Sensenbrenner) (speaking in favor of the FMLA: "It sends the message that the voice of the tavern keeper in Boston, Massachusetts, Greensboro, North Carolina, or Milwaukee, Wisconsin is just as important as the parade of celebrities that Hollywood has trotted out . . ."). Scarborough then rose again to say that it was he, not

each other names.¹⁵⁶ But no such controversy erupted about term extension—everyone was in favor.¹⁵⁷ There were plenty of Congressmembers who spoke for the concentrated copyright and hospitality industries, but not a single representative of the public defended the public domain against encroachment by term extension. The Congressmembers who opposed term extension did so not out of concern for contraction of the public domain, but by way of holding term extension hostage to the restaurant exemption; they withdrew their opposition once the latter was expanded.¹⁵⁸ Diffuse interests simply did not count.

In the end, the CTEA easily cleared committee and became law. It was favorably reported out of the House Judiciary Committee by voice vote¹⁵⁹ and out of the Senate Judiciary Committee by a roll call vote of fifteen yeas to three nays.¹⁶⁰ Before the whole Congress, support was so overwhelming that the bill passed by unanimous consent in the Senate¹⁶¹ and by voice vote in the House.¹⁶² The only reason the CTEA took until 1998 to become law was that its passage was tied by Representative Sensenbrenner to the Fairness in Music Licensing bill.¹⁶³ It was the latter, not the former, that became a close call and engendered delay.¹⁶⁴ The Fairness in Music

Sensenbrenner, who was pro-small business, and the song and dance continued. *See* 144 CONG. REC. H1460 (daily ed. Mar. 25, 1998).

156. *Compare* 144 CONG. REC. H1457 (daily ed. Mar. 25, 1998) (statement of Rep. Doggett) (speaking against the FMLA and calling it “the Music Theft Act”), *with* 144 CONG. REC. H1472–73 (daily ed. Mar. 25, 1998) (statement of Rep. Talent) (speaking in favor of the FMLA).

157. *E.g.*, 144 CONG. REC. H9949 (daily ed. Oct. 7, 1998) (statement of Rep. Jackson-Lee); 144 CONG. REC. H9950 (daily ed. Oct. 7, 1998) (statement of Rep. Coble); 144 CONG. REC. S11,672 (daily ed. Oct. 7, 1998) (statement of Sen. Leahy); 144 CONG. REC. S11,673 (daily ed. Oct. 7, 1998) (statement of Sen. Thurmond).

158. *E.g.*, 144 CONG. REC. H1459 (statement of Rep. Sensenbrenner) (“I rise in support of H.R. 2589, the Copyright Term Extension Act, if, and only if, my amendment to ensure fairness in music licensing passes.”).

159. H.R. REP. NO. 105-452, at 6 (1998).

160. S. REP. NO. 104-315, at 21 (1996).

161. 144 CONG. REC. S11,673.

162. 144 CONG. REC. H9954 (daily ed. Oct. 7, 1998).

163. *See* 144 CONG. REC. H1457–59 (daily ed. Mar. 25, 1998) (statement of Rep. Sensenbrenner).

164. The restaurant exemption occupied Congress for a number of years. Congress first tried to persuade restaurateurs and the performance rights organizations to reach a compromise. When that failed, it considered

Licensing bill was ultimately added as Title II of the Copyright Term Extension Act, which ensured its passage.¹⁶⁵

In short, the legislative political economy of copyright is such that the rightsholders get their way and the general public is unheard, resulting in a relentless expansion of copyrights. Recognizing this reality renders the proposals to “fix” fair use by congressional legislation decidedly unrealistic. There is no reason to suppose that a Congress so enthralled by the copyright industry would have any interest in passing laws, be it to create new fair use rules or a new administrative agency, that would *decrease* the power of copyright owners vis-à-vis users. Quite the contrary, the foregoing review of legislative dynamics indicates that the most likely result of a shift in lawmaking responsibility to Congress would be a smaller fair use safe harbor. This would be a perverse result for reform advocates, as their goal is to expand access and make life easier for users and second-generation creators.¹⁶⁶ The reformers’ efforts, it would seem, are self-defeating. Remarkably, however, they devote little attention to the immense political barriers standing in the way of their legislative proposals.

To his credit, Carroll does devote a page and a half to exploring the political barriers to his proposal for a Fair Use Board.¹⁶⁷ His analysis of this point, however, is too breezy. He does not explore the public choice problems that would attend the creation and makeup of the Fair Use Board or the likelihood of regulatory capture in the Board’s subsequent performance. And his assurance that the “proposal is not a

legislative solutions. Term extension would have passed much earlier had it not been tied to the restaurant exemption. When there finally came time for floor debate, the House first voted on the McCollum Amendment, a less generous expansion of the restaurant exemption offered in place of the Sensenbrenner Amendment, and the amendment was defeated by a vote of 150 ayes, 259 noes, and 22 not voting. 144 CONG. REC. H1481–83 (daily ed. Mar. 25, 1998). Then the House voted on the Sensenbrenner Amendment, and passed it by a vote of 297 ayes, 112 noes, and 22 not voting. *Id.* Once the music-licensing issue was taken care of, the extension legislation was passed swiftly by both chambers of Congress. See Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (amending scattered sections of 17 U.S.C.).

165. See Pub. L. 105-298, 112 Stat. 2827–34.

166. See *supra* Part II.

167. See Carroll, *supra* note 10, at 1142–43.

threat to the interests of copyright owners”¹⁶⁸ is not credible. The very purpose of the proposal, as Carroll explains in the beginning, is to reduce the power of rightsholders to scare users and second-generation creators into obtaining a license for every use instead of relying on fair use.¹⁶⁹ Such a proposal *is* by necessity “a threat to the interests of copyright owners”; indeed, that is the whole point of it. These difficulties are too serious to be alleviated by the comment that the proposal might be “ahead of its time.”¹⁷⁰

Other legislative proposals are even more oblivious to the real world than Carroll’s. Mazzone refers in passing to the possibility of bureaucratic capture when discussing his proposal for administrating fair use by an agency, but he fails to answer the question of why our pro-copyright holder Congress would have any interest in creating or empowering an administrative agency to undercut the power of copyright holders.¹⁷¹ The other commentators make no effort at all to reconcile their image of ideal laws with the realities of copyright legislation.¹⁷² Their legislative proposals are divorced from reality and, as such, destined to fail.

V. POTENTIAL OBJECTIONS AND QUALIFICATIONS

This conclusion about the futility of reform efforts predicated on congressional action would be false, however, if at least one of the following conditions is satisfied: (1) if the interest group structure is such that fair use falls into the exceptional pockets of resistance to copyright expansion, or (2) if recent developments in the technology world have fundamentally upended the old power structure, as evidenced by the 2012 defeat of SOPA and PIPA in Congress.¹⁷³ Unfortunately for reform advocates, neither of these conditions is satisfied.

168. *Id.* at 1142.

169. *Id.* at 1089–96.

170. *Id.* at 1091, 1143.

171. *See* Mazzone, *supra* note 10, at 429–30.

172. *See supra* Part II.

173. *See* Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011); Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

A. INTEREST GROUP STRUCTURE

With respect to interest group structure, fair use is more like the CTEA than the FMLA. There are no concentrated interests to counter the rightsholders' influence. If anything, fair use is the paradigm case of a concentrated-versus-diffuse structure. Whereas most other expansion-curbing provisions of the Copyright Act reflect specific compromises between the concentrated copyright industry and the concentrated interests that resisted expansion in some particular area,¹⁷⁴ § 107 is a catchall protection for all users. Fair use, unlike other legislative exceptions to ever-expanding copyright, does not pit concentrated interests against concentrated interests; rather, it pits the concentrated copyright industry that would benefit from user restrictions against the diffuse, and often unknown, members of the public who would benefit from more user rights.¹⁷⁵ This interest group structure means that any redrafting would likely go in the wrong direction.

It is true that concentrated interests sometimes stand behind fair use. When the 1976 Copyright Act was being drawn up, libraries and educational institutions argued for a stronger § 107.¹⁷⁶ And the Google Books controversy has seen the behemoth Google line up on the side of fair use.¹⁷⁷ But that does not make for a well-balanced interest group structure. Universities and libraries are not in the same weight class as the copyright industry, and their efforts will likely be limited to educational and scholarly uses anyway. They cannot be relied on as protectors of second-generation creators. Nor have they had much to say about file sharing, streaming, user-generated

174. See *supra* text accompanying notes 107–13.

175. See Litman, *supra* note 98, at 886 (“In the midst of these expansively defined rights and rigid exemptions, the fair use doctrine became the statute’s central source of flexibility. In the earliest versions of the bill, the beleaguered fair use provision offered the sole means of tempering the expansive scope of the copyright owner’s exclusive rights. Fair use was also the sole safe harbor for interests that lacked the bargaining power to negotiate a specific exemption.”).

176. See *id.* at 869, 887; see also WILLIAM PATRY, PATRY ON FAIR USE §§ 9:1–9:37 (2014) (recounting the legislative history of § 107).

177. See *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

content, and the multitude of similar issues that the Internet has brought to the fore.¹⁷⁸

Google and its ilk are more powerful, but they will probably find it advantageous to concentrate on fine-tuned exceptions—just as they did with respect to the safe harbor provision of the Digital Millennium Copyright Act¹⁷⁹ and just as other concentrated interests have done—rather than on a catchall guardian of the public domain.¹⁸⁰ It is quite possible, for example, that we will witness the emergence of a *sui generis* regime to deal with issues such as Google Books. Indeed, Google initially settled with the plaintiffs, but the settlement was thrown out by the district judge.¹⁸¹ It seems that a decision on fair use grounds was not Google's first choice but was instead forced by the Second Circuit, which instructed the district court to adjudicate the fair use defense before deciding the plaintiffs' motion for class certification.¹⁸² In short, Google's guardianship of fair use is an ephemeral coincidence. There are no concentrated interests reliably standing behind fair use, which ensures its unpopularity in Congress.

