

# BEYOND FAIR USE

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*For centuries, the fair use doctrine has been the main—if not the exclusive—bastion of user rights. Originating in the English courts of equity, the doctrine permitted users, under appropriate circumstances, to employ copyrighted content without the rightsholder’s consent. In the current digital media environment, however, the uncertainty that shrouds fair use and the proliferation of technological protection measures undermine the doctrine and its role in copyright policy. Notably, the enactment of the Digital Millennium Copyright Act, which prohibits the circumvention of technological protection measures even for fair use purposes, has diminished the ability of fair use to counterbalance a copyright owner’s rights in the digital age.*

*Recognizing the relatively precarious state of the fair use doctrine, many copyright scholars have rushed to resuscitate the doctrine, offering various ways to revamp fair use. As this Article makes clear, these proposals fall short of the mark. To address the shortcomings of the fair use doctrine in the digital age, this Article reconceives the policy challenge and takes a fundamentally different tack. Rather than tinkering with the fair use doctrine, this Article proposes the creation of a system of new user-privileges that would supplement fair use. Specifically, this Article crafts a framework of adaptive regulation that would cause copyright owners to dramatically increase the access and use opportunities granted to users. The framework would achieve this goal by requiring content owners and distributors to acknowledge user needs and even compete among themselves over the creation of new user-liberties. Such an approach, this Article explains, is superior to rival suggestions and can best assure ongoing technological development and the preservation of user privileges in the digital age.*

INTRODUCTION .....	92
I. THE FAIR USE DOCTRINE IN A DIGITAL WORLD .....	98
A. Fair Use and Uncertainty .....	99
B. Digital Technology and Its Challenge to Fair Use ...	101

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C.	Scholarly Proposals and Their Shortcomings . . . . .	106
1.	<i>The Right to Hack</i> . . . . .	106
2.	A “Reverse Notice and Takedown Regime” . . . . .	108
3.	<i>The Creation of an Administrative Agency to Oversee Fair Use</i> . . . . .	110
II.	MAPPING THE DIGITAL DOMAIN OF USER PRIVILEGES . . . . .	114
A.	Opportunities for Multiple Copies of Digital Media . . . . .	115
1.	<i>Apple’s FairPlay</i> . . . . .	115
2.	<i>Windows Media DRM</i> . . . . .	116
3.	<i>Adobe’s Digital Editions</i> . . . . .	118
4.	<i>Spore</i> . . . . .	118
B.	Sampling and the Right to Remix . . . . .	120
1.	<i>The Associated Press</i> . . . . .	121
2.	<i>Nintendo’s Super Smash Bros. Brawl</i> . . . . .	122
3.	<i>Copyright Clearing Houses</i> . . . . .	123
C.	The Economic Rationale for Sharing Content . . . . .	123
III.	THE NEXT STEP FOR DIGITAL COPYRIGHT POLICY . . . . .	126
A.	The Principles Underlying Our Proposal . . . . .	127
1.	<i>Overcoming the Inertial Force Against Sharing Content</i> . . . . .	128
2.	<i>The Importance of Competition and Experimentation</i> . . . . .	130
3.	<i>Government as Norm Entrepreneur</i> . . . . .	133
B.	Stage Two: “The Shotgun Behind the Door” . . . . .	134
	CONCLUSION . . . . .	136

## INTRODUCTION

Fair use has long been a venerable part of our copyright system. As one court explained, the doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>1</sup> Originating in the English courts of equity, the doctrine operates as an equitable rule of reason that courts apply on a case-by-case basis. Over the years, the doctrine has become a principal counterweight to concerns rooted in the proprietary control of content by copyright holders. As such, it has captured the hearts and minds of generations of scholars, sparking extensive writings and generating considerable controversy.

One overriding concern and controversy related to fair use is whether the doctrine can successfully accomplish its purpose—namely, to balance our copyright system. A threshold issue in this

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<sup>1</sup> *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

regard concerns the fuzziness of fair use. In particular, the fair use doctrine requires courts and users to engage in a complex multivariate analysis whose result is nearly impossible to predict. Compounding this problem is the fact that courts generally keep the doctrine as vague as possible and decline to provide a formula for what constitutes fair use. Given that courts use such an open-ended analysis, their failure to converge on a shared understanding of what constitutes fair use is unsurprising.

While some judges and scholars view the open-ended nature of the fair use inquiry as a virtue, a growing number of theorists view it as a fatal flaw. Notably, the ambiguity and uncertainty that shroud fair use have led to a dramatic underutilization of the doctrine. Unsure about the doctrine's precise contours and fearing the drastic sanctions that courts impose on copyright infringers, users of copyrighted content rationally elect either to secure a license from copyright owners when the cost of doing so is reasonable<sup>2</sup> or to forego the use of copyrighted content altogether when transaction costs are prohibitive.<sup>3</sup> In short, even during the best of times, the fair use doctrine has fallen short of its designated goal of facilitating creativity for users of copyrighted content.

The second problem plaguing the fair use doctrine is that, sadly, the best of times are long gone.<sup>4</sup> The golden era of fair use—if one ever existed—ended about a decade ago with the enactment of the Digital Millennium Copyright Act (DMCA).<sup>5</sup> This legislation prohibited users from circumventing technological protection measures (TPMs) employed by rightsholders to control access to their works.<sup>6</sup> Furthermore, the legislation famously banned the production and provision of circumvention technologies.<sup>7</sup> Taken together, these two prohibitions changed the traditional balance between rightsholders and users. As is clear from the legislative history, Congress made a conscious decision not to recognize fair use as a defense in circumven-

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<sup>2</sup> See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 907 (2007).

<sup>3</sup> See Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 *VA. L. REV.* 1483, 1497–1500 (2007).

<sup>4</sup> See, e.g., Wendy J. Gordon, *Keynote: Fair Use: Threat or Threatened?*, 55 *CASE W. RES. L. REV.* 903, 906 (2005) (discussing the popular conception “that fair use is dead”); see also Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 *J. COPYRIGHT SOC'Y U.S.A.* 193, 193–95 (2000) (discussing the death of copyright in the context of the predicted deaths of other areas of law); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 *VA. L. REV.* 813, 814 (2001) (arguing that “[c]opyright is dead”).

<sup>5</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>6</sup> See 17 U.S.C. § 1201(a) (2006).

<sup>7</sup> See *id.* § 1201(b).

tion cases.<sup>8</sup> In so doing, Congress significantly limited the scope of fair use for copyrighted works in digital media; notably, Congress did not grant users fair use privileges for TPM-protected content.<sup>9</sup>

Copyright scholars have offered solutions to both problems outlined above. One group of scholars has proposed various mechanisms for alleviating some of the uncertainty surrounding the fair use doctrine. Michael Carroll, for example, has suggested establishing a special “Fair Use Board” that would issue rulings on the fairness of uses before they are actually taken.<sup>10</sup> In the same spirit, Jason Mazzone has proposed establishing a special regulatory agency to promulgate rules to govern which uses are fair in specific contexts.<sup>11</sup>

Another group of scholars has focused its attention on the second challenge to fair use: the anticircumvention provisions in the DMCA.<sup>12</sup> Decrying the effect of the ban on fair use, some commentators have justified self-help strategies that defeat TPMs and have pressed for a reform of the DMCA. Most notably, Julie Cohen has argued for the recognition of a “right to hack”<sup>13</sup> TPMs to the extent necessary to engage in fair uses.<sup>14</sup>

We find all of these above-mentioned proposals laudable in many respects, and we agree that fair use is an important component of our copyright system. Yet—and here we critically differ with the extant literature—we submit that the proposals to reform fair use and the proposals to reform the DMCA do not adequately respond to the ongoing erosion of user privileges. For reasons we will explain, many of the relevant proposals represent a marginal improvement over the existing state of affairs. None of these proposals (or any combination

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<sup>8</sup> See *infra* note 52 and accompanying text.

<sup>9</sup> For an example of how this limitation plays out in practice, consider the impact of *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). In that case, the United States Court of Appeals for the Second Circuit concluded that users must make do with fair uses of analog content where a TPM denies access to any digital fair use opportunities. See *id.* at 459. Notably, because all content will eventually be available in digital form, the *Corley* doctrine is unsustainable over the long term and illustrates the potential for the narrowing of the fair use doctrine over time.

<sup>10</sup> See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090–91 (2007).

<sup>11</sup> See Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 415–19 (2009).

<sup>12</sup> See, e.g., ELEC. FRONTIER FOUND., UNINTENDED CONSEQUENCES: TEN YEARS UNDER THE DMCA 6–9 (2008), <http://www.eff.org/files/DMCAUnintended10.pdf> [hereinafter EFF REPORT].

<sup>13</sup> Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1141 (1998).

<sup>14</sup> See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 531–32 (1998) (“I have argued that the law should not prohibit consumers from circumventing digital CMS to defend privileges traditionally afforded under the public law of copyright, and that federal copyright law and policy instead should be interpreted affirmatively to authorize such conduct.”).

of them), however, strike the optimal balance between the interests of rightsholders on the one hand and users on the other.

A fundamental flaw of the existing proposals concerns their practicability. In particular, implementing these proposals requires an openness to undoing some of the DMCA's core premises that is currently wanting. Indeed, Congress is unlikely to reverse its chosen policy strategy and establish broad exceptions to the anticircumvention provisions in the face of widespread opposition from the content industries. Congress is equally unlikely to choose to overhaul the fair use doctrine that the courts have shaped since time immemorial. Most importantly, perhaps, we argue that fair use alone cannot, and should not, provide the *sole* policy tool available to policymakers in the digital age. In short, the nature of fair use as a rule of reason that requires ad hoc analysis imposes an insurmountable limitation on the usefulness of fair use as a policy tool, particularly in today's digital-networked environment.

Instead of attempting to reform fair use, this Article departs from the existing scholarly literature and presents a radically different policy strategy. In particular, we argue that the fair use doctrine must be supplemented with a system of what we call "use privileges" or "user privileges"—i.e., privileges that will dramatically increase the range of permissible uses of copyrighted content in digital media. To this end, we propose a system of adaptive regulation that, over time, will lead to the development of a broad range of privileged uses.