This reality is reflected in the fate of fair use legislation. One might think that the very existence of a fair use provision in the Copyright Act is testimony to Congress's receptivity to the idea of protecting the public domain from copyright expansion. Such a conclusion, however, would be vastly overstated. To begin, we must remember that it was not Congress that created fair use. Fair use existed long before the 1976 Copyright Act and its § 107.¹⁸³ It appeared famously in

178. In the file sharing context, this might be in part due to the fact that “a college or university has no legal obligation to defend or accept responsibility for the illegal actions [including copyright violations] of its students, faculty, or staff.” Constance S. Hawke, *Piracy and Protocols: Handling Information on University Networks*, 209 EDUC. L. REP. 17, 25 (2006); see also Rebecca Lindsey, *Obama Administration Defends \$650K File Sharing Fine Against Grad Student*, DAILY TECH (Jan. 21, 2010, 2:16 PM), <http://www.dailytech.com/Obama+Administration+Defends+650K+File+Sharing+Fine+Against+Grad+Student/article17478.htm>.

179. 17 U.S.C. § 512 (2012).

180. See *supra* notes 107–13 for a recounting of specific areas of interest group-inspired resistance against copyright expansion.

181. See *Authors Guild, Inc. v. Google, Inc.*, 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011).

182. See *Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132 (2d Cir. 2013).

183. See *supra* note 3.

Justice Story's 1841 opinion in *Folsom v. Marsh*,¹⁸⁴ and less famously in English cases of even earlier times.¹⁸⁵ And it was continuously refined by judges, without the aid of any statutory guidance, in the 135 years from *Folsom* to the 1976 Copyright Act. Fair use is a creation of judges, not congressmen.

Nor did § 107 expand fair use. The House and Senate Reports both state clearly that "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."¹⁸⁶ Although such a statement does not constitute a definitive interpretation of § 107—it is subject to all the usual criticisms about the use of legislative history in interpreting statutes, plus it leaves one wondering what the point of legislation is if it does not change the law—its basic truth cannot be denied. There is nothing in § 107 that was not already in the long-developed body of common law jurisprudence on fair use.¹⁸⁷ The more ambitious exemptions from copyright infringement lobbied for by libraries and educational groups—most notably, a general exemption for educational and research uses made by not-for-profit entities, but also a private use exemption and an exemption for certain computer uses—never made it into the Copyright Act.¹⁸⁸ So the

184. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

185. See generally Sag, *supra* note 3 (reviewing English "fair abridgement" cases litigated between 1710 and 1841).

186. See S. REP. NO. 94-473, at 62 (1975); H.R. REP. NO. 94-1476, at 66 (1976).

187. Indeed, the four factors prefigure in *Folsom* itself. See *Folsom*, 9 F. Cas. at 348-49 ("In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy The intention to pirate is not necessary in an action of this sort Much must, in such cases, depend upon the nature of the new work, the value and extent of the copies, and the degree in which the original authors may be injured thereby.").

188. Libraries and educational groups did, however, get a little bit of what they wanted by obtaining a limited right to copy for libraries and archives in § 108 and remission of statutory damages for nonprofit employees acting upon a reasonable and bona fide belief that their copying constituted fair use in §

enactment of a fair use provision as part of the 1976 Copyright Act does not represent a triumph for user groups against copyright holders (though it probably does not represent a victory the other way around either).¹⁸⁹

Any illusions about the 1976 Congress's support of the public domain are dispelled when one considers that the 1976 Act was extremely pro-rightsholder as a whole. Among other things, the Act lengthened the term of copyright from twenty-eight years renewable for an additional twenty-eight years (for a maximum total of fifty-six years) to life of the author plus fifty years,¹⁹⁰ disposed of certain "formalities" that had previously been required for copyright protection,¹⁹¹ conferred on copyright holders a general right to "prepare derivative works based upon the copyrighted work,"¹⁹² eliminated the "for profit" requirement for a public performance to constitute infringement,¹⁹³ increased the maximum statutory damages award,¹⁹⁴ gave plaintiffs the right to elect statutory damages at any time during litigation,¹⁹⁵ and eliminated the 1909 Act's proviso that statutory damages "shall not be regarded as a

504(c)(2) (2012). For a detailed recounting of the legislative history of fair use, including extended discussion of the failed educational exemption, see PATRY, *supra* note 176, at §§ 9:1–9:37; *see also* Litman, *supra* note 98, at 875–77, 887–88.

189. It is possible that the codification of fair use had the intention or effect of curtailing the defense. Passing diluted reform legislation to forestall real reform, be it legislative or judicial, is not unheard of. But I found no evidence that § 107 was primarily intended to limit fair use or that it had such an effect.

190. 17 U.S.C. § 302 (2012). As discussed, the CTEA further extended the term of protection to life of the author plus seventy years. *See* Sonny Bono Copyright Term Extension Act of 1998 §§ 302, 304; *supra* text accompanying note 132.

191. *See supra* note 129 and accompanying text.

192. 17 U.S.C. § 106(2) (2012); *see also* 17 U.S.C. §§ 101, 103 (2012). Copyright protection for derivative works existed prior to the 1976 Act, but the piecemeal protection was made general for the first time in the Act. *See, e.g.*, Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1509, 1511–17 (2013).

193. 17 U.S.C. § 106(4). For an explanation of the elimination of the so-called "nonprofit exemption," *see* H.R. REP. NO. 94-1476, at 62–63 (1976) and S. REP. NO. 94-473, at 59 (1975).

194. 17 U.S.C. § 504(c) (2012).

195. 17 U.S.C. § 504(c)(1).

penalty.”¹⁹⁶ Surely it cannot be said of a Congress that ushered in such sweeping swelling of copyrights that it intended to create a great public safe haven by codifying fair use. The 1976 Congress unmistakably sided with rightsholders and against the public domain, even if this side taking is not as evident in § 107 as in other sections of the Copyright Act.

In any event, any ambivalence one might feel when characterizing Congress’s attitude toward fair use in 1976 disappears when assessing that body’s posture today. If Congress was lukewarm about user rights in 1976, it is decidedly hostile now. That hostility is reflected in the fate of three major fair use bills that have been introduced in recent years.

The Digital Media Consumers’ Rights Act, introduced by Representative Rick Boucher in October 2002 and again in January 2003 and March 2005, would have amended the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA) by providing that circumvention of access-controlling technological measures is permitted if it does not result in copyright infringement, and that manufacturing or selling circumventing devices is permitted if carried out solely for purposes of scientific research on technical protection measures.¹⁹⁷ The bill would have also fully restored the rule of *Sony v. Universal City Studios* by exempting from contributory infringement the distribution of hardware or software “capable of enabling significant noninfringing use.”¹⁹⁸

196. Copyright Act of 1909 § 25(b), 17 U.S.C. § 101(b) (1970) (repealed). For a discussion of statutory damages under the 1909 and 1976 Copyright Acts, see Samuelson & Wheatland, *supra* note 122, at 446–63.

197. Digital Media Consumers’ Rights Act of 2002, H.R. 5544, 107th Cong. (2002); Digital Media Consumers’ Rights Act of 2003, H.R. 107, 108th Cong. (2003); Digital Media Consumers’ Rights Act of 2005, H.R. 1201, 109th Cong. § 5 (2005).

198. H.R. 5544 § 5(b)(2). *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”), *with* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 918 (2005) (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”). The bill also contains measures related to the proper labeling of copy-protected CDs. *See* H.R. 1201 §§ 3–4.

Similarly, the Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act, introduced by Representative Zoe Lofgren in March 2003 and again in December 2005, would have exempted archival and personal uses of lawfully acquired digital works from liability for copyright infringement.¹⁹⁹ It would have also affirmed that the first sale doctrine applies to sales of digital works.²⁰⁰ And it would have amended the DMCA's anticircumvention provisions by providing that circumvention of access-controlling technological devices is not prohibited if such circumvention is necessary to enable a noninfringing use of a work.²⁰¹

Finally, the Freedom and Innovation Revitalizing U.S. Entrepreneurship (FAIR USE) Act, introduced in February 2007 by Representative Rick Boucher, would have made the DMCA's prohibition on the circumvention of access-controlling technological devices inapplicable to acts of circumvention carried out solely for the following purposes: (1) to make compilations of audiovisual works for educational use in a classroom by an instructor;²⁰² (2) to skip over "commercial or personally objectionable content" in an audiovisual work;²⁰³ (3) to transmit a work over a home or personal network (excluding Internet uploads for mass redistribution);²⁰⁴ (4) to gain access to public domain works included in a compilation consisting primarily of such works;²⁰⁵ (5) to access a work of "substantial public interest" for purposes of "criticism, comment, news reporting, scholarship, or research;"²⁰⁶ and (6) for public or research libraries, to "preserve or secure a copy or to replace a copy that is damaged, deteriorating, lost, or stolen."²⁰⁷ The

199. Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2005, H.R. 4536, 109th Cong. § 3 (2005); Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R. 1066, 108th Cong. § 3 (2003).

200. H.R. 4536 § 4; H.R. 1066 § 4.

201. H.R. 4536 § 5; H.R. 1066 § 5.

202. Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007, H.R. 1201, 110th Cong. § 3(b) (2007) (proposing to add provision (G)(i) to 17 U.S.C. § 1201(a)(1)).

203. *Id.* (proposing to add provision (G)(ii) to § 1201(a)(1)).

204. *Id.* (proposing to add provision (G)(iii) to § 1201(a)(1)).

205. *Id.* (proposing to add provision (G)(iv) to § 1201(a)(1)).

206. *Id.* (proposing to add provision (G)(v) to § 1201(a)(1)).

207. *Id.* (proposing to add provision (G)(vi) to § 1201(a)(1)).

FAIR USE Act would have further exempted the distribution of hardware “capable of substantial, commercially significant noninfringing use” from contributory copyright infringement.²⁰⁸

As the foregoing summaries make clear, all of these bills would have strengthened the legal position of users vis-à-vis copyright holders. So it is no surprise that they were supported by user groups and opposed by copyright industry organizations.²⁰⁹ Nor is it a surprise, given the previously described interest group structure, that none of the bills ever got anywhere. The same fate befell other pro-public domain bills recently introduced in Congress.²¹⁰ In short, the recent history of fair use legislation shows that Congress is in no way inclined to support legislation that would strengthen fair use or

208. *Id.* § 2(b). The bill also seeks to reform the statutory damages provisions of the Copyright Act. *See id.* § 2(a).