Our proposed strategy builds on an ongoing yet largely unnoticed dynamic that has developed in the digital realm: many owners and distributors of digital content have chosen, of their own accord, to expand user privileges. Furthermore, they have developed innovative approaches for granting users access to content, reflecting, as the examples discussed herein make clear, more than some quirk of a few firms acting against interest. Rather, this dynamic represents a rational, self-interested response of firms to market pressures (i.e., consumer demand for access opportunities). From the standpoint of copyright policy analysis, therefore, the behavior of these firms constitutes a real-world experiment that can provide valuable guidance as to the formulation of user privileges in the future.

By reconceptualizing the terms of the debate over fair use and emphasizing the importance of user privileges, we explain how a regime of adaptive regulation promises to reverse what Yochai Benkler has called the "enclosure movement" of placing increasing content under digital locks.<sup>15</sup> To this end, we develop a two-step regulatory

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<sup>15</sup> See 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, 354–55, 412 (1999).

regime to encourage copyright owners to expand use privileges with respect to their proprietary content. The first step requires content owners to offer users a set of access and use privileges and to publicize them. In particular, we recommend that Congress mandate content owners to adopt *some* measures to facilitate access to and use of digital content (as opposed to requiring content owners to adopt a particular form of accommodation). By issuing such a broad and open-ended decree, Congress can allow multiple standards to emerge over time and compete against one another in the marketplace. Given current marketplace conditions, competition among content providers—coupled with pressure from illegal downloads and content-sharing platforms (such as creative commons and the open-source movement)—is reasonably likely to result in a much greater accommodation of user needs than we presently see.

To spur more competition and to ensure that consumers are informed of user privileges, our proposed regulatory regime would require content owners to provide clear and explicit notification of the substance and the scope of the privileges they afford to users.<sup>16</sup> By insisting on a clearly understood and articulated notification requirement, this regime would empower users to make informed choices and catalyze self-regulatory forces. Among other things, this regime, if properly implemented, could spur the use of “Web 2.0” technology<sup>17</sup> as a means of enabling users to report on and aggregate information about the actual conduct of digital content owners and distributors. To ensure that firms disclose user privileges accurately and effectively, this Article recommends that Congress authorize the Federal Trade Commission (FTC) to ensure compliance with the proposed disclosure requirement.

The first step of the policy proposal developed in this Article is hardly guaranteed to succeed. Consequently, should the strategy outlined above fail to generate a satisfactory level of access to digital content, Congress must be ready and willing to implement a second strategy of specifying use privileges that content owners must provide.

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<sup>16</sup> This requirement would, in effect, operate along the lines of nutrition product-labeling information: content providers would need to specify clearly and notoriously what limits and freedoms they offer to users with respect to fair use opportunities. Notably, rather than specify the precise scope and nature of the access privileges, Congress would leave the nature and extent of such privileges to the discretion of the various content owners or distributors of digital content.

<sup>17</sup> “Web 2.0” refers to the development of tools and technologies that enable users to produce content that other users can aggregate and consume. The proliferation of blogs, the popularity of Facebook, and the emergence of Twitter are all examples of the significance of Web 2.0 technology. For the classic definition of the term by the person who coined it, see Tim O’Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O’REILLY (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>.

Because the first strategy is less intrusive to the market and promises to lay the groundwork for the second strategy (should it be necessary), Congress should not begin with this second strategy. Notably, the market experimentation that takes place under the first strategy would inform the form and substance of the user privileges that the second strategy requires. In particular, use measures and technologies adopted by firms that craft their own rules concerning use privileges would inform Congress as to what approaches are practicable. Moreover, if the content industry is concerned about the possibility of more intrusive regulation under the second step, it will be more likely to take its obligations under the initial regime seriously, making the first strategy more likely to succeed and more worthy of a first attempt. In short, even if competition falls short of yielding adequate access to digital media, implementing the first proposal will provide tremendously valuable information to policymakers and will demonstrate that, even with clear notice of the importance of addressing this issue, the industry is unable to do so without more binding forms of regulation.

In sum, this supply-side approach has four main advantages over rival demand-side (e.g., right to hack) proposals. First, it has significant potential to bring about greater and improved access opportunities to content via competition and experimentation. Second, it holds a great promise of creating increased certainty for users as to how they can use digital content, and the proposal will empower users to become more sophisticated purchasers of digital content. By contrast, demand-side solutions, by and large, relegate users to a life of uncertainty, requiring them to determine whether their planned uses fall within the aegis of the current fair use doctrine—a nearly impossible task given the doctrine’s vagueness. Third, our approach has the advantage of being more attainable because it entails both lower legislative and adjudicative costs than rival proposals. In particular, we believe that the FTC—which has already begun to oversee and address deceptive and unfair practices with regard to digital rights-management systems—is well equipped to oversee such a regime. Finally, demand-side models, especially the right to hack proposal, are likely to generate an ongoing and inefficient arms race, whereby content owners adopt increasingly sophisticated TPMs and users employ increasingly sophisticated hacking techniques.

This Article proceeds in four parts. In Part I, we discuss the current state of digital copyright law, highlighting the polarized debate over fair use. In Part II, we survey the access privileges that content providers have voluntarily adopted to allow certain uses of copyrighted content. In Part III, we set forth our normative proposal for creating user privileges in the digital world, explaining how it would

operate and the role of the FTC in its implementation. A short conclusion follows Part III.

## I

### THE FAIR USE DOCTRINE IN A DIGITAL WORLD

The future of fair use continues to spark debates in the academy, Congress, and the courts. Even in the analog world, the concept of fair use provoked considerable controversy and was regularly criticized for lacking any well-defined structure.<sup>18</sup> In particular, critics argued that judicial implementation of the doctrine “has resulted in it growing increasingly unpredictable,” and despite a number of academic efforts to develop a tractable standard, an increasing number of commentators agree that “it is now virtually impossible to predict the outcome of fair use cases.”<sup>19</sup> The advent of digital technology, which facilitates massive copying, has led copyright holders to question the wisdom of addressing infringement concerns (and fair use defenses) after the fact. It has also given rise to new lines of debate, with some insisting that TPMs provide necessary front-end protection (even against possible fair uses) and others complaining that TPMs infringe on users’ freedom and stifle fair use.<sup>20</sup>

This Part sets the stage for the debates over fair use by discussing its origins and common law development. It then examines the DMCA’s anticircumvention provisions,<sup>21</sup> which prohibit circumvention technologies when they facilitate fair uses. Notably, this Part discusses how the DMCA arguably gives “copyright owners an absolute veto over any fair uses of their works”<sup>22</sup> and has sparked a series of legal arguments that the courts and Congress have not yet resolved. Finally, this Part engages the scholarly debate, evaluating a number of proposals aimed at protecting fair use in the digital age.

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<sup>18</sup> To be fair to Congress and the courts, the fair use doctrine’s commitment to a vague standard and case-by-case decision making was intentional and grounded on the theory that clearer rules and principles would emerge over time. See Parchomovsky & Goldman, *supra* note 3, at 1496.

<sup>19</sup> *Id.*

<sup>20</sup> Compare David Kravets, *Universal Says DMCA Takedown Notice Can Ignore ‘Fair Use,’* WIRED (July 18, 2008, 1:46 PM), <http://www.wired.com/threatlevel/2008/07/universal-says> (reporting Universal Music’s position in litigation that DMCA permits it to require a website to remove a posting with its copyrighted material regardless of whether the posting was a fair use), with EFF REPORT, *supra* note 12, at 14 (“As an increasing number of copyright works are wrapped in technological protection measures, it is likely that the DMCA’s anti-circumvention provisions will be applied in further unforeseen contexts, hindering the legitimate activities of innovators, researchers, the press, and the public at large.”).

<sup>21</sup> 17 U.S.C. § 1201 (2006).

<sup>22</sup> Parchomovsky & Goldman, *supra* note 3, at 1489–90.

### A. Fair Use and Uncertainty

English courts of equity originally fashioned the fair use doctrine over two and a half centuries ago.<sup>23</sup> The courts intended to create a sphere in which users could utilize copyrighted works without authorization from copyright owners. In the United States, Justice Joseph Story famously introduced the principle in *Folsom v. Marsh*,<sup>24</sup> a case involving rival biographies of George Washington. In an oft-cited paragraph that became the basis of the modern formulation of fair use, Justice Story wrote:

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.<sup>25</sup>

Over time, the courts refined the considerations that Justice Story listed, and in 1976, Congress codified the fair use doctrine. Following precedent, Congress “refrained from [specifically] defining fair use or articulating a clear test of fairness. Instead, it provided a nonexhaustive list of illustrative uses—such as comment, criticism, scholarship, research, news reporting, and teaching—that may qualify as fair.”<sup>26</sup> Moreover, Congress set forth four nonexclusive factors for courts to consider when deciding whether a particular use is fair.<sup>27</sup> As any student of the field knows, these factors are (1) the use’s purpose and character, including its commercial or nonprofit nature; (2) “the nature of the copyrighted work”; (3) the amount and substantiality of the reproduced parts in relation to the copyrighted work as a whole; and (4) the impact of the use on “the potential market for or value of the copyrighted work.”<sup>28</sup>

In the Copyright Act of 1976, “Congress provided no guidance as to how to measure these factors against one another, whether all [of the factors] must be satisfied for a finding of fair use,” or how to reconcile conflicts among the factors.<sup>29</sup> Instead, it simply instructed courts that “each case raising the question must be decided on its own facts.”<sup>30</sup> Over time, the Supreme Court has attempted to provide

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<sup>23</sup> See, e.g., *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.) 490 (introducing the concept of “fair abridgment”).

<sup>24</sup> See 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

<sup>25</sup> *Id.* at 348.

<sup>26</sup> Parchomovsky & Goldman, *supra* note 3, at 1495; see also Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 352–53 (1997) (discussing interpretive problems that arise from the text of the statute).

<sup>27</sup> Parchomovsky & Goldman, *supra* note 3, at 1495.

<sup>28</sup> 17 U.S.C. § 107 (2006).

<sup>29</sup> Parchomovsky & Goldman, *supra* note 3, at 1496.