209. For contemporary expressions of support and opposition, see, for example, *Boucher, Doolittle Float “FAIR USE” Act*, ANALOGHOLE (Feb. 28, 2007), http://analoghole.typepad.com/analoghole/2007/02/boucher_doolitt.html; Thomas Claburn, *FAIR USE Act Aims to Clarify Copyright Limits*, INFORMATIONWEEK (Feb. 28, 2007, 5:06 PM), <http://www.informationweek.com/fair-use-act-aims-to-clarify-copyright-limits/d/d-id/1052437>; *ALERT: Tell Congress to Support Rep. Boucher & Doolittle’s Digital Media Consumers’ Rights Act!*, ELECTRONIC FRONTIER FOUND. (Oct. 10, 2002), <https://www.eff.org/effector/15/32>; Grant Gross, *Bill Would ‘Protect’ Consumers from DMCA*, INFOWORLD (Mar. 5, 2003), <http://www.infoworld.com/t/applications/bill-would-protect-consumers-dmca-950>; Grant Gross, *RIAA Opposes New Fair Use Bill*, INFOWORLD (Feb. 28, 2007), <http://www.infoworld.com/d/security-central/riaa-opposes-new-fair-use-bill-749>; Rik Lambers, *A Short Analysis of the May 2004 Hearing on the Digital Media Consumers’ Rights Act*, INDICARE (Jan. 20, 2005), http://www.indicare.org/tiki-read_article.php?articleId=70; Jacob Roberts, *Library Copyright Alliance Strongly Supports H.R. 1201, the FAIR USE Act*, DISTRICT DISPATCH (Feb. 28, 2007), <http://www.districtdispatch.org/2007/02/library-copyright-alliance-strongly-supports-hr-1201-the-fair-use-act/>. Note, however, that some pro-public domain groups refused to support the FAIR USE Act because they thought it did not go far enough in curbing the DMCA’s abuses. *See, e.g.*, Julie Jacobson, *Fair Use Act Would Allow In-Home Content Sharing, Not DVD Ripping*, CEPRO (Mar. 3, 2007), http://www.cepro.com/article/fair_use_act_would_allow_in_home_content_sharing_not_dvd_ripping/; Tim Lee, *FAIR USE Act Analysis: DMCA Reform Left on the Cutting Room Floor*, ARS TECHNICA (Feb. 28, 2007, 10:12 AM), <http://arstechnica.com/tech-policy/2007/02/8942/>.

210. *See, e.g.*, Section 115 Reform Act of 2006, H.R. 5553, 109th Cong. (2006); Public Domain Enhancement Act of 2005, H.R. 2408, 109th Cong. (2005); Public Domain Enhancement Act of 2003, H.R. 2601, 108th Cong. (2003); Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. (2002).

otherwise improve the position of users and second-generation creators vis-à-vis content owners.

B. SOPA AND PIPA

Finally, what about the recent defeat of SOPA and PIPA by a much-heralded grassroots campaign? SOPA and PIPA were bills introduced in the House and the Senate, respectively, in 2011.²¹¹ They were purportedly designed to combat massive copyright infringement by “rogue” foreign websites.²¹² The bills would authorize actions by private parties and the Attorney General to require payment processors and advertisers to refrain from doing business with infringing websites.²¹³ They would even compel search engines and Internet service providers to delink and delist infringing websites—which means wiping the Internet clean of undesirable “rogue” elements and creating a sanitized web palatable to copyright holders.²¹⁴ These draconian remedies could be procured summarily, without a full adjudication on the merits, and in some cases even *ex parte*.²¹⁵ SOPA additionally provided for more stringent criminal penalties for online streaming of copyrighted content.²¹⁶

Opposition to SOPA and PIPA first surfaced in isolated YouTube videos posted in June 2011 by video gamers wary of the streaming provisions, but it soon engulfed the whole Internet.²¹⁷ The wave of resistance eventually came to include

211. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011) (known interchangeably as PIPA or PROTECT IP); see also *H.R. 3261—CRS Summary*, LIBR. CONGRESS (Oct. 26, 2011), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03261:@@D&summ2=m&> (summarizing SOPA); *S. 968—CRS Summary*, LIBR. CONGRESS (May 26, 2011), <http://thomas.gov/cgi-bin/bdquery/z?d112:SN00968:@@D&summ2=m&> (summarizing PIPA).

212. H.R. 3261; S. 968.

213. H.R. 3261; S. 968.

214. See S. 968 § 3.

215. See H.R. 3261 §§ 102–03; S. 968 §§ 3–4.

216. H.R. 3261 § 201.

217. Yafit Lev-Aretz, *Copyright Lawmaking and the Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 221 nn.139–41 (2013). See *id.* for a concise chronology of the events culminating in the defeat of SOPA and PIPA, including data and statistics on the protests.

the following: a widely observed “American Censorship Day;”²¹⁸ participation in the opposition by hundreds of thousands of websites, including BoingBoing, the Drudge Report, Facebook, Google, Mozilla, Oatmeal, Reddit, Tumblr, Wikipedia, Wired, and Wordpress;²¹⁹ tens of thousands of blog posts written against the bills;²²⁰ millions of letters, emails, and petitions written to Congressmembers and the President;²²¹ a campaign to transfer domains away from GoDaddy, a domain-hosting firm which had supported the legislation but was forced to retract its support in response to the campaign;²²² a campaign to unseat Congressman Paul Ryan, who then came out against the legislation;²²³ a statement in opposition by Facebook founder Mark Zuckerberg;²²⁴ a half-day blackout by Reddit and similar blackouts by BoingBoing and Mozilla, among others;²²⁵ a blacked out Google logo;²²⁶ and, perhaps most shocking of all, Wikipedia’s decision to “go dark” globally for a whole day.²²⁷

Following the torrent of protest, the White House issued a statement against the legislation²²⁸ and the bills’ supporters dropped out one by one.²²⁹ Finally, both the House and the Senate indefinitely postponed the bills from consideration on January 20, 2012.²³⁰ SOPA and PIPA were dead.

218. *Id.* at 221.

219. *Id.* at 222–26.

220. *Id.* at 204.

221. *Id.* at 225–26.

222. Declan McCullagh, *GoDaddy Bows to Boycott, Now ‘Opposes’ SOPA Copyright Bill*, CNET (Dec. 29, 2011, 2:03 PM), <http://www.cnet.com/news/godaddy-bows-to-boycott-now-opposes-sopa-copyright-bill/>.

223. John Hudson, *Reddit Forces Paul Ryan to Play Defense on SOPA*, WIRE (Dec. 29, 2011, 1:47 PM), <http://www.thewire.com/politics/2011/12/reddit-forces-paul-ryan-play-defense-sopa/46782/>.

224. Lev-Aretz, *supra* note 217, at 225.

225. *Id.* at 221–23.

226. *Id.* at 224.

227. *Id.* at 222.

228. Victoria Espinel et al., *Combating Online Piracy While Protecting an Open and Innovative Internet*, WE THE PEOPLE (Jan. 14, 2012, 8:09 AM), <https://www.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet>.

229. David Nguyen, *SOPA Opera: Where Do Your Members of Congress Stand on SOPA and PIPA?*, PROPUBLICA, <http://projects.propublica.org/sopa/> (last updated Jan. 20, 2012); Lev-Aretz, *supra* note 217, at 223.

230. See Senator Harry Reid, TWITTER (Jan. 20, 2012, 6:27 AM), <https://twitter.com/senatorreid/status/160367959464878080> (“In light of recent events, I have decided to postpone Tuesday’s vote on the PROTECT IP Act

Doesn't this episode show that people power has triumphed over concentrated corporate interests, that the old interest group structure has been upended after all? Not really. The SOPA-PIPA episode is certainly significant. It shows that Congress cannot always get away with subordinating the public interest to that of the copyright industry. Beyond this general statement, however, it is unclear what lessons to draw from the episode and how to apply them to fair use. To my knowledge no one has distilled the causes of SOPA-PIPA's defeat in a way that would help us predict when pro-copyright holder legislation is likely to be defeated in the future, nor has anyone sketched out a plausible account of how the new era is different from the old. Here I will discuss two plausible structural changes that could distinguish the new era from the period of rightsholder dominance: (1) the rise of content-disseminating companies such as Google and YouTube that have an interest in greater access to copyrighted works, and (2) the widespread availability of social media and the Internet, which have decreased the costs of collective action and information-sharing, making it easier for diffuse members of the public to communicate and organize.²³¹

The first factor is not really new. Every era has its own new content-disseminating technology—be it radio, television, cable, or whatever. And in many cases companies built on these technologies eventually gain enough power to extract concessions from copyright holders. This is very much part of the pattern of discrete holes in a broad fabric of expansion that has characterized copyright legislation for decades. Indeed, many of the specific interest group compromises in the Copyright Act were made for content-disseminating technologies, such as § 111(a)(3) for cable, § 119 for satellite television, and § 512 for internet service providers.²³² The rise of better technologies for content dissemination is great news for users, but the phenomenon is neither specific to this era nor

#PIPA"); Lamar Smith, *Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act*, GOP VOTE (Jan. 20, 2012, 1:51 PM), <http://www.texasgopvote.com/knowledge-topics/stop-sopa-pipa/statement-chairman-smith-senate-delay-vote-protect-ip-act-003761>.

231. For a discussion of the importance of social media in reducing collective action costs, see Lev-Aretz, *supra* note 217, at 213–15.

232. 17 U.S.C. §§ 111(a)(3), 119, 512 (2012).

relevant to fair use. If anything, this perspective on the SOPA-PIPA defeat makes it seem like part of the old paradigm rather than an exception to it.