<sup>30</sup> H.R. Rep. No. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

some structure to the otherwise open-ended analysis. At one point, it focused on providing latitude to noncommercial actors;<sup>31</sup> more recently, however, the touchstone inquiry has become whether individuals use protected works in a “transformative” fashion.<sup>32</sup> Notwithstanding these efforts, the fair use doctrine has decidedly remained an “equitable rule of reason,” with all of its attendant uncertainty.<sup>33</sup>

The uncertainty that surrounds fair use comes at a high cost: “law and economics scholars have long observed that vague standards cause overdeterrence.”<sup>34</sup> The standard’s vagueness prevents actors from discerning the optimal behavior that the law requires of them.<sup>35</sup> Thus, “actors [generally] find it in their best interest to err on the side of safety and . . . overcomply (by minimizing the use of protected works) or overinvest in precautions.”<sup>36</sup> Concretely, users who exceed the permissible level of copying expose themselves to full liability under the Copyright Act. Hence, they will always prefer to take *less* than what they perceive to be the permissible amount and will be sheltered from liability.

Several factors aggravate the problem of overdeterrence in the copyright context. First, expressive works invariably generate spillovers (or positive externalities) due to their public-good characteristics.<sup>37</sup> As a result, individuals using copyrighted material “cannot capture the full benefit of the use but stand to bear the full cost if sued.”<sup>38</sup> “Second, the Copyright Act provides a wide array of remedies to copyright owners, including injunctions and supercompensatory damages.”<sup>39</sup> Notably, courts can order the impounding of infringing articles,<sup>40</sup> allow plaintiffs the defendants’ profits,<sup>41</sup> or award statutory damages of up to \$150,000 per infringement if the infringement is

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<sup>31</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation[,] . . . if it is for a noncommercial purpose, the likelihood [for harm] must be demonstrated [to support an infringement claim].”).

<sup>32</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–85 (1994); cf. *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring) (noting that Borland’s commercial appeal lay not in its copying of Lotus’s computer spreadsheet menu but in Borland’s added features).

<sup>33</sup> *Sony*, 464 U.S. at 448.

<sup>34</sup> Parchomovsky & Goldman, *supra* note 3, at 1497–98.

<sup>35</sup> *Id.* at 1498.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also, e.g., R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1016–33 (2003) (explaining why rightsholders cannot fully appropriate copyrighted information and assessing what this fact implies for policymaking).

<sup>38</sup> Parchomovsky & Goldman, *supra* note 3, at 1498.

<sup>39</sup> *Id.*

<sup>40</sup> 17 U.S.C. § 503 (2006).

<sup>41</sup> *Id.* § 504(b).

deemed willful.<sup>42</sup> Thus, the expected cost that unauthorized users face is likely to far exceed the expected benefit, which in many cases will be quite modest.<sup>43</sup> Due to this disparity between expected cost and expected benefit, users are generally wary about making fair use of works.<sup>44</sup>

For users attempting to protect against the uncertainty of fair use, securing a license from a rightsholder is their only alternative to stopping their use of copyrighted content.<sup>45</sup> Licensing, however, has numerous problems:

Professor James Gibson demonstrates how the vagueness of intellectual property doctrines, including fair use, forces users to secure licenses even when they do not necessarily need to do so and how this dynamic enables rightsholders to expand their rights at the expense of users and the [general] public.

Additionally, securing an unnecessary license is a wasteful expenditure of resources that could be directed to other, more creative, ends. The purpose of fair use, after all, is to spare users from these costs by giving them the privilege to use some protected expression for free.<sup>46</sup>

## B. Digital Technology and Its Challenge to Fair Use

Uncertainty is not the only problem plaguing fair use. The fair use doctrine developed in an analog world. In that environment, copyright owners relied on the nature of the technological environment—where copying creative works led to degraded copies and where the distribution of such works was costly—as an important form of protection. In the digital-networked environment that the Internet fuels, both forms of technological protection—the degradation of copies and the relatively high distribution costs (e.g., selling pirated VCR cassettes on a street corner)—came undone. For the recording industry, the new paradigm and existential threat to its business model was the advent of Napster, which used the ability of digital technology to make perfect copies and used the Internet as a distribution outlet to lay the seeds of destruction for the industry’s legacy business model.<sup>47</sup> For the content industry, this threat was dubbed “the digital

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<sup>42</sup> *Id.* § 504(c)(2). If the infringement is not willful, a plaintiff can collect a maximum amount of \$30,000. *Id.* § 504(c)(1).

<sup>43</sup> Parchomovsky & Goldman, *supra* note 3, at 1498.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 1499.

<sup>46</sup> *Id.* at 1498–99; *see* Gibson, *supra* note 2, at 887–95.

<sup>47</sup> *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–12 (9th Cir. 2001) (describing Napster’s “peer-to-peer” Internet music file-sharing service).

dilemma<sup>48</sup> in the mid- to late-1990s and remains a vexing challenge today.

Confronted with this existential threat, the content industries responded by using both technological and legal means. Two principal tactics merit discussion here. First, the industry began to employ a myriad of TPMs to render illegal copying of content more difficult and less cost effective. Indeed, the use of one form of TPM—encryption—has become ubiquitous: content owners regularly encrypt DVDs, CDs, and downloadable files to prevent their duplication.<sup>49</sup> Second, the content industries have pushed for legal measures to bolster the effectiveness of TPMs. Mindful of the fact that TPMs can be “hacked,” content owners called on Congress to pass legislation that bars the circumvention of TPMs (sometimes called copy-protection systems). In 1998, Congress responded to such requests by enacting the DMCA, which bans the creation, use, marketing, and trafficking of circumvention technologies.<sup>50</sup>

To ensure that TPMs were effective in preventing copyright infringement, the DMCA created civil and criminal penalties for their circumvention.<sup>51</sup> Although Congress specified several exceptions to the circumvention and trafficking bans that the DMCA imposed, it did not include fair use among them, showing “relative indifference” to the issue.<sup>52</sup> Despite the omission of fair use from the exception list, some hoped that courts would construe the DMCA as implicitly providing a fair use exception.<sup>53</sup>

The first and most important fair use case under the DMCA dashed the hopes of those who believed that there was a fair use prin-

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<sup>48</sup> See COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 1–2 (2000), available at [http://www.nap.edu/html/digital\\_dilemma/exec\\_summ.html](http://www.nap.edu/html/digital_dilemma/exec_summ.html).

<sup>49</sup> Parchomovsky & Goldman, *supra* note 3, at 1521. In some cases, content owners implement extreme security measures to ensure that individuals cannot copy their materials. See, e.g., Joe Morgenstern, *The Screens Have Eyes*, WALL ST. J., Dec. 10, 2005, at P3 (describing movie studios' enhanced security efforts to prevent movie critics from pirating films prior to public release).

<sup>50</sup> See 17 U.S.C. § 1201(a)(1), (a)(2), (b)(1) (2006).

<sup>51</sup> See *id.* § 1201; cf. Sharon R. King, *Consumers Still Seem Resistant to Some New High-End Electronics*, N.Y. TIMES, Mar. 8, 1999, at C1 (“[C]opy-protection issues are keeping some studios from offering some of the hottest titles [in DVD format].”).

<sup>52</sup> Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1004 (2007) (noting that the lobbying clout of those concerned about DMCA's anticircumvention provisions was limited and that “deployment of TPMs to protect copyrighted works was in its early stages, so concerns about impediments to fair and other privileged uses may have seemed speculative”).

<sup>53</sup> There was also some hope that the Librarian of Congress's procedure for exceptions might address troublesome uses of TPMs. That hope, however, overlooked the limits of this procedure. See *id.* at 1006–08.

principle embedded in the DMCA. In particular, *Universal City Studios, Inc. v. Corley* involved the Content Scrambling System (CSS) used by the motion picture industry to prevent hackers from copying DVDs.<sup>54</sup> In that case, a noted hacker—Jon Johansen, now known as DVD Jon—developed a program, DeCSS, for decrypting CSS-protected DVDs.<sup>55</sup> Johansen contended that he developed DeCSS as a means of enabling a DVD player to operate on a Linux operating system.<sup>56</sup> After he created the software, however, a number of websites posted the decryption program, thereby enabling users to circumvent DVDs' TPM and use DVD content for whatever purpose they saw fit.<sup>57</sup>

One website that posted the code was 2600.com, operated by Eric Corley.<sup>58</sup> As Corley explained during trial, his decision to post the code was motivated by the fact that “[w]riting about DeCSS without including the DeCSS code would have been . . . analogous to printing a story about a picture and not printing the picture.”<sup>59</sup> In reaction to Corley’s posting of DeCSS, the motion picture industry sued him under the DMCA, alleging that he violated the law’s “anti-trafficking” provision,<sup>60</sup> which bans any efforts to distribute circumvention technology.<sup>61</sup>

Corley’s principal defense was that his distribution of the DeCSS program was a privileged use because he shared Johansen’s goal of enabling DVDs to be played on a Linux machine and that this purpose constituted a fair use under copyright law and was protected by the First Amendment.<sup>62</sup> The district court, noting that the DMCA did not permit the use of circumvention technology to enable fair uses, ruled against Corley and stated that “[i]f Congress had meant the fair use defense to apply to [anticircumvention cases], it would have said so.”<sup>63</sup> Moreover, the district court (as well as the Second Circuit Court of Appeals) remarked that the nature of digital technology—the fact that it allows mass copying and distribution before the copyright holder can take protective action—justified preventing copying before it takes place.<sup>64</sup> As for the claim that the denial of a fair use

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<sup>54</sup> 273 F.3d 429, 435–37 (2d Cir. 2001).

<sup>55</sup> *Id.* at 437.

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 438–39.

<sup>58</sup> *Id.* at 439.

<sup>59</sup> *Id.* (quotations omitted).

<sup>60</sup> 17 U.S.C. § 1201(a)(2) (2006).

<sup>61</sup> *See Corley*, 273 F.3d at 435.

<sup>62</sup> *See id.* at 436.

<sup>63</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000).

<sup>64</sup> To that end, the Second Circuit quoted the district court’s reasoning:

There was a time when copyright infringement could be dealt with quite adequately by focusing on the infringing act. If someone wished to make and sell high quality but unauthorized copies of a copyrighted book, for example, the infringer needed a printing press. The copyright holder,

right violated the First Amendment, both the district court and Second Circuit concluded that there was insufficient evidence to support a showing that a lack of access to DeCSS prevented users from accessing content for legitimate purposes.<sup>65</sup> To support this conclusion, the Second Circuit explained that “[w]e know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.”<sup>66</sup> In effect, the Second Circuit concluded that the availability of traditional analog forms of copying—including a video recording of a movie played on a television set—provides a sufficient fair use opportunity and obviates the need for any direct access to digital content protected by the DMCA.<sup>67</sup>

In enacting the DMCA, Congress moved quickly to address the concerns of the content industry and did not focus on the potential for cases like *Corley* to restrict the scope of the fair use doctrine in the digital age. Fearful that broad exceptions might allow increased circumvention to occur, Congress provided only limited exceptions to the DMCA. Thus, to those in the content industry, the fair use claim advanced in *Corley* underscored the need for the DMCA in the first place.

In the wake of *Corley* and other high-profile DMCA cases, such as the RIAA’s threatened prosecution of Princeton computer science Professor Ed Felten for publishing a scholarly paper discussing the encryption technology that the RIAA’s Secure Digital Music Initiative utilizes,<sup>68</sup> many commentators and some policymakers grew more concerned about the potentially overbroad scope of the DMCA and its ability to chill legitimate and, in some cases, constitutionally protected speech.<sup>69</sup> Fueled by such criticism, Congressman Rick Boucher has

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once aware of the appearance of infringing copies, usually was able to trace the copies up the chain of distribution, find and prosecute the infringer, and shut off the infringement at the source.

In principle, the digital world is very different. Once a decryption program like DeCSS is written, it quickly can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiffs’ copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear.

*Corley*, 273 F.3d at 452 (quoting *Reimerdes*, 111 F. Supp. 2d at 331).

<sup>65</sup> *Id.* at 459 (quoting *Reimerdes*, 111 F. Supp. 2d at 338 n.246).

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> For a discussion of the Ed Felten case, see Cassandra Imfeld, *Playing Fair with Fair Use? The Digital Millennium Copyright Act’s Impact on Encryption Researchers and Academicians*, 8 COMM. L. & POL’Y 111, 136–43 (2003).

<sup>69</sup> *See, e.g.*, 149 CONG. REC. E19–20 (daily ed. Jan. 8, 2003) (statement of Rep. Boucher) (“Given the breadth of the [DMCA] and its application so far, the fair use rights of the public at large clearly are at risk.”); Neil Weinstock Netanel, *Locating Copyright Within*

pushed for an exception to the DMCA, concluding that the DMCA “tilt[s] the balance in our copyright laws too heavily in favor of the interests of copyright owners and undermine[s] the longstanding fair use rights of information consumers.”<sup>70</sup> In particular, he introduced the Digital Media Consumers’ Rights Act of 2005<sup>71</sup> to create a fair use exception to the DMCA and to make clear that “it is not a violation of this section to circumvent a technological measure in order to obtain access to the work for purposes of making noninfringing use of the work.”<sup>72</sup> When that bill failed to gain traction in Congress, Representative Boucher sponsored the Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007, which protected a set of uses from liability and limited statutory damages to cases where “no reasonable person could have believed [the] conduct to be lawful.”<sup>73</sup> Likewise, this bill failed to garner significant congressional support.

Given that the Supreme Court has yet to interpret the DMCA, the DMCA’s exact scope remains up for debate. Indeed, in decisions involving efforts to use the DMCA to prevent competition in the “aftermarket” context, some courts have interpreted the DMCA in a manner more hospitable to fair use concerns than did the Second Circuit in *Corley*.<sup>74</sup> In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,<sup>75</sup> for example, the Federal Circuit ruled that Skylink, a garage-door-opener manufacturer, did not violate the DMCA when it manufactured a universal remote that bypassed the security feature of Chamberlain-made garage doors and allowed the user to open such doors without Chamberlain equipment.<sup>76</sup> In rejecting Chamberlain’s DMCA claim against Skylink, the court highlighted that Skylink did not intend to infringe Chamberlain’s copyrights in the system’s code by circumventing the security feature but to interoperate with it.<sup>77</sup> Notably, unlike the Second Circuit, which lacked interest in evaluat-

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*the First Amendment Skein*, 54 STAN. L. REV. 1, 80–81 (2001) (discussing how the DMCA “is highly vulnerable to facial First Amendment challenge”); see also Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 52 (2001) (“In some instances of overreaching via technological controls, the Constitution may even demand a limited self-help right, or ‘right to hack’ . . . .”); cf. *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (referring to the fair use doctrine as providing “built-in First Amendment accommodations”).

<sup>70</sup> 149 CONG. REC. E19 (daily ed. Jan. 8, 2003) (statement of Rep. Boucher).

<sup>71</sup> H.R. 1201, 109th Cong. (1st Sess. 2005).

<sup>72</sup> *Id.* § 5(b)(1).

<sup>73</sup> H.R. 1201, 110th Cong. § 2(a) (1st Sess. 2007).

<sup>74</sup> See Neil Weinstock Netanel, *Temptations of the Walled Garden: Digital Rights Management and Mobile Phone Carriers*, 6 J. ON TELECOMM. & HIGH TECH. L. 77, 91–92 (2007) (discussing how “courts have repeatedly found ways to hold that the DMCA does not apply to protect exclusivity in aftermarkets for consumer goods in which manufacturers have embedded computer code”).

<sup>75</sup> 381 F.3d 1178 (Fed. Cir. 2004).

<sup>76</sup> *Id.* at 1203–04.

<sup>77</sup> *Id.* at 1197.

ing the context of the use, the Federal Circuit concluded that circumvention does not violate the DMCA if it is done within the user's prerogative to utilize a product he or she purchased and not to infringe copyrights.<sup>78</sup> In a later case, the Federal Circuit elaborated on its view that the DMCA seeks to reinforce the Copyright Act, stating "[t]o the extent that [the copyright holder's] rights under copyright law are not at risk, the DMCA does not create a new source of liability."<sup>79</sup>

### C. Scholarly Proposals and Their Shortcomings

The enactment of the DMCA prompted an outcry among legal scholars. Notably, several leading commentators have expressed grave concern about the future of fair use, decrying the diminished applicability of the doctrine.<sup>80</sup> Similarly, a number of commentators have harshly criticized the DMCA's anticircumvention provisions, arguing that these provisions enable content owners to eliminate certain forms of fair use at will.<sup>81</sup> Concerned over the impact of the DMCA, some commentators have even argued that "fair use is dead."<sup>82</sup>

Academic criticism of the DMCA has spurred a series of reform proposals for ensuring fair use in the digital era. In this Subpart, we review those proposals, evaluating each in turn. In so doing, we underscore their limitations and lay the intellectual groundwork for the approach we propose in Part III.

#### 1. *The Right to Hack*

Of the various proposals designed to resuscitate fair use, Julie Cohen advanced perhaps the most provocative one. In particular, Cohen argues that the use of TPMs by content owners, together with the DMCA's anticircumvention provisions, restricts users' traditional privileges and threatens their First Amendments rights. To address this problem, Cohen recommends that users be granted the "right to hack the digital code that implements and enforces the challenged restric-

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<sup>78</sup> See *id.* at 1203–04.

<sup>79</sup> *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed. Cir. 2005).

<sup>80</sup> See, e.g., Netanel, *supra* note 69, at 79–81.

<sup>81</sup> See, e.g., EFF REPORT, *supra* note 12, at 1 (“[T]he DMCA grants to copyright owners the power to unilaterally eliminate the public’s fair use rights.”); Burk & Cohen, *supra* note 69, at 50–51 (asserting that the DMCA effectively “allow[s] every copyright owner to custom-design its own version of copyright law”).

<sup>82</sup> See Gordon, *supra* note 4, at 906, 909 (describing the claim as “common” though ultimately concluding that “[w]hile fair use is in danger from the DMCA and developments in contract law, I am not yet prepared to pronounce fair use to be dead”).

tion.”<sup>83</sup> Cohen’s argument is predicated on the view that the traditional copyright balance between owners’ rights and users’ privileges sets an immutable legal baseline that content owners may not change either contractually or by the use of code. The same is true, *a fortiori*, for users’ First Amendment rights. Accordingly, any attempt by content owners to unilaterally erode privileged uses or restrict speech rights via the use of TPMs amounts to a violation of the law, entitling users to employ self-help measures to remove the incursion on their rights. Cohen defends her proposal on the principle that public law (the Copyright Act and the First Amendment) is supreme to private law (contract and code). In short, Cohen suggests, any attempts to change public law privately by restrictive technological measures justifies the employment of countermeasures that nullify the purported change.

Cohen’s view finds some support in a number of cases. Notably, the Federal Circuit recognized a limited right to circumvent TPM in two cases. In these cases, the copyright holder attempted to use the DMCA *not* to protect its copyright but rather to prevent competition in the aftermarket of related services.<sup>84</sup> In *Chamberlain*, for example, the court rejected Chamberlain’s suit because Skylink circumvented the code feature not to infringe Chamberlain’s copyrights in the system’s code but to interoperate with it.<sup>85</sup>

Cohen’s proposal to give users the “right to hack” has a powerful intuitive appeal. After all, it is difficult to justify why users should not be allowed to circumvent TPMs that limit the use of content that the rightsholder illegally denied them access to in the first place. The key shortcoming of this proposal, however, is that it is likely to be either underinclusive or overbroad in practice and thus unlikely to provide an effective or viable policy response. Moreover, it also risks inviting an ongoing cat-and-mouse game whereby rights owners and hackers are—under the color of law—engaging in a constant and wasteful effort to develop and hack new TPMs.

Despite the claims of some commentators that everyone on the Internet can be an effective hacker,<sup>86</sup> only a relatively small group of

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<sup>83</sup> Cohen, *supra* note 13; see also Burk & Cohen, *supra* note 69, at 52 (“In some instances of overreaching via technological controls, the Constitution may even demand a limited self-help right, or ‘right to hack’ . . .”).