The facilitation of user interaction through social media and the Internet might have more explanatory power in distinguishing this era from others. But new media alone will not obliterate public apathy and rational ignorance. Access to the Internet and social media has not transformed the diffuse and uninterested public of yore into a well-organized and alert body; mass mobilization of the kind that occurred in response to SOPA and PIPA remains the exception. A large-scale public reaction has not occurred in response to other Internet-age public-domain-constricting laws, including the Anti-Counterfeiting Trade Agreement (ACTA),²³³ the Cyber Intelligence Sharing and Protection Act (CISPA),²³⁴ and the

233. ACTA is a multinational IP agreement signed by the United States, Canada, Australia, and other countries in 2011, and joined by European Union member states and other countries in 2012. Anti-Counterfeiting Trade Agreement, May 2011, available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf; Erik Kain, *Final Draft of ACTA Watered Down, TPP Still Dangerous on IP Rules*, FORBES (Jan. 2012, 9:23 AM), <http://www.forbes.com/sites/erikkain/2012/01/28/final-draft-of-acta-watered-down-tp-own-tp-tp-still-dangerous-on-ip-rules/>. It has not been implemented in the United States. *Anti-Counterfeiting Trade Agreement*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/> (last visited Nov. 12, 2014). For the White House's response to an online petition against ACTA, see Miram Sapira, *The Role of the Anti-Counterfeiting Trade Agreement (ACTA)*, WE THE PEOPLE, <https://petitions.whitehouse.gov/response/role-anti-counterfeiting-trade-agreement-acta> (last visited Oct. 26, 2014); see also Maira Sutton & Parker Higgins, *We Have Every Right to Be Furious About ACTA*, ELECTRONIC FRONTIER FOUND. (Jan. 27, 2012), <http://www.webcitation.org/65Awbn3Qn> (criticizing ACTA).

234. Cyber Intelligence Sharing and Protection Act, H.R. 3523, 112th Cong. (2011). Cyber Intelligence Sharing and Protection Act, H.R. 624, 113th Cong. (2013), is a proposed law that would allow for more information-sharing between the United States government and technology companies. It passed the House in 2013, but remains stalled in the Senate, and the White House has stated that President Obama would veto it. See Gerry Smith, *Senate Won't Vote on CISPA, Deals Blow to Controversial Cyber Bill*, HUFFINGTON POST (Apr. 25, 2013, 7:13 PM), http://www.huffingtonpost.com/2013/04/25/cispa-cyber-bill_n_3158221.html; Gerry Smith, *White House Threatens CISPA Veto*, HUFFINGTON POST (Apr. 16, 2013, 5:18 PM), http://www.huffingtonpost.com/2013/04/16/white-house-cispa-veto-threat_n_3094865.html. CISPA has attracted a great deal of criticism from Internet freedom activists and other civil liberties organizations. Karen McVeigh & Dominic Rushe, *House Passes CISPA Cybersecurity Bill Despite Warnings from White House*, GUARDIAN (Apr. 18, 2013, 5:17 PM), <http://www.theguardian.com/technology/2013/apr/18/house-representatives-cispa-cybersecurity-white-house-warning>. For a

Trans-Pacific Partnership (TPP).²³⁵ In Yafit Lev-Aretz's phrase, the public is like a "sleeping giant" who is awakened only once in a long while.²³⁶

Understanding the causes of this occasional awakening is not an easy task. Lev-Aretz has argued that SOPA-PIPA's defeat was traceable to three factors.²³⁷ First, the SOPA-PIPA protests were part of a worldwide people-power trend in 2011, including the Arab Spring and Occupy Wall Street.²³⁸ Second, SOPA and PIPA threatened the suppression of user-generated content, such as people's favorite "cute cat" videos on YouTube, thereby targeting ordinary people in a much more direct way than regular copyright legislation,²³⁹ which is often inaccessibly technical. Third, the SOPA-PIPA issue somehow passed the high threshold to trigger large-scale public engagement.²⁴⁰

This explanation leaves a lot to be desired. It is hard to say whether the first factor was actually a cause or just a historical coincidence, and Lev-Aretz does not offer any evidence supporting the former interpretation. The second explanation—

dynamic survey and links to the criticisms and advocacy, see *Cyber Intelligence Sharing and Protection Act*, WIKIPEDIA, http://en.wikipedia.org/wiki/Cyber_Intelligence_Sharing_and_Protection_Act (last modified Aug. 22, 2014, 5:44 PM).

235. The TPP, currently in negotiation, is a proposed trade agreement to include the United States, Australia, Brunei, Chile, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. *Trans-Pacific Partnership (TPP)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Nov. 12, 2014). Negotiations are occurring in secret, so the provisions of a potential law are not fully known, but the IP provisions that have been leaked promise to be more stringent than current American law. See TRANS-PACIFIC PARTNERSHIP INTELLECTUAL PROPERTY RIGHTS CHAPTER DRAFT (2011), *available at* <http://keepthewebopen.com/assets/pdfs/TPP%20IP%20Chapter%20Proposal.pdf>; TRANS-PACIFIC PARTNERSHIP INTELLECTUAL PROPERTY RIGHTS CHAPTER SELECTED PROVISIONS (2011), *available at* <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf>. For an informative interview on the TPP, see Bill Moyers, *The Top Secret Trade Deal You Need to Know About*, MOYERS (Nov. 1, 2013), <http://billmoyers.com/episode/full-show-the-top-secret-trade-deal-you-need-to-know-about/>.

236. Lev-Aretz, *supra* note 217, at 208–10.

237. *Id.* at 210.

238. *Id.* at 208–09, 256.

239. *Id.* at 209, 256.

240. *Id.* at 209–10, 256.

the “cute cat theory of Internet censorship”²⁴¹—is interesting and potentially promising, but again no evidence is offered to show its causal effect in the SOPA-PIPA context. It is by no means evident that the whole uproar was about cute cat videos, especially since the brunt of SOPA-PIPA did *not* fall on user-generated content, and since such provisions could have been severed from the law to appease the public. Finally, the third explanation—that SOPA-PIPA passed the high threshold of public notice—merely restates the conclusion without offering an explanation.

To my knowledge, there are no satisfactory historical-theoretical explanations of why SOPA-PIPA encountered massive public resistance where many other copyright-expanding laws do not.²⁴² Nor have I seen a satisfactory apportionment of responsibility for the bills’ defeat between the general public and public-minded organizations such as the Electronic Frontier Foundation on the one hand, and Google, Facebook, and other large corporations on the other. The last question is critical for purposes of fair use because it would help us understand whether the SOPA-PIPA episode was just another manifestation of the concentrated-versus-concentrated dynamic or whether the diffuse public made a decisive difference.²⁴³ If the former, then the case fits comfortably

241. The theory was first proposed by Ethan Zuckerman at the 2008 O’Reilly Emerging Technology (ETech) Conference. See Ethan Zuckerman, *The Cute Cat Theory of Digital Activism*, WORLDCHANGING (Mar. 9, 2008), <http://www.worldchanging.com/archives/007877.html>.

242. Scholarly accounts bearing on the SOPA-PIPA episode include: Yochai Benkler et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate* (Berkman Ctr. Internet & Soc’y Harv. Univ., Working Paper No. 2013-16, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295953; Antino Kim et al., *Combating Online Piracy: The “Longer Arm” of Enforcement* (Univ. Wash., Foster Sch. Bus., Working Paper, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296116; see Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21 (2013); David S. Levine, *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105 (2012); Daniel E. O’Leary, *A Twitter-Based Event Analysis of “Computer-Based Political Action” on Intellectual Property (PIPA)* 1–13 (Univ. S. Cal., Marshall Sch. Bus., Working Paper No. ACC 01.13, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185651.

243. See *supra* notes 95–96 and accompanying text for a general discussion on concentrated and diffuse interests, *supra* text accompanying notes 132–50 for the concentrated-versus-diffuse example of the CTEA, and *supra* text

within the existing public choice framework;²⁴⁴ if the latter, then we would want to isolate the factors that contributed to public engagement and harness them in future cases in which the public interest is at stake.

The upshot is that the SOPA-PIPA episode is difficult to understand, and existing accounts don't do it justice. Moreover, SOPA-PIPA's defeat does not save any of the proposed legislative fair use fixes surveyed above because they do not draw in any way on the experience of that defeat; in fact, as far as I can tell, they all appeared before SOPA and PIPA were defeated. The happy outcome in this one case simply does not excuse the legislative reform proposals' general inattention to legislative dynamics. To better understand the causes of the SOPA-PIPA defeat and its implications for copyright legislation and public choice theory is an unanswered call for political scientists, legal scholars, and economists. Only after the call is answered can we begin to understand what lessons, if any, to take away for fair use policy. Meanwhile, we cannot ignore legislative dynamics if we want Congress to fix fair use.

C. SUMMARY OF CRITIQUE

The foregoing analysis of the political economy of copyright legislation exposes the unrealistic nature of academic proposals for Congress to legislate in a way that would reduce copyrightholders' power. Quite the contrary, the available evidence indicates that if Congress acts at all, it would likely be to increase the power of copyrightholders vis-à-vis users and second-generation creators. Congressional "reform" of fair use will probably be either nonexistent or counterproductive.

This analysis should not be taken to deprecate the exercise of ideal theory. Normative theories are of course needed, and it is beneficial sometimes to ignore important features of reality in building our theories. In fact the opposite tendency—the exercise of presenting a practical second-best solution as the theoretical first choice—can just as well be criticized.²⁴⁵ But the

accompanying notes 107–13, 151–54 for the concentrated-versus-concentrated examples of the 1976 Copyright Act and the FMLA.

244. See *supra* Part IV.

245. See Ryan Bubba & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1596, 1597 (2014) (criticizing the behavioral law and economics movement for failing to "pursue

fair use reformists are not offering ideal theory proper; they are presenting what they purport to be commonsense practical solutions. These proposals are neither packaged as, nor have the necessary rigor to be taken seriously as, ideal theory. Any virtue they might possess lies in their practical appeal. And you cannot have practical appeal if you ignore practical realities.

VI. WHAT IS TO BE DONE?

This Article so far has criticized easy fixes. I've argued that the same problems which make present copyright law such a mess render many academic reform proposals impossible. It would be silly, then, if I were to turn around and offer my own easy fix. But just because the proposals for Congress to fix fair use are hopeless does not mean that we should give up on copyright reform altogether. This section accordingly discusses more plausible avenues of reform.

A. NON-LEGISLATIVE REFORMS, COURTS, AND THE CONSTITUTIONAL DIMENSION

There are many ways of improving fair use that do not require congressional legislation. In a recent book review, Pamela Samuelson mentions ten such ways.²⁴⁶ Reform through several of these venues—namely, a congressionally created commission on copyright reform, a (reestablished) Office of Technology Assessment (OTA), and the Copyright Office—would require specific congressional action, if not actual legislation, and as such would encounter similar public choice problems as the proposals critiqued above.²⁴⁷ Other reform venues mentioned by Samuelson—namely, the federal courts, the publication of treatises, a Copyright Principles project of

the full implications of its own underlying social science” and “artificial truncation” of reform proposals in the interest of offering solutions that would be more politically palatable).

246. Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 764–69 (2013) (reviewing MAZZONE, *supra* note 56, and PATRY, *supra* note 56) (discussing copyright reform broadly, but it applies equally to fair use in particular).

247. The same can probably be said of reform through U.S. Intellectual Property Enforcement Coordinator (IPEC, or the “IP Czar”). See Samuelson, *supra* note 246, at 765. The public choice problems afflicting executive agencies, however, could potentially be different from those plaguing Congress. See *id.* at 764 n.122, 765.

the American Law Institute (ALI), private ordering, social norms, and international agreements—appear more promising.²⁴⁸

This list is not exhaustive. One may add the preparation of guidelines and best-practices manuals;²⁴⁹ the work of independent nongovernmental organizations, monitoring groups, and law school clinics;²⁵⁰ reports and recommendations by presidential commissions;²⁵¹ and other possibilities. Each

248. *See id.* at 766–69.

249. *See, e.g.*, PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011), available at http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf; CTR. FOR MEDIA & SOC. IMPACT, THE CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION (n.d.), available at <http://www.cmsimpact.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education#code> (last visited Nov. 13, 2014); L. Ray Patterson, *Regents Guide to Understanding Copyright and Educational Fair Use*, 5 J. INTELL. PROP. L. 244 (1997); *Guidelines on the Fair Use of Copyrighted Works by Law Libraries*, AM. ASSOC. LAW LIBR. (June 2014), <http://www.aallnet.org/mm/Advocacy/recommendedguidelines/policy-fair.html>. *But see* Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 599 (2001) (criticizing various guidelines that “attempt to define the scope of fair use for specific applications . . .”).

250. These organizations include, for example, Center for Democracy and Technology, *see About CDT*, CENTER FOR DEMOCRACY & TECH., <https://cdt.org/about/> (last visited Nov. 13, 2014); Chilling Effects, *see CHILLING EFFECTS*, <https://www.chillingeffects.org> (last visited Nov. 13, 2014); Electronic Frontier Foundation, *see About EFF*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/about> (last visited Nov. 13, 2014); Free Software Foundation, *see About FSF*, FREE SOFTWARE FOUND., <http://www.fsf.org/about/> (last visited Nov. 13, 2014); NYU Technology Law and Policy Clinic, *see NYU Technology Law and Policy Clinic*, NYU LAW, <http://www.law.nyu.edu/academics/clinics/semester/technologylawandpolicy> (last visited Nov. 13, 2014); Public Knowledge, *see About Us*, PUBLIC KNOWLEDGE, <https://www.publicknowledge.org/about-us/> (last visited Nov. 13, 2014); and Samuelson Law, Technology & Public Policy Clinic, *see Samuelson Law, Technology & Public Policy Clinic*, BERKELEY L., U. CAL., <http://www.law.berkeley.edu/samuelsonclinic.htm> (last visited Nov. 13, 2014).

251. *See, e.g.*, FIN. CRISIS INQUIRY COMM’N, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011); JAMES A. BAKER, III ET AL., IRAQ STUDY GROUP REPORT (2006); 9/11 COMM’N, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004); PRESIDENT’S SPECIAL REVIEW BD., TOWER COMMISSION REPORT (1987); PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967). It is exceedingly unlikely that such a commission would be established to inquire into copyright, as the subject has not reached the level to be considered a national crisis.

venue or modality of reform comes with its own advantages and disadvantages, and its own version of collective action and public choice problems. Samuelson's focus is on a potential ALI Copyright Principles project.²⁵² I would like to concentrate here on the federal courts.

The federal courts are the most natural venue for fair use reform. It was judges who gave us fair use in the first place.²⁵³ And much of what is pro-user in fair use, as in the rest of copyright, comes from judge-made law—the rule of *Sony*,²⁵⁴ the freedom to parody,²⁵⁵ the allowance for mass digitization in the public interest,²⁵⁶ the permission to include thumbnail images of photographs in search-engine results,²⁵⁷ the protection for intermediate copying of software on the way to reverse engineering,²⁵⁸ and so forth. Indeed, the law of fair use is pretty much all judge-made common law. It is only natural, then, that those who seek to improve fair use should look to the federal courts.

And they do. There are many who actively work, not without considerable success, to improve fair use by helping to shape copyright litigation in the federal courts. The list includes the Center for Democracy and Technology, Chilling

252. See Samuelson, *supra* note 246, at 770–78.

253. See *supra* note 3 and accompanying text.

254. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 442, 454–56 (1984) (holding that the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, even if it is merely capable of substantial noninfringing uses, and that recording a broadcast television program for later home viewing, or “time shifting,” is fair use).

255. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that making a rap version of a pop song may be fair use, in light of the rap song's parody elements, and reversing the appellate court's determination that the commercial nature of the song precluded a fair use finding).

256. See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (holding that digitizing the print collections of university libraries for the purpose of enabling full-text searches and providing access to visually disabled persons is fair use); *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (holding that the Google Books project, pursuant to which Google has digitized and made text-searchable the contents of more than twenty million books in the collection of several research libraries, is fair use).

257. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

258. See *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 598 (9th Cir. 2000).

Effects, the Electronic Frontier Foundation, the Free Software Foundation, the NYU Technology Law and Policy Clinic, Public Knowledge, and the Samuelson Law, Technology & Public Policy Clinic, among many others.²⁵⁹ These organizations and their law-professor members bring lawsuits,²⁶⁰ defend lawsuits,²⁶¹ write amicus briefs,²⁶² compile facts, and issue reports²⁶³ to raise judicial awareness of copyright abuses and alert judges to the downside of copyright expansionism.²⁶⁴

259. See sources cited *supra* note 250.

260. See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

261. See, e.g., *Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 419 F.3d 1005 (9th Cir. 2005); *Astrolabe v. Olson*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/cases/astrolabe-v-olson> (last visited Nov. 13, 2014) (advocacy group summarizing the factual issues and dismissal of the case).

262. See, e.g., Brief for the Electronic Frontier Foundation, Public Knowledge, and the Center for Democracy & Technology as Amici Curiae Supporting Appellees, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (No. 12-4547-CV); Brief of Digital Humanities and Law Scholars as Amici Curiae in Support of Defendants-Appellees and Affirmance, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (No. 12-4547-CV); Brief of 25 Intellectual Property Law Professors as Amici Curiae in Support of Petitioner, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (No. 11-697); Brief of Amici Curiae Public Knowledge et al. in Support of Petitioner, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (No. 11-697); Brief of Amici Curiae Electronic Frontier Foundation et al., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (Nos. 10-3270-cv, 10-3342-cv); Brief of Amici Curiae Chilling Effects Clearinghouse Leaders in Support of Appellee, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (Nos. 06-55405, 06-55406, 06-55425, 06-55759, 06-55854, 06-55877); Amicus Curiae Brief of the Electronic Frontier Foundation et al. in Support of Google, Inc., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (Nos. 06-55405, 06-55406, 06-55425, 06-55759, 06-55854, 06-55877); Brief of George Akerlof et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

263. See, e.g., PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), available at http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf; MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL (2005), available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>.

264. Of course, the same actors also work in areas other than litigation. The Electronic Frontier Foundation, for example, monitors and participates in the DMCA rulemaking process. See *DMCA Rulemaking*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/dmca-rulemaking> (last visited Nov. 13, 2014).

Scholars also write law review articles discussing how judges should interpret the fair use doctrine. At least two of these articles, Professor Gordon's *Fair Use as Market Failure* and Judge Leval's *Toward a Fair Use Standard*,²⁶⁵ appear to have had significant influence on fair use jurisprudence.²⁶⁶

Doctrinal scholarship on fair use has become all the more important since the Supreme Court declared that the doctrine might be of constitutional import. The Supreme Court's recent record on constitutional copyright law is poor. In *Eldred v. Ashcroft*, decided in 2003,²⁶⁷ and *Golan v. Holder*, decided in 2012,²⁶⁸ the Court rejected constitutional challenges to copyright-expanding legislation, dealing a heavy blow to those who had hoped that courts would recognize meaningful constitutional limits on copyright expansion.²⁶⁹ But although *Eldred* and *Golan* signaled that a majority of Supreme Court Justices perceives nearly no constitutional limits on congressional policymaking in the copyright area,²⁷⁰ they did leave a thin ray of hope for advocates of constitutional limits.

First, the majority did not retreat from the longstanding American insistence on the centrality of the economic or utilitarian justification for copyright. In both opinions, the Court remained true to the constitutional criterion that copyright exists to "promote the progress of science"—that is, to incentivize the creation and dissemination of valuable products

265. Gordon, *supra* note 8; Leval, *supra* note 8.

266. See Netanel, *supra* note 30, at 734–36 (noting "Gordon's highly influential" article cited in Justice Blackmun's dissent in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) and Leval's article cited in *Campbell v. Acuff-Rose*, 510 U.S. 569, 576 (1994)).

267. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

268. *Golan v. Holder*, 132 S. Ct. 873 (2012).

269. *Eldred* involved challenges to the CTEA under the Copyright Clause and the First Amendment. *Eldred*, 537 U.S. at 193. *Golan* involved challenges under the same sources to § 514 of the Uruguay Round Agreements Act (URAA), 17 U.S.C. § 104A, which extended copyright protection to foreign works that had previously been in the public domain. *Golan*, 132 S. Ct. at 875, 881–82. For a dissection of the reasoning of these decisions, see Shahshahani, *supra* note 134.