<sup>84</sup> See *Storage Tech.*, 421 F.3d at 1318; *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203–04 (Fed. Cir. 2004); see also Netanel, *supra* note 74, at 91–94 (summarizing the line of cases).

<sup>85</sup> See *Chamberlain*, 381 F.3d at 1197.

<sup>86</sup> See, e.g., Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 641 (2004) (“[O]nce a sophisticated user has broken the ‘digital lock’ and extracted the content, there is no ‘speed bump’ impeding subsequent unsophisticated users from gaining unauthorized access.”).

consumers have the know-how to circumvent TPMs on their own.<sup>87</sup> (Consider, for example, that despite the availability of DeCSS, most purchasers of DVDs have not taken advantage of the circumvention technology.) Consequently, to ensure that this right is conferred more broadly, it may require the authorization of manufacturing, trafficking, and distribution of circumvention tools (to the extent that they are sold) to enable fair uses. Yet, the recognition of such an exemption is highly unlikely and problematic from the point of view of the content industry because it is impossible to allow the manufacture of circumvention devices for fair use only. In practice, an authorization to manufacture, traffic, and distribute circumvention devices may enable a large number of consumers to circumvent TPMs in many cases unconnected to any fair use. Consequently, the right to hack risks either providing an illusory right (i.e., a right that is only available to skilled hackers) or narrowing the prohibition on providing circumvention tools to such a degree that it might well render any effort to protect TPMs altogether futile.

## 2. A “Reverse Notice and Takedown Regime”

Professors Jerome Reichman, Graeme Dinwoodie, and Pamela Samuelson advance a different solution to the fair use challenge, calling for the establishment of a “reverse notice and takedown regime.”<sup>88</sup> Their proposed regime would allow users who wish to make a noninfringing use of TPM-protected material to notify the content owner of their intention to circumvent the TPM for this purpose. Following such a notice, the proposal gives copyright owners fourteen days either to object to the circumvention or to allow it by inaction, without prejudice. In the case of an objection, the regime would entitle the users to seek a declaratory judgment of their entitlement to bypass the TPM.

These professors’ proposal seeks to level the rights of content owners and users by allowing users to utilize the “notice and takedown” tool, which is available to copyright owners under a different provision of the DMCA.<sup>89</sup> Certainly, the practicality of this model could be enhanced if the proposal established standardized procedures regarding the required notice and provided for expeditious, low-cost administrative tribunals. Yet, even without these mechanisms in place, this proposal could be applied on a case-by-case basis.<sup>90</sup>

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<sup>87</sup> See Paul Ohm, *The Myth of the Superuser: Fear, Risk, and Harm Online*, 41 U.C. DAVIS L. REV. 1327, 1330 (2008) (“Most Internet users are unsophisticated, exercising limited power and finding themselves restricted by technological constraints . . .”).

<sup>88</sup> See Reichman et al., *supra* note 52, at 987, 1032–33.

<sup>89</sup> See 17 U.S.C. § 512 (2006).

<sup>90</sup> See Reichman et al., *supra* note 52, at 1033.

Despite this possibility, the principal shortcomings of the reverse notice and takedown proposal are its transaction costs and uncertainty. First consider transaction costs. As experience with the DMCA's notice and takedown regime indicates, the implementation of a mirror-image regime (i.e., a reverse notice and takedown regime) would introduce significant transaction costs.<sup>91</sup> In particular, the regime would require users to locate the relevant rightsholder, contact him or her, and justify their request to secure permission.<sup>92</sup> Although the cost involved is not enormous, it may be high enough to thwart many low-value fair uses. It is important to recall that the leading theoretical justification of fair use focuses on its ability to overcome the presence of high transaction costs by obviating the need for negotiations between the parties. Indeed, this ability is the main virtue of fair use according to Wendy Gordon's landmark conception of the doctrine.<sup>93</sup> The reverse notice and takedown model would thus risk stripping fair use of its main virtue by requiring parties to negotiate prior to the use of protected materials.<sup>94</sup> As a result, under the reverse notice and takedown regime, fair use may not be available precisely in those cases where it is most socially desirable: when transaction costs are prohibitive.

The risk of managing uncertainty is an even greater problem. Under this proposal, copyright owners could simply deny users permission to use copyrighted content. As already explained, fair use is a notoriously murky doctrine. Thus, copyright owners would almost always be able to generate a reason, or at least a pretext, to object to the requested use. In these instances, the user has the option of seeking a declaratory judgment against the content owner, but this option is both costly and time consuming because "split courts, reversed decisions, and inconsistent opinions" mar fair use jurisprudence.<sup>95</sup>

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<sup>91</sup> See *id.* at 1037 n.290.

<sup>92</sup> See *id.*

<sup>93</sup> See 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, 1618 (1982).

<sup>94</sup> We acknowledge that, by the terms of the proposal, negotiation would constitute an additional safeguard and, in theory, leave users no worse off than the *status quo ante* in terms of their ability to implement fair uses without first seeking permission. But this suggestion ignores the very real—and perhaps likely—possibility that the introduction of such a procedure would spur a concomitant expectation by courts that users avail themselves of this option. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1384, 1387 (6th Cir. 1996) (finding that the availability of a clearing mechanism for obtaining permission to make photocopies used in course packets was a basis for showing harm under the fair use inquiry); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930–31 (2d Cir. 1994) (reasoning that the existence of a workable market for corporate photocopying centers to pay a licensing fee to copyright holders militates against a finding of fair use).

<sup>95</sup> Parchomovsky & Goldman, *supra* note 3, at 1496; see also Parchomovsky, *supra* note 26, at 348 n.7 (demonstrating this point by reviewing case law).

The reverse notice and takedown model may also be most effective if circumvention tools are available on the market. Otherwise, users will be unable to access protected expressions even when the rightsholder does not object.<sup>96</sup> As noted, most users do not possess the requisite technological expertise to overcome the defensive measures that protect copyrighted expressions.<sup>97</sup> Hence, implementation of the reverse notice and takedown proposal will operate most effectively in the face of a significant relaxation of the antitrafficking ban. Such a relaxation, however, would defeat the purpose Congress had in mind when enacting the DMCA; with circumvention technologies available on the market, *all* users, not just fair users, will be able to get around TPMs. The availability of circumvention technologies will also weaken users' incentives to notify copyright owners about their desire to use copyrighted content. Given the small probability of detection and legal sanction, many users may choose to avoid the cost of contacting the rightsholders. Instead, they will elect to proceed unilaterally and put the material to the planned use. Hence, permitting the marketing of circumvention technologies will largely reinstate the state of affairs that preceded the enactment of the anticircumvention provisions of the DMCA.

### 3. *The Creation of an Administrative Agency to Oversee Fair Use*

A third solution suggested by some scholars is to institute a special administrative body to tackle the challenge of determining what constitutes a fair use. Michael Carroll, for example, has called for establishing a "Fair Use Board" within the Copyright Office that would be authorized to rule on the fairness of various uses.<sup>98</sup> With such a board in place, users could petition the board to opine on their planned use, thereby receiving immunity from liability in cases where the board rules in their favor.

Jason Mazzone espouses a somewhat different approach, seeking to improve upon Carroll's proposal.<sup>99</sup> Mazzone calls for the establishment of a special administrative agency to regulate fair use, contemplating two possible models of regulation. In the first model, the agency would promulgate regulations that address what constitutes fair use in specific contexts.<sup>100</sup> The agency would be responsible for preventing efforts by content owners to impede fair uses of their content. In the second model, which constitutes an extension of the first,

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<sup>96</sup> Alternatively, users would be able to use materials only in cases where the rightsholder fully cooperates with the users' requests and instructs them on how to get around the relevant TPM.

<sup>97</sup> See *supra* note 87 and accompanying text.

<sup>98</sup> Carroll, *supra* note 10, at 1090.

<sup>99</sup> See Mazzone, *supra* note 11.

<sup>100</sup> *Id.* at 415–18.

the agency would not only be charged with promulgating fair use regulations but also would be required to determine whether the putative defendant's use is fair prior to the commencement of any infringement suit.<sup>101</sup>

Both Carroll's and Mazzone's proposals raise several concerns. The most obvious problem is their cost. In particular, two types of costs must be taken into account. First, there is the fixed cost of setting up the review body—be it a board within the copyright office or an independent administrative organization. Second, there is the cost of the actual review. As for the set-up cost, it bears emphasis that establishing a new administrative agency typically involves lengthy political battles, accompanied by extensive lobbying efforts. The copyright context is no exception.

The second type of cost is even more daunting. Given that fair use is the most common defense to infringement suits, review requests may overwhelm the administrative body. The experience of the Patent Office is instructive. In 2008, the average pendency time of patent applications was just over thirty-two months, and the number of applications pending before the patent office was approximately 1,200,000.<sup>102</sup> While examining a patent application undoubtedly takes longer—an average of eighteen hours per application<sup>103</sup>—than making a fair use determination, the volume of fair use review petitions could far exceed the number of patent applications. Also, given the vagueness of the fair use doctrine, the agency is unlikely to hand down fair use determinations quickly. Accordingly, the proposed review process may prove costly and time consuming. As a result, it will create a drag on the creative process and will be completely useless for users who need to use copyrighted materials expeditiously.

Mazzone's first model (but not the second) avoids the delay problem but only at the price of generating a potentially greater problem. To be sure, the model's call for general fair use rules or standards is, in theory, a good idea. In practice, however, it will meet several difficult challenges. Setting aside the question of whether adopting regulations that define fair use with the level of precision necessary to implement Mazzone's proposal is desirable,<sup>104</sup> the content and the

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<sup>101</sup> *Id.* at 419–21.

<sup>102</sup> Gene Quinn, *USPTO Backlog: Patent Pendency Out of Control*, IPWATCHDOG (Apr. 22, 2009, 7:43 PM), <http://www.ipwatchdog.com/2009/04/22/uspto-backlog-patent-pendency-out-of-control/id=2848/>.

<sup>103</sup> Mark Lemley & Bhaven N. Sampat, *Examiner Characteristics and the Patent Grant Rate* 6 (John M. Olin Program in Law & Econ., Stanford Law Sch., Working Paper No. 369, 2009), available at <http://ssrn.com/abstract=1329091>.

<sup>104</sup> For an argument that fair use should remain vague, see Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 140 (1999) (“[F]air use appears to be employed in situations of high transaction costs, where a muddy entitlement may be appropriate . . . [because the vague] fair use [standard] allows courts to reallocate what the market

basis for drafting the regulations is unclear. As we already noted, the case law in this area does not provide a coherent body of law on which to base a comprehensive regulation.<sup>105</sup> Worse yet, very little agreement exists as to what fair use means in many different contexts.

The prevailing disagreement as to the meaning of fair use does not bode well for Mazzone's proposal. In particular, past experience in the area of copyright law underscores that implementation of even small-scale changes is impossible in the absence of judicial guidance or real-world benchmarks. Consider the case of the compulsory license rates for digital performances of sound recordings. In 1995, Congress recognized a new exclusive copyright: the digital performance right in sound recordings.<sup>106</sup> Webcasters, fearing that this new right spelled doom for their business, opposed its recognition. To alleviate the webcasters' concerns, Congress, in what seemed to be a reasonable compromise, established a compulsory royalty arrangement, which called for the parties to engage in voluntary negotiations to determine the precise amounts of royalty payments. What ensued surprised many in the copyright world: failing to reach an agreement on royalty rates, copyright owners and webcasters engaged in a protracted political battle lasting over a decade.<sup>107</sup> It is entirely possible—and indeed likely—that similar battles would occur in the fair use context.

Public choice theory explains another problem with relying on administrative agencies. Despite its benign label, public choice theory explains how and why agencies set up to regulate a certain industry or economic sector will sometimes act to advance the narrow interests of the regulated industry or sector.<sup>108</sup> This problem is omnipresent, and there are reasons to believe that it is especially acute in the intellectual

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cannot."); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 257 (1995) (noting that, in some cases, "bargaining may be more efficient under a blurry balancing test than under a certain rule").

<sup>105</sup> See *supra* text accompanying notes 54–67 & 74–79.

<sup>106</sup> Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

<sup>107</sup> For a discussion of this battle, see Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 827–29 (2007).

<sup>108</sup> For a succinct discussion of public choice theory, see Pierre Lemieux, *The Public Choice Revolution*, REGULATION, Fall 2004, at 22, 22, 27. In a vivid illustration of how businesses can view government regulation as an aid to their ambitions, and not an impediment, consider what Richard Olney, a former railroad lawyer and Grover Cleveland's Attorney General, told his former clients when they asked him for assistance in killing off the newly created Interstate Commerce Commission:

"The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. . . . The part of wisdom is not to destroy the Commission, but to utilize it."

property context. As Professor Jessica Litman has demonstrated persuasively, the content industry exercises enormous influence over the legislative process, leading Congress to pass unbalanced legislation that favors the interests of the content industry over that of the public at large.<sup>109</sup> There is no reason to believe that the content industry will not similarly influence an administrative body established to regulate it. Consequently, establishing an agency to regulate fair use may result in a net social loss, draining public resources without providing any meaningful offsetting benefits.

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Reflecting on the three proposals outlined above, we must emphasize that each has considerable merit and addresses a pressing concern in a creative fashion. Yet, each has considerable imperfections, and these imperfections may prevent their adoption or may not fully protect fair use if adopted. As we make clear in Part III, this Article proposes to move beyond the often all-consuming focus on the fair use doctrine and seeks to focus instead on the role of user privileges in the digital age. While we share our colleagues' concern for the future of fair use, we believe a markedly different strategy is necessary to advance its underlying policy concern.

Each of the proposals outlined above is premised on a model of content-industry behavior that suggests (either implicitly or explicitly) that fair use interests only users and academics—not content owners. We disagree. In a compelling explanation of the importance of sharing information goods with the public (to at least a limited degree), Carl Shapiro and Hal Varian counsel owners of information goods to grant limited opportunities to consumers to use parts of their goods free of charge as a means of increasing their profits.<sup>110</sup> In the Internet Era, such uses are widespread, suggesting that many content owners are following this advice. Indeed, as Tim Wu has suggested, many content owners endorse the concept of “tolerated use” by consciously deciding to refrain from enforcing their rights against fan

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Thomas Frank, *Obama and 'Regulatory Capture,'* WALL ST. J., June 24, 2009, at A13. In this sense, public choice theory suggests a perspective on government regulation more nuanced than the idea of “regulatory capture,” which often is presented as the core problem and is remedied by measures to prevent “the revolving door” between industry and government.

<sup>109</sup> See JESSICA LITMAN, *DIGITAL COPYRIGHT* 144–45 (2001). As to the DMCA, Litman concluded that its passage constituted “a lot of rent-seeking at the expense of new upstart industries and the public at large.” *Id.* For her earlier study on how public choice pressures shape copyright policy, see generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

<sup>110</sup> See CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 85–92 (1999).

sites, believing that “fan sites will increase, not hurt, demand for the [copyrighted content].”<sup>111</sup>

Drawing on this insight that content owners confront powerful incentives to permit fair uses of their copyrighted content, Part II discusses a number of case studies of content owners who voluntarily design their protective technologies to allow user privileges above and beyond what the law requires. Our survey thus indicates, at the very least, that in some instances, use privileges for digital content are robust and are not endangered, as some commentators suggest. It also points the way, as we discuss in Part III, for a framework of adaptive regulation that spurs more content owners to act along the lines depicted in Part II.

## II

### MAPPING THE DIGITAL DOMAIN OF USER PRIVILEGES

In contrast to the claims of some commentators who portray the marketplace as bereft of opportunities for users to access digital content in creative ways,<sup>112</sup> we identify, using an informal survey, a number of steps taken by content owners to make content available relatively cheaply or for free.<sup>113</sup> Unlike some courts, we do not believe that such access arrangements, taken alone, necessarily bar a fair use claim.<sup>114</sup> We do believe, however, that such opportunities are significant because they undermine the rationale for a more aggressive response to the claimed lack of use opportunities in the digital age. In many cases, these measures take the form of authorized “terms of use” that operate as nonexclusive licenses and explicitly permit uses comparable to or even beyond those envisioned by the fair use doctrine.

Our survey reveals that content owners have taken a number of steps to make available access on reasonable terms and conditions along two dimensions. First, some owners or distributors of digital content have provided flexibility on copies of the digital work to approximate the rights afforded under fair use. Second, some owners or distributors of digital content have made copies of their product ac-

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<sup>111</sup> Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008). On Wu’s account, this form of a “tolerated use” may well be coexistent with “fair use,” but “thanks to the inherent vagueness in the concept of fair use and the costs of litigation, the contours of fair use for casual infringement have not been—and may never be—well mapped out.” *Id.* at 620.

<sup>112</sup> See, e.g., Mazzone, *supra* note 11, at 398–401.

<sup>113</sup> Obviously, what constitutes reasonably cheap access is open to debate, but our principal focus is on terms of access that would not impede new creations. For a discussion of the difficulty of gaining permission in the context of creating documentary films, see Nancy Ramsey, *The Secret Cost of Documentaries*, N.Y. TIMES, Oct. 16, 2005, at 13.

<sup>114</sup> See, e.g., sources cited *supra* note 94. Some commentators have deemed this inquiry the “market failure approach to fair use.” See, e.g., Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1020 (2002).

cessible for use in various contexts in a manner that is reasonably affordable.

Before discussing our informal survey, we would like to emphasize two points. First, our aim in surveying the various use privileges developed in the real world is to *complement*, not replace, fair use. In certain contexts, such as parodies,<sup>115</sup> reverse engineering,<sup>116</sup> and the search-engine industry,<sup>117</sup> fair use serves an important social purpose; therefore, it is critical to retain the doctrine. Second, we concede that our survey is not sufficiently comprehensive or scientific to conclusively negate concerns about enclosure of content under “digital locks.” Nonetheless, our survey indicates that ongoing developments in the marketplace undermine the gravity of such claims. In short, these developments suggest that commentators should more carefully evaluate what circumstances lead content owners to make their works available for creative uses.<sup>118</sup>

#### A. Opportunities for Multiple Copies of Digital Media

We begin by presenting and discussing real-world cases of content owners who chose to allow users to create multiple copies of copyrighted works embedded in digital media. Traditionally, courts held that copying a work in its entirety weighs heavily against a fair use finding.<sup>119</sup> Yet, market pressures, as well as the need to address the challenge of illegal copying, have prompted content owners to expand use privileges for certain users. The following cases are indicative of this trend.

##### 1. *Apple’s FairPlay*

The success of Apple’s iTunes revolutionized the music industry. During the rise of illegal digital-distribution outlets (e.g., Napster), the music industry declined to license its content in digital form. Once Apple entered into contracts with major music companies,

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<sup>115</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>116</sup> See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526–28 (9th Cir. 1992).

<sup>117</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007).

<sup>118</sup> One possibility is that some parties will grant access to digital content on reasonable terms and conditions so that others can reuse their creations in new ways that create value for the rightsholder. See *supra* text accompanying note 110. Another possibility is that the current state of confusion as to the appropriate fair use standard—let alone how it intersects with the DMCA—creates some incentives for parties to reach marketplace solutions. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1295–96 (1996); see also Burk, *supra* note 104, at 139–40 (explaining that vague entitlement standards can encourage parties to negotiate a solution).