270. This sense is captured by the title of a case note published in the wake of *Golan*: Jessica W. Rice, Note, "*The Devil Take the Hindmost*": *Copyright's Freedom from Constitutional Constraints after Golan v. Holder*, 161 U. PA. L. REV. ONLINE 283 (2013), available at <http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-283.pdf>.

of the mind.²⁷¹ A contrary conclusion, for example the Court's embrace of a "moral rights" or "natural rights" conception, would have practically removed all constitutional fetters by allowing Congress to legislate in the service of ends that have no ascertainable limiting principle.

Second, and vitally for present purposes, the Court held that fair use is of constitutional import. Writing for the majority in *Eldred*, Justice Ginsburg observed that copyright contains "built-in First Amendment accommodations,"²⁷² and singled out the idea-expression dichotomy and the fair use doctrine as examples of such built-in accommodations.²⁷³ The Court went on to say, "the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."²⁷⁴ *Golan* repeated much the same language about "traditional contours" (with the difference that, this time, fair use and the idea-expression dichotomy were named as the *only* inviolable "contours").²⁷⁵

To recognize a constitutional aspect in fair use is consonant with the foregoing discussion of public choice.²⁷⁶ As

271. See *Golan*, 132 S. Ct. at 888–89 (holding that promoting the progress of science embraces not only incentives for creation but also incentives for dissemination); *Eldred*, 537 U.S. at 212 (affirming that "the primary objective of copyright is to promote the Progress of Science") (citation omitted).

272. *Eldred*, 537 U.S. at 219.

273. *Id.* at 219–20.

274. *Id.* at 221 (quoting *Eldred v. Reno*, 239 F. 3d 372, 375 (2001)).

275. The Court in *Golan* rejected the petitioners' First Amendment challenge, finding it doomed by the "pathmarking decision in *Eldred*." *Golan*, 132 S. Ct. at 889. In explaining the relationship between the Copyright Clause and the First Amendment, the Court mostly repeated *Eldred*'s analysis, but also added a new twist: *Eldred*, said the *Golan* Court, "described the 'traditional contours' of copyright protection, *i.e.*, the 'idea/expression dichotomy' and the 'fair use' defense." *Id.* at 890. *Eldred* had been unclear about whether idea-expression and fair use are the *only* elements of the "traditional contours" set; the phrase "*i.e.*" in the quoted sentence from *Golan* suggests that they are. This suggestion was more clearly confirmed in a footnote, which stated, "[o]n the initial appeal in this case, the Tenth Circuit gave an unconfined reading to our reference in *Eldred* to 'traditional contours of copyright.' That reading was incorrect, as we here clarify." *Id.* at 890 n.29 (citations omitted).

276. See *supra* Part IV.

that discussion showed, the political economy of copyright legislation is such that the rightsholders get their way and the general public is unheard, resulting in a relentless and counterproductive expansion of copyrights. In such a climate, the usual justifications for leaving economic legislation to the democratic process do not hold. For even if the issues at hand require consideration of a huge amount of data, the input of experts, and the views of various affected interests—tasks that seem to be more suited to the legislative and executive branches, with their larger staff, longer timeframes, and greater powers of collecting and analyzing data and receiving public input—the question of institutional competence is beside the point because the institution is not exercising its competence. The legislative process of copyright is one of dispensing private favors, not of calibrating the laws to the public interest. This is the result of public choice problems occasioned by copyright law's interest group structure. The judiciary, not being subject to the same public choice problems, is well positioned to step in.

This is not some newfangled notion of judicial interventionism. To be sure, the public choice literature's insights into the power of concentrated interests are relatively recent (decades, not centuries, old).²⁷⁷ But the idea that the function of judicial review by an independent judiciary is to correct for the deficiencies of the democratic political process is as old as the idea of judicial review itself.²⁷⁸ *Federalist 78* attempts to justify the idea of life tenure (“during good behavior”) as an “indispensable ingredient” to an independent judiciary.²⁷⁹ In the course of this, Alexander Hamilton defends judicial review on a number of grounds, prominent among

277. See sources cited *supra* note 85.

278. I am aware of objections to the usefulness of the “independent judiciary” concept. See Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 45 (Stephen B. Burbank & Barry Friedman eds., 2002). But I use the phrase here as shorthand to denote the political insulation, from popular opinion as well as the legislature and the executive, provided to federal judges by Article III of the Constitution, and I find it to be a useful shorthand.

279. *THE FEDERALIST* NO. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

which is the tendency of an unchecked democratic process to oppress minorities:²⁸⁰

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.²⁸¹

The connection between the robustness of judicial review and the breakdown of the regular democratic process was also elaborated in the famous footnote four of *United States v. Carolene Products Co.*, which laid the foundation for the idea of levels of scrutiny now familiar to every student of American constitutional law.²⁸² In *Carolene Products* the Supreme Court rejected a constitutional challenge to a federal statute that criminalized the shipment of “filled milk” (skim milk made to resemble whole milk) in interstate commerce.²⁸³ The Court stated that “regulatory legislation affecting ordinary commercial transactions” should not be held unconstitutional unless “it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”²⁸⁴ This is the familiar, easy rational-basis review. But, the Court cautioned in footnote four:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities . . . whether prejudice against discrete and insular

280. *See id.* at 466–70.

281. *Id.* at 469.

282. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938).

283. *Id.* at 154.

284. *Id.* at 152.

minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.²⁸⁵

What, one might ask, has all this got to do with the political economy of copyright? The concern in these canonical sources appears to be with the tyranny of the majority and the oppression of “discrete and insular minorities.”²⁸⁶ The picture I have painted, by contrast, shows the outsized power of minorities.

The connection is that the concern of Hamilton and Madison in *The Federalist* and of Justice Stone in *Carolene Products* was not with minority status *per se*, but with the *lack of voice in the political process* that minority status entails. What calls for judicial solicitude for minorities is not the simple fact that they are minorities; no one can argue that minorities are intrinsically “more equal than others” before the law.²⁸⁷ The point, rather, is that minorities were thought more likely to be voiceless in the democratic political process—democracy, after all, means *majority* rule²⁸⁸—and therefore appropriate subjects of protection by a source from without that process. The relation between minority status and political process is apparent when one reflects on the second and third paragraphs of footnote four, which discuss political process and minorities respectively.²⁸⁹ A focus on that relation is the only way to make

285. *Id.* at 152–53 n.4 (citations omitted).

286. *Id.*

287. *Cf.* GEORGE ORWELL, *ANIMAL FARM* 148 (Harcourt, Brace & Co. 1946) (1945) (“All animals are equal but some animals are more equal than others.”).

288. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826*, 566 (James Morton Smith ed., 1st ed. 1995) (“Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.”). This quote underlines public choice theory’s contribution to the understanding of political power in a democracy since the Founders’ time: it adds a concern about minority oppression of the majority in a democracy to the Founders’ concern about majority oppression of the minority.

289. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); *cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980) (“The first paragraph [of footnote four] is pure interpretivism: it says the Court should enforce the ‘specific’ provisions of the Constitution. We’ve seen, though, that interpretivism is incomplete: there are

sense of the Founders' (and Justice Stone's) special solicitude for minorities. It does not make sense to say that minority status *per se* entitles one to special protection.²⁹⁰

Once the connection between minority status and political process is understood, the relevance of public choice theory becomes evident. What is relatively new is the well-supported insight that certain majorities are systematically likely to be voiceless in the political process; what is ancient is the logic that the judiciary ought to show special concern for the voiceless. The application of the ancient principle to the relatively new insights yields the proposition that the judiciary ought to show special concern not just for voiceless minorities but for voiceless majorities as well.²⁹¹ The latter are just as oppressible as the former. They need a constitutional bulwark

provisions in the Constitution that call for more. The second and third paragraphs give us a version of what that more might be. Paragraph two suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open. Paragraph three suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws 'directed at' religious, national, and racial minorities and those infected by prejudice against them.'') (citations omitted).

290. ELY, *supra* note 289, at 151 argues for a "participation-oriented, representation-reinforcing approach to judicial review," and seems to accept a similar understanding of the significance of minority status.

[A] "discrete and insular minorities" approach, at least one that refuses to attend to *why* the minority in question is discrete and insular, also turns out to be less than entirely tenable. Perhaps the most obvious objection is one it is always easy to make, that courts aren't qualified to engage in this kind of practical political analysis Should the inquiry turn out to be constitutionally appropriate, however, we would want to ask—even admitting courts will have trouble (which may just mean that they should intervene only in reasonably clear cases)—whether any other institution is better situated to make it, and the answer to that question seems clearly to be no. The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.

Id.

291. Conversely, a well-supported finding that certain minorities are not as voiceless in the political process as they were once thought to be would seem to support the conclusion that special judicial solicitude for them is no longer warranted. Whether and to what extent this might be the case in various situations is beyond the scope of this work.

watched over by the courts. We might call this the phenomenon of “discrete and insular majorities,” a phenomenon nowhere more apparent than in copyright legislation.²⁹² The Supreme Court’s conclusion that fair use is of constitutional import is therefore a welcome development.²⁹³

Fair use’s recently recognized constitutional dimension makes relevant doctrinal scholarship all the more interesting and important. Incorporating speech-related considerations from the First Amendment and “progress of science” considerations from the Copyright Clause could make scholarship about the proper judicial interpretation of fair use richer and more challenging.²⁹⁴ It could also make such scholarship more important because, to the extent certain interpretations of fair use might be constitutionally required, they cannot be overruled by ordinary congressional legislation. All of this adds to the value of reform efforts through federal courts.

I don’t think the importance of doctrinal scholarship on fair use is unnoticed, given the influence of previous landmark

292. My concern here is with copyright in particular, but others have advanced more general theories of judicial review based on public choice. See, e.g., ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000); Farber & Frickey, *Jurisprudence of Public Choice*, *supra* note 85; Macey, *supra* note 85; Mashaw, *supra* note 85.