<sup>119</sup> This assertion flows from the third fair use factor, which examines the “amount and substantiality” of the copied work. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

allowing Apple to distribute their music in digital form, it was able to enter the digital-music marketplace. The quid for the quo of entry, however, was that Apple enabled a digital rights management (DRM) system known as “FairPlay.”<sup>120</sup> Under that system, each iTunes user can authorize only five copies of iTunes at one time but can deauthorize a copy of an iTunes-purchased song at will.<sup>121</sup> The system also has a huge built-in incentive for individuals to protect access to their iTunes user names and passwords, as the individuals use the same user name and password to purchase music from the iTunes store.<sup>122</sup>

Subsequent pressures to abandon the implementation of any DRM system—spurred on by Apple—eclipsed FairPlay’s effort to provide only limited user privileges. In 2007, Apple took its first step in this direction by entering into a contract with EMI Music so that it could provide EMI’s music without DRM restrictions.<sup>123</sup> Apple called this music the “iTunes Plus” format,<sup>124</sup> providing twice the sound quality of Apple’s DRM-protected music and making the music available at the same price as DRM-protected iTunes songs. More recently, Apple agreed with other major labels to distribute their music without DRM restrictions.<sup>125</sup> Although Apple had long called for access to music without DRM restrictions, it merits note that Apple’s progress on this front followed Amazon’s agreement with major recording companies to distribute music without DRM restrictions.<sup>126</sup>

## 2. *Windows Media DRM*

Although Apple’s iTunes remains the dominant digital-distribution platform, its rivals have also sought to offer music in formats that are not as restrictive as the DMCA would allow. Windows Media Encoder, for example, encrypts media files in DRM-protected formats—specifically, Microsoft’s Windows Media Video (WMV) and Windows

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<sup>120</sup> See Steve Jobs, *Thoughts on Music*, APPLE (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/>.

<sup>121</sup> See *About iTunes Store Authorization and Deauthorization*, APPLE, <http://www.apple.com/support/itunes/store/> (follow “Authorization” link; then follow “Authorize or deauthorize your computer” link; then follow “About iTunes Store authorization and deauthorization” link) (last visited Aug. 28, 2010).

<sup>122</sup> See *iTunes Store: About Apple ID and Password*, APPLE, <http://support.apple.com/kb/ht2204> (last modified Aug. 2, 2010).

<sup>123</sup> Dan Moren, *A Year After iTunes Plus, Apple Faces Stepped-Up Competition*, MACWORLD (May 30, 2008, 2:48 PM), <http://www.macworld.com/article/133667/2008/05/stateofdrm.html>.

<sup>124</sup> *iTunes Store: iTunes Plus Frequently Asked Questions (FAQ)*, APPLE, <http://support.apple.com/kb/ht1711> (last modified June 25, 2010).

<sup>125</sup> Greg Sandoval, *Sources: Apple to Expand DRM-Free Music, Pricing*, CNET NEWS (Jan. 5, 2009, 5:05 PM), [http://news.cnet.com/8301-1023\\_3-10131761-93.html](http://news.cnet.com/8301-1023_3-10131761-93.html).

<sup>126</sup> See Moren, *supra* note 123.

Media Audio (WMA) formats.<sup>127</sup> Windows Media DRM, which enables individual consumers to make use of DRM-protected WMV and WMA files,<sup>128</sup> is considerably more complicated than Apple's FairPlay system.

Stated simply, Windows Media DRM operates as follows: First, the content owner must set up an account with a Windows Media license provider,<sup>129</sup> costing between twenty and fifty dollars per month plus a small start-up fee.<sup>130</sup> Second, the content owner is authorized to encode his or her content in a DRM-protected file by using Windows Media Encoder or a similar program. Third, the content owner distributes his or her digital media in any manner he or she chooses, allowing the consumer (by Internet connection) to automatically acquire a license from the license provider. The principal advantage of Windows Media DRM is that it is extremely flexible in what terms of use it makes possible,<sup>131</sup> including restricting when users can access the media, how many times users can play the media, and the number of times users may copy the media.<sup>132</sup> This flexibility means, for example, that Windows Media DRM can allow—in addition to a number of permanent copies—the ability to create “temporary” copies (i.e., copies that users can access only at certain times). By so doing, Windows Media DRM can enable time-shifting, space shifting, and other activities that likely far exceed the use options that fair use affords.<sup>133</sup>

Some developers also generated means of using Windows Media DRM in creative ways. Consider, for example, the case of MediaKey, a licensed provider of Windows Media DRM.<sup>134</sup> MediaKey has attempted to use DRM as a means of inviting users to try out a service before paying for the service. In particular, MediaKey enables content owners to encrypt a file with apparently harmless DRM and to dis-

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<sup>127</sup> *Expression Encoder Pro 4 FAQ*, MICROSOFT, [http://www.microsoft.com/expression/products/Encoder\\_FAQ.aspx](http://www.microsoft.com/expression/products/Encoder_FAQ.aspx) (last visited Aug. 28, 2010). Note that Microsoft is phasing out support for the Windows Media Encoder and is replacing Windows Media Encoder with the “Expression Encoder,” which provides additional functionality. See *Expression Encoder 4 Overview*, MICROSOFT, [http://www.microsoft.com/expression/products/Encoder-Standard\\_Overview.aspx](http://www.microsoft.com/expression/products/Encoder-Standard_Overview.aspx) (last visited Aug. 28, 2010).

<sup>128</sup> See *Windows Media DRM FAQ*, MICROSOFT, <http://www.microsoft.com/windows/windowsmedia/forpros/drm/faq.aspx> (last updated Oct. 2005).

<sup>129</sup> Andrea Pruneda, *Using Windows Media Encoder to Protect Content*, MICROSOFT (Mar. 2003), <http://www.microsoft.com/windows/windowsmedia/howto/articles/ProtectContent.aspx>.

<sup>130</sup> See, e.g., EZDRM DIGITAL RIGHTS MANAGEMENT, <http://www.ezdrm.com/> (last visited Aug. 28, 2010).

<sup>131</sup> See *Windows Media DRM FAQ*, *supra* note 128.

<sup>132</sup> See *id.*

<sup>133</sup> See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–57 (1984) (finding that “time-shifting,” or recording media for viewing at a different time than it was made available to the public, is a fair use).

<sup>134</sup> *About MediaKey*, MEDIAKEY, <http://www.mediakey.com/company.php> (last visited Aug. 28, 2010).

tribute that file over peer-to-peer networks.<sup>135</sup> When a “critical number” of users have played the file, the hidden DRM clamps down on *all* users—thus preventing them from accessing the content—and directs them to the MediaKey website,<sup>136</sup> suggesting the users to purchase a license to continue using the media. In short, MediaKey seeks to turn “piracy” into a tool for market penetration in a manner that some suggest is consistent with the fair use principle but in all likelihood goes way beyond uses coming within the aegis of fair use broadly constructed.<sup>137</sup>

### 3. *Adobe’s Digital Editions*

Another notable use of DRM is Adobe’s Digital Editions (formerly known as “eBooks”), which are distributed from the Adobe website.<sup>138</sup> Once sold, Adobe makes available books in portable document format (PDF) and protects them through the use of DRM, which enables users to access the books only by Adobe Reader. That DRM also allows the copyright owner to decide the duration of the license and whether to allow users to print the work. Notably, Adobe only allows users to access a book on “activated” computers.<sup>139</sup> To provide some level of sharing, Adobe allows users to activate up to six computers, although, unlike Apple’s FairPlay, it does not allow the deactivation of a computer so as to free up a license.<sup>140</sup>

### 4. *Spore*

As instructive as the efforts to provide for user privileges are as an initial matter, it is perhaps more instructive to note the pressures that firms face when they fail to provide such opportunities. A famous case of a content owner’s lack of concern over user privileges is the Spore video game, one of the most-awaited video games of 2008.<sup>141</sup> The premise of the game is that players are able to lead a species from birth as a single-celled organism to control (by military, religion, or trade) the known universe. When first released, consumers quickly criticized

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<sup>135</sup> *Business Scenarios*, MEDIAKEY, <http://www.mediakey.com/business-scenarios.php> (last visited Aug. 28, 2010).

<sup>136</sup> *See id.*

<sup>137</sup> *Cf.* Brief for Defendant at 5, *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (No. 05-1314), (arguing that “sampling” music, or listening to it for evaluation purposes, has no significant, negative economic impact).

<sup>138</sup> *See generally Adobe Reader 7.0: Frequently Asked Questions for Digital Edition Users*, ADOBE, 1 (2005), [http://www.adobe.com/products/acrobat/pdfs/95003923\\_eBook\\_FAQ\\_UE.pdf](http://www.adobe.com/products/acrobat/pdfs/95003923_eBook_FAQ_UE.pdf).

<sup>139</sup> *See id.* at 2.

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *See* Stephen Johnson, *Our Ten Most Awaited Games of 2008*, G4TV (Dec. 27, 2007), [http://www.g4tv.com/thefeed/blog/post/681795/Our\\_Ten\\_Most\\_Awaited\\_Games\\_Of\\_2008.htm](http://www.g4tv.com/thefeed/blog/post/681795/Our_Ten_Most_Awaited_Games_Of_2008.htm). Maxis developed Spore, and Electronic Arts produced the video game.

Spore for its severely restrictive DRM, which permitted only three installations of the game.<sup>142</sup> At every installation, the user had to enter a serial key, and this key was reported to Electronic Arts to subtract one from the “remaining uses” of that key. What most angered consumers was that Spore did not allow keys to be restored by deactivating a given computer.<sup>143</sup> In particular, consumers were concerned that, as computers need to be reformatted regularly, a user might need to frequently install a video game where that video game became corrupted. To put it differently, the user privilege that Spore made possible was nowhere near “fair” in consumers’ eyes, and consumers retaliated by posting over 2,500 1-of-5-star reviews of Spore on Amazon.com, virtually all of which focused on its severe DRM.<sup>144</sup> As one critic put it, the nature of Spore’s DRM system meant that Electronic Arts was in fact “renting” Spore to players for an inevitably limited time.<sup>145</sup>

Electronic Arts responded by drastically revising Spore’s DRM system. In particular, it allowed five installations and multiple screen names per account as well as the ability for users to deauthorize a given computer to “free up” an installation for another computer.<sup>146</sup> Moreover, as a safety valve, Electronic Arts promised that users who legitimately ran out of installations could contact the company by phone to renew their serial keys.<sup>147</sup> Even with the subsequent reforms of Spore’s DRM system—to which there are virtually no complaints (particularly when compared to its predecessor)—Spore continues to pay a price for its earlier use of restrictive DRM because it suffered considerable and enduring reputational damage. Other developers, however, have learned from Spore’s example: video games like *Far Cry 2* and *Mass Effect* enable a greater number of computers to play the game and permit users to deauthorize computers to free up previous installations or to call the producer and request a serial key renewal.<sup>148</sup> Most notably, the new Chief Executive Officer of Electronic

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<sup>142</sup> See Stephen Kamizuru, *EA Loosens Spore DRM Restrictions*, DAILYTECH (Sept. 22, 2008), <http://www.dailytech.com/EA+Loosens+Spore+DRM+Restrictions+Promises+Further+Change/article13014.htm>.