293. The Court made a terrible mistake, however, in holding that fair use and the idea-expression dichotomy are the *only* constitutional safeguards within copyright. See Shahshahani, *supra* note 134.

294. There already exists a vast body of scholarship on the relationship between copyright and the First Amendment. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

doctrinal articles.²⁹⁵ The same goes for more practical reform efforts through litigation, which, as described, are alive and well.²⁹⁶ So one wonders why a rising share of scholarship is devoted to advocating legislative reforms that are essentially impossible, instead of the more traditional law professors' work of arguing about how existing laws should be interpreted. The remainder of this section will explore philosophical and practical arguments against judicial rulemaking to see whether they could justify this shift of focus on the part of some scholars.

B. PHILOSOPHICAL ARGUMENTS AGAINST JUDICIAL RULEMAKING

One possible reason to focus on legislative, rather than judicial, solutions is a principled objection to unelected courts making the law in such an important area. I doubt that, as a positive matter, such compunctions are presently preventing advocates of copyright reform from advocating their preferred judicial interpretation. The courts *are* making fair use law; the only question is *how* they will make it. As a normative matter, however, it is important to engage with the argument that courts are not the proper institution to make fair use law, especially constitutional fair use law.

Taking as a given the apparent fact that the *substantive* failings of recent copyright legislation are evident to most copyright scholars—i.e., most scholars (though with notable exceptions) agree that copyright has expanded far beyond its optimal bounds²⁹⁷—one is still left with questions about the legislative *process*. Are the public choice “problems” described above really problems, and do they justify judicial intervention, especially in the form of constitutional review? Two arguments for answering “no” to these questions are worth discussing.

First, one can say, as Alexander Bickel did, that even if small interest groups control the legislature, that control is still obtained and exercised via democratic means and is thus

295. See *supra* note 31 and accompanying text.

296. See *supra* text accompanying notes 251–56.

297. For expressions of the majority view, see *supra* notes 98, 102, 106. For the minority view, see, for example, RONALD CASS & KEITH HYLTON, *LAWS OF CREATION* (2012); ROBERT MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

preferable on the score of process to judicial decisionmaking.²⁹⁸ This objection is not fatal. It amounts, at least in the form stated by Bickel, to a love of elections for election's sake (accepting, *arguendo*, Bickel's equation of democracy with elections). But to hold an irrebuttable presumption in favor of the procedural superiority of elections would be to assume the conclusion that leaving matters to the democratic branches is always best, and the procedural question about judicial review would not even be worth asking. I accept that we should start with the premise that the democratic process is procedurally preferable, but that premise is neither self-sufficient nor always true. It is not self-sufficient because the procedural preference for elections lies not in some magical quality of elections *per se* but in their tendency to preserve autonomy and self-rule, which are the procedural virtues of democracy, and it is not always true because they do not always do that. So it is possible to rebut the presumptive procedural superiority of the democratic process by showing that the process does not further the autonomy values usually associated with it. The public choice reasons I have given above count as just such a showing.²⁹⁹ Even if the problems recounted above do not eliminate the procedural reasons for leaving copyright legislation entirely to the democratic branches, they at least substantially reduce their force.³⁰⁰

298. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 19 (1962) ("And if the control is exercised by 'groups of various types and sizes, all seeking in various ways to advance their goals,' so that we have 'minorities rule' rather than majority rule, it remains true nevertheless that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command the votes of a majority of individuals in the electorate . . . [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.").

299. See *supra* Part IV.

300. There is also another consideration that weakens the force of process-based critiques of judicial policymaking. Namely, a large and growing body of empirical literature, produced primarily by political scientists, has shown that the federal courts (the Supreme Court in particular) are substantially influenced by public opinion in their constitutional decisionmaking. See, e.g., TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2011); Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011); Robert A. Dahl, *Decision-Making in a Democracy:*

The second procedural objection goes deeper. Einer Elhauge has pointed out that the findings of public choice theory are positive, not normative, and has argued it would be a mistake to draw a normative conclusion from them.³⁰¹ It is meaningless, he says, to talk about the “disproportionate influence” of groups without having a normative baseline of how much influence is proportionate.³⁰² And, because no adequate normative baseline exists, we cannot jump to the conclusion that what public choice describes is really a problem.³⁰³

I would like to say two things about this objection. First, it does not weaken the argument for robust judicial review. Second, it is wrong anyway. With respect to the first point, the conclusion of Elhauge’s analysis is that there is no such thing as proper process; it is all about outcomes.³⁰⁴ But if you accept

The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279 (1957); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993). A critical evaluation of these empirical studies is beyond the scope of this Article. Suffice it to say that the overwhelming thrust of their findings undermines the argument that judicial decisionmaking is unresponsive to majoritarian preferences, just as the public choice literature undermines the conviction that the legislative process is responsive above all to majoritarian preferences.

301. See Elhauge, *supra* note 77, at 48–59.

302. *Id.* at 48, 51.

303. *Id.* at 50–59 (identifying “economic,” “egalitarian,” and “majoritarian” baselines and arguing that they are unsatisfactory). One might interpret Elhauge as arguing not that adequate independent normative baselines do not exist, but that such baselines are not supplied by public choice itself. There are passages in his article that could be read this way. See *id.* at 49 (“The condemnation of the political process draws any persuasiveness it has from the underlying normative theory rather than from interest group theory.”); *id.* at 54 (“[I]nterest group theory provides no reason for changing whatever view one holds about the attraction of . . . a normative standard.”). But if that is all he is saying, he has not said much. It is fairly obvious that the predictions of public choice theory are positive, not normative. Public choice does not supply normative baselines by itself, but its insights about the vulnerabilities of the democratic process might provide good cause to reevaluate our reverence for democratic decision making by showing that it is out of line with our normative baseline. So, if Elhauge’s critique of the relevance of public choice is to have any bite at all, it must be a critique of the normative baselines as well. I think Elhauge recognizes this, and that is why he spends so much time arguing that various normative baselines are inadequate. See *id.* at 50–59.

304. See, e.g., *id.* at 48 (“[I]nterest group theory provides us with no reason to condemn (or approve) the operation of the political process that stands

that, then you would not have a procedural preference for leaving copyright legislation to Congress anyway. And if that is so, then the clearly evident substantive problems with copyright legislation should be sufficient to recommend robust judicial review.

Second, Elhauge is wrong anyway. Although he is correct to draw attention to the fact that public choice analysis is positive and cannot by itself supply normative conclusions, he is mistaken to think there exists no adequate normative baseline of proper influence. Consider these two possible candidates for a normative baseline (and bear in mind we are talking about process here, not outcomes): (1) a group should have influence roughly proportional to its interests; (2) a group should have influence roughly proportional to the number of natural persons belonging to it.³⁰⁵ Both of these seem logically plausible, in tune with the procedural intuitions people have in

independent of our condemnation (or approval) of the results of that political process.”); *id.* at 49 (“[C]ondemning the political process because of interest group influence is indistinguishable from condemning the political process for producing outcomes the condemner dislikes on independent normative grounds.”); *id.* at 62 (“[I]nterest group theory offers no reason for condemning our political process that stands independent of our condemnation of the results of that political process.”).

305. Levine and Forrence have introduced a more sophisticated procedural baseline by distinguishing “general-interest policies” from “special-interest policies.” See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 176 (1990) (“General-interest policies or actions are those policies or actions adopted or undertaken by a regulatory agent that would be ratified by the general polity according to its accepted aggregation principles if the information, organization (including exclusion costs), and transaction and monitoring costs of the general polity were zero. In other words, they would be adopted by a polity uninhibited by the problems identified by Downs, Olson, and modern agency theorists. Special-interest policies or actions are those that would only be ratified by a self-interested subset of a polity.”). This conceptualization is introduced in an attempt to produce a positive theory that would permit the identification of regulatory capture independent of the normative desirability of its outcome. See *id.* at 178 (“The capture debate can be most profitably pursued as a debate about domination of the regulatory process, and not about motivation or about the ultimate goodness of policy. ‘Capture’ is best analyzed in terms of the distinction between general and special interests. ‘Capture’ is the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs.”). For present purposes, I will keep to the two simple candidates identified in the main text, but I realize that more sophisticated procedural baselines might be helpful for other purposes.

favor of democracy, and true to the procedural virtues of autonomy and self-rule.

The first candidate, I realize, is vulnerable to the objection that it is not really a *procedural* baseline because it is keyed to welfare-maximizing *outcomes*. Elhauge argues that under traditional assumptions of economic analysis, if the influence of conflicting groups is roughly proportional to their interests, then the group with the most at stake wins, which means that the resulting outcome is value-maximizing because it results in the allocation that is most highly valued.³⁰⁶ If that is so, then we would not have gained any additional traction by adding a procedural dimension to our normative assessment. “One may as well immediately move to the issue of whether the resulting law is efficient.”³⁰⁷

This is true, but only in abstract, under strong assumptions, and in the very long run. In practice, we might have a normative preference for the types of procedure that in the long run would tend to produce good outcomes, while recognizing that the confluence of proper procedure and proper outcome is not perfect. If it is possible for processes that generally produce good outcomes to not produce good outcomes in certain particular instances (which is emphatically the case in the real world), and if we believe that the long-run net gains to be had from maintaining good processes sometimes outweigh the net gains of trying to tailor the procedure to the outcome in every case, then it is worth having recourse to normative assessments of both process and outcome.³⁰⁸

In any event, the second candidate for a normative procedural baseline—that a group should have influence roughly proportional to the number of natural persons belonging to it—avoids even the perceived problems with the first candidate. This baseline seems purely procedural and in

306. See Elhauge, *supra* note 77, at 55.

307. *Id.*

308. One might respond that if that is the case we might as well do away with outcome-based evaluations and just stick to process. But that does not follow. First, a process baseline that is keyed to outcomes in the long run cannot exist without having an outcome baseline to begin with. Second, it is possible that the net gains from maintaining good processes outweigh the net gains from shooting only for good outcomes in some cases but not in others, in which event we would want to have both process- and outcome-based evaluations handy.

line with general pro-democracy intuitions. It is one way of stating the principle of “one person, one vote”—or, more accurately, “one person, one iota of influence.”

Elhauge’s answer is that “majoritarian baselines are normatively unattractive because they do not account for the varying intensity of individual preferences.”³⁰⁹ It is possible, in other words, for a proposal to help more people than it hurts but to hurt so badly that it results in a net welfare loss (and vice versa).³¹⁰

But this answer is all confused. Elhauge has now made the exact same outcome-process conflation that he accused the pro-judicial review camp of making. *Of course* the process baseline will not always match the outcome baseline; that is the point of having a separate process baseline. As Elhauge himself pointed out, if the good process always converged with the good outcome, there would be no point to evaluating them separately.³¹¹ So the argument that satisfactory normative baselines of proper influence do not exist is wrong.

I could dwell on these points longer, but that would take the discussion even farther from copyright without adding much to the analysis. The bottom line is this: the process of copyright legislation is broken, no matter what procedural baseline we use to evaluate it. There is no reasonable procedural baseline by which Congress’s facilitation of the copyright industry’s appropriation of ever-increasing property rights to the detriment of consumers, users, and downstream creators is desirable. And the broken process is generating bad outcomes like the CTEA—outcomes that are out of whack with the constitutional standard of promoting the progress of knowledge and do not advance the public interest more generally.³¹² All of this erodes the usual bases for maximal deference to the legislature in the area of economic policy.

309. Elhauge, *supra* note 77, at 59.

310. *Id.* at 50–52, 64–65.

311. *Id.* at 66. One might ask how to reconcile procedural and substantive values in the event that they collide, but such a question does not arise here because copyright legislation exhibits *both* a broken process *and* bad outcomes.

312. *See supra* text accompanying notes 132–35.

C. PRACTICAL ARGUMENTS AGAINST JUDICIAL RULEMAKING

Even if there are no good reasons in principle for opposing fair use reform through courts, there might be good practical reasons for doing so. As discussed above, the central failing of many fair use critics is that, instead of comparing different imperfect institutions to each other, they compare the real world with an ideal state.³¹³ I would be indulging in the same nirvana fallacy if I were to offer up the judiciary as an institution exempt from public choice—one that could solve all the problems attendant to copyright legislation while itself being magically immune to them.³¹⁴ Potential public choice problems and other institutional shortcomings of the courts should be considered when offering them up as an alternative locus of reform. If it turns out the federal courts are even *more* susceptible to capture by rightsholders than Congress, then reform through courts is likely to be counterproductive.

It is not hard to see, however, that this is not the case. The same public choice problems plaguing the legislative process simply do not apply to the courts. There are many bad things one can say about the federal courts; that they are for sale is not one of them. Such political insulation is not a surprising quirk; it is, as Hamilton argued in *Federalist 78*, the whole point of Article III.³¹⁵

To say that judges do not buy votes and sell legal outcomes is in no way inconsistent with public choice. It does not idealize judges. It does not even say that “ideology” or other forms of “naked” policy preference play no role in judicial decisionmaking.³¹⁶ All it states is the rather obvious fact that,

313. See *supra* Part IV.

314. Cf. Demsetz, *supra* note 73.

315. See *supra* notes 277–81 and accompanying text.

316. The social science literature on the determinants of judicial decision making—from ideology to laziness (and many other things)—is voluminous. See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); EILEEN BRAMAN, *LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* (2009); PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008); FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007); LEE EPSTEIN, WILLIAM LANDES & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); JACK KNIGHT & LEE EPSTEIN, *THE CHOICES JUSTICES MAKE*

for institutional and other reasons, judges' "preferences" incorporate a heavy dose of law-regarding and public-regarding considerations, to a much larger degree than, say, a typical Congressman under pressure by well-organized constituents.³¹⁷ And in a subject such as copyright—where ideology does not figure prominently³¹⁸ and (uniquely among the enumerated powers) the constitutional goal is specified³¹⁹—

(1997); C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* (1948); JEFFREY A. SEGAL & HOWARD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Chris W. Bonneau et al., *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 890 (2007); Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROCEEDINGS NAT'L ACAD. SCI. 6889 (2011); Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158 (1999); Ahmad E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1 (2004). See chapter two of EPSTEIN, LANDES & POSNER, *supra*, for a useful literature review. For a judge's riposte to the literature, see Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

317. The reasons for the preference structure of judges are beyond the scope of this Article. They might include, in addition to the institutional features of an independent judiciary, the personal inculcation of certain values about the rule of law and what a judge's job is. RICHARD A. POSNER, *HOW JUDGES THINK* 369–77 (2010).

318. That intellectual property is not an ideological subject is, as far as I know, the majority view among practitioners, observers, and commentators, and appears to be justified by the high incidence of unanimous or near-unanimous opinions and the unusual coalitions of Justices in IP cases. Rigorous empirical scholarship on the subject is still in its infancy, and the existing studies have come up with varying conclusions. See Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence From the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 519 (2008) (“[J]udges’ ideological preferences have no significant effect on their adjudication of the fair use defense.”); Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 851 (2009) (concluding that “ideology is a significant determinant of how Supreme Court justices vote in relation to IP,” but that “ideology has less of an effect on IP than other areas of the law”). For other empirical studies of judicial decisionmaking in IP generally and copyright specifically, see Beebe, *supra* note 30; Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1 (2009); Netanel, *supra* note 30; Sag, *supra* note 30; Samuelson, *supra* note 30.

319. Intellectual property is unique among enumerated powers in that the Constitution prescribes one objective for all copyright and patent legislation: “to promote the progress of science and the useful arts.” U.S. CONST. art. I, § 8, cl. 8.

I fail to see other forms of public choice bias that afflict the judiciary but not Congress.

To be sure, scholars have made arguments as to why the judicial process would be subject to capture. Elhauge argues, for example, that (1) the same free-riding dynamics identified by Mancur Olson would make special interest groups more likely to devote more resources to litigation and win,³²⁰ and (2) increasing the rulemaking power of federal judges would increase interest group influence on judicial appointments.³²¹ These arguments might be persuasive in some contexts; as applied to copyright, however, they are theoretically underdeveloped and empirically speculative.

It is unclear why free-riding dynamics would affect the litigation process the same way as legislation. Spending on litigation, unlike on legislation, has sharply decreasing returns to scale. One can pay to get a lawyer with good legal skills and large resources for factual investigation, but such costs are affordable by many parties, as evidenced by the *Eldred* challengers' getting some of the best legal talent in the country;³²² past that threshold, increasing spending doesn't appreciably increase payoffs. By contrast, there is no evident limit to productive spending to influence legislation.

Moreover, litigation affects the bottom line of at least two affected parties in a much more direct way than other group members. Legislation is often general, and obtaining laws individually tailored for an actor is extremely difficult and therefore uncommon. By contrast, it is common for litigants to obtain individually tailored results that are unhelpful or of uncertain application to similarly situated entities. This means group members have less to gain from free-riding on the efforts of others and more to lose from refraining to initiate their own efforts, both of which reduce the incentives for free-riding.

320. See *supra* notes 85–86 and accompanying text for a discussion of this collective action problem.

321. See Elhauge, *supra* note 77, at 67, 70, 81–82.

322. Eldred's legal team consisted of a who's who of prominent lawyers and legal scholars. In addition, the petitioners were supported by amici briefs written on behalf of a number of famous scholars, including five Nobel laureates in economics. The briefs are available at *Cert Granted: Supreme Court Will Hear Eldred v. Ashcroft in Its Fall Term*, OPENLAW, HARV. U., <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/legal.html> (last visited Jan 13, 2015).

Moreover, those who are sued rarely have the option of letting other group members defend the suit for them. So the public good aspect is less pronounced in litigation than in legislation.

The argument about interest group influence on judicial appointments is also speculative. To begin with, life tenure means that extracting credible commitments from federal judges is difficult, so the likelihood of successful picking by interest groups is low. Moreover, the evidence for such influence is scant and does not appear extendable to copyright. It is true, as Elhauge notes, that some federal judges are appointed with particular attention to their views on the issue of abortion,³²³ and it is possible that special interest influence (as opposed to genuine majoritarianism) is driving that litmus test. But the same is not true in other areas where judicial rulemaking, whether statutory or constitutional, plays a prominent policy role, as in antitrust law, First Amendment law, and indeed copyright law itself. It seems implausible that copyright would become tomorrow's litmus test for judicial appointments. And it would be unwise to suppose that a demonstrably broken legislative process is the way to go because the judicial process is not perfect.

None of this means special interests will not have disproportionate influence in the litigation process. The foregoing analysis shows, however, that their influence in federal court is likely to be less than in Congress. In short, there is no good reason to suspect that judicial rulemaking in copyright could possibly be any worse than congressional rulemaking. The point is not that judges are immune from public choice (or from incentives). No one is. The point is that the public choice problems of copyright legislation do not afflict the adjudicatory process to nearly the same extent. So the dynamics that privilege the interests of rightsholders over the general public in Congress are not present to the same extent in the federal courts.

VII. CONCLUSION

Institutions matter. Designing institution-dependent fair use fixes without regard for real institutional dynamics is like designing a political system without regard for real human

323. Elhauge, *supra* note 77, at 81.

characteristics.³²⁴ But a prominent school of fair use criticism has unfortunately ignored the prevailing political dynamics in the institution that is supposed to carry out its proposed reforms, producing legislative reform proposals that are futile at best and counterproductive at worst. Realistic consideration of political dynamics and past performance reveals that federal courts are likely to be much more hospitable than Congress to pro-user fair use reform. Moreover, philosophical and practical objections to extensive judicial rulemaking in this area are not persuasive. The implication for academic efforts is that a focus on doctrinal scholarship, especially scholarship that takes into account the now-recognized constitutional aspect of fair use, is likely to be more fruitful. Fair use is safer in the hands of judges. It was judges who created it, and it is judges who are most likely to guard it. At the very least, they will not do any worse than Congress.

324. Cf. THE FEDERALIST NO. 51, *supra* note 281, at 322 (James Madison) (“It may be a reflection on human nature, that such devices [as the separation of powers and a system of checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).