<sup>143</sup> Cf. *id.* (stating that changes made to the DRM policy included “[t]he ability to deauthorize machines and move authorizations to new machines” (italization omitted)).

<sup>144</sup> See *Customer Reviews: Spore*, AMAZON.COM, <http://www.amazon.com/Spore-Mac/product-reviews/B000FKBCX4> (last visited Aug. 28, 2010).

<sup>145</sup> Erich Maria Remarque, *Dumbed Down Experience and Draconian DRM*, AMAZON.COM (Sept. 7, 2008), <http://www.amazon.com/review/RK9RKIUMYF757/> (reviewing Spore). This review repeatedly emphasizes Spore’s “draconian DRM.” As of August 28, 2010, “8,350 of 9,071 people” have found this 1-of-5-star review “helpful.” *Id.*

<sup>146</sup> See Kamizuru, *supra* note 142.

<sup>147</sup> Cf. *id.* (“[Electronic Arts] will continue to offer channels to request additional activations where warranted.” (italization omitted)).

<sup>148</sup> See Andy Chalk, *Far Cry 2 DRM Confirmed*, THE ESCAPIST (Oct. 15, 2008, 3:39 PM), <http://www.escapistmagazine.com/news/view/86838-Far-Cry-2-DRM-Confirmed>; Jay

Arts has changed the company's attitude radically and has embraced the "freemium" approach, encouraging users to "pirate lots" of its games "[b]ecause what's in the middle of the game is an opportunity to buy stuff."<sup>149</sup>

## B. Sampling and the Right to Remix

In addition to providing opportunities to access content in flexible ways (including time shifting and place shifting), user privileges play a critical role in enabling access to content that others can creatively use. In particular, as the Supreme Court suggested in *Campbell v. Acuff-Rose Music, Inc.*, it is important that users be free to use content in "transformative" ways.<sup>150</sup> Most famously, Lawrence Lessig has emphasized the growing importance of the "remix" economy and has highlighted the importance of protecting user privileges in the digital world through guaranteed access to digital works.<sup>151</sup> Lessig's view generally assumes that individual content holders decline to make digital works available and contends that making such content available for free is the optimal policy strategy.<sup>152</sup> As we discuss below, there is considerable evidence to challenge his view on both scores.

As an initial matter, we concede that Lessig's concerns are not unreasonable and that many content owners do not seek to make their content available in a form that allows for creative uses by consumers. Notably, many websites have adopted terms of service that seek to limit the ability to copy their content. Moreover, as for software, DVDs, and some CDs, many content owners provide their media only in encrypted form that consumers cannot access without violating the DMCA. That said, we do see encouraging signs of allowing access to content on reasonable terms and, as we discuss in Part III, we believe that a strategy less aggressive than providing a right to hack better addresses these restrictions. In the following sections, we provide several real-world examples of accommodation by companies that decided on their own or in response to public pressure to allow opportunities for the remixing and reusing of their copyrighted content.

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Watamaniuk, *Official Bioware/EA Response to DRM Discussion*, BioWare — MASS EFFECT 2 (May 9, 2008, 6:44 PM), <http://masseffect.bioware.com/forums/viewtopic.html?topic=629059&forum=125>.

<sup>149</sup> Ben Kuchera, *EA's New Motto: Please Pirate Our Games. . . Er, Storefronts*, ARS TECHNICA (June 23, 2009, 11:07 PM), <http://arstechnica.com/gaming/news/2009/06/eas-new-motto-please-pirate-our-games-er-storefronts.ars>.

<sup>150</sup> See 510 U.S. 569, 579 (1994).

<sup>151</sup> See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 68–83, 253–87 (2008).

<sup>152</sup> See *id.* at 254–59.

### 1. *The Associated Press*

Most recently, the Associated Press (AP) created a furor when it challenged Google's handling of search requests for its content.<sup>153</sup> In short, AP, which allows online access to its stories under certain terms,<sup>154</sup> wants to ensure it can control and monetize its content.<sup>155</sup> To do so, AP mandates users to follow its terms of service that specify, among other things, that users cannot "copy, reproduce, publish, transmit, transfer, sell, rent, modify, create derivative works from, distribute, repost, perform, display, or in any way commercially exploit the [m]aterials" found on its website without its express permission.<sup>156</sup> Moreover, users can obtain that permission by paying a licensing fee under which a quotation of five to twenty-five words costs \$12.50 and one of twenty-six to fifty words costs \$17.50.<sup>157</sup> This requirement, if enforced literally, would abrogate fair use insofar as a five word quotation—almost certainly a fair use under any set of imaginable circumstances<sup>158</sup>—would be the basis for legal action.

Like the Spore case,<sup>159</sup> AP's policies generated considerable controversy and sparked a change in its practice. Notably, in June 2008, AP asked *Drudge Retort* (a blog whose moniker parodies the more well-known *Drudge Report*) to remove various quotations from AP stories of between thirty-nine and seventy-nine words.<sup>160</sup> In response, a wide range of online news and blogging outlets complained that AP was attempting to interfere with their news reporting and that AP failed to adhere to the fair use principle.<sup>161</sup> The reaction of *TechCrunch* was representative of the general trend:

So here's our new policy on A.P. stories: they don't exist. We don't see them, we don't quote them, we don't link to them. They're banned until they abandon this new strategy, and I encourage others to do the same until they back down from these ri-

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<sup>153</sup> See Dirk Smillie, *AP's Curley Has Fightin' Words for Google*, FORBES.COM (Mar. 30, 2009, 6:35 PM), <http://www.forbes.com/2009/04/30/associated-press-google-business-media-apee.html>.

<sup>154</sup> See *The Associated Press Terms and Conditions of Use*, THE ASSOCIATED PRESS, <http://www.ap.org/pages/about/terms.html> (last visited Aug. 28, 2010).

<sup>155</sup> See Smillie, *supra* note 153.

<sup>156</sup> See *The Associated Press Terms and Conditions of Use*, *supra* note 154.

<sup>157</sup> David Bollier, *Associated Press Tramples on Fair Use Rights*, ON THE COMMONS (June 18, 2008), <http://onthecommons.org/content.php?id=2006>.

<sup>158</sup> See 17 U.S.C. §§ 107(3)–(4) (2006) (listing the "amount and substantiality" of what was taken from the work and the "effect of the use upon the potential market" as factors in the fair use analysis).

<sup>159</sup> See discussion *supra* Part II.A.4.

<sup>160</sup> Saul Hansell, *The Associated Press to Set Guidelines for Using Its Articles in Blogs*, N.Y. TIMES, June 16, 2008, at C7.

<sup>161</sup> See *id.*

diculous attempts to stop the spread of information around the Internet.<sup>162</sup>

In response, AP backed down from its aggressive position, admitting that its actions were “‘heavy-handed,’”<sup>163</sup> promising to “create[ ] a more thoughtful standard.”<sup>164</sup>

## 2. *Nintendo’s Super Smash Bros. Brawl*

As noted above, almost all software, including video games, uses restrictive DRM. One development among video game creators provides a notable exception to this practice. In particular, some creators are allowing increased access to screen shots that users can manipulate and share. In its 2008 release of *Super Smash Bros. Brawl*, for example, Nintendo integrated “snapshot” functionality to the game itself.<sup>165</sup> Consequently, when a player pauses the game in the middle of a “brawl,” he or she is given the option to move the game “camera,” change its angle, zoom in or out, and save a snapshot (i.e., “replays” of up to three minutes) with the tap of a button—all of which users can access and store on an SD Card. Indeed, the game manual emphasizes that a player can “easily transport” such media and encourages the player to “transfer data to a friend.”<sup>166</sup>

As a result of Nintendo’s permissive attitude toward copying copyrighted content, entire websites dedicated to displaying amusing and impressive snapshots from *Super Smash Bros. Brawl* have sprung up.<sup>167</sup> Players are increasingly entertaining one another by capturing stills of preposterously meaningful “scenes” (something the game developers never would have anticipated or intended to make possible). For instance, a flexing, warlike figure with an arm upraised might incidentally be standing adjacent to a radiant explosion; adjusting the camera angle slightly places that radiance behind the warlike figure, which will now resemble a haloed saint preaching the good word.<sup>168</sup> Such amusing manipulation of media designed by others is exactly the type

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<sup>162</sup> Michael Arrington, *Here’s Our New Policy on A.P. Stories: They’re Banned*, TECHCRUNCH (June 16, 2008), <http://www.techcrunch.com/2008/06/16/heres-our-new-policy-on-ap-stories-theyre-banned/>.

<sup>163</sup> Hansell, *supra* note 160.

<sup>164</sup> *See id.*

<sup>165</sup> *See* NINTENDO, SUPER SMASH BROS. BRAWL: INSTRUCTION BOOKLET 25 (2008), *available at* [http://www.nintendo.com/consumer/gameslist/manuals/Wii\\_Super\\_Smash\\_Brawl.pdf](http://www.nintendo.com/consumer/gameslist/manuals/Wii_Super_Smash_Brawl.pdf).

<sup>166</sup> *Id.*

<sup>167</sup> *E.g.*, BRAWL SNAPSHOTS, <http://www.brawlsnapshots.com> (last visited Aug. 28, 2010). Notably, many snapshots on this site are available under the Creative Commons Attribution-Share Alike 3.0 Unported License. *See Upload New Screenshots and Stages*, BRAWL SNAPSHOTS, <http://www.brawlsnapshots.com/upload> (last visited Aug. 28, 2010).

<sup>168</sup> *See Captain Jesus*, BRAWL SNAPSHOTS (Sept. 6, 2009, 9:42 AM), <http://www.brawlsnapshots.com/snapshots/60779>.

of “remixing” praised by Lessig.<sup>169</sup> This use also illustrates the principle suggested by Shapiro and Varian: copyright holders can promote their brand and products effectively by allowing users free access under certain circumstances.<sup>170</sup>

### 3. *Copyright Clearing Houses*

The final emerging opportunity to access digital content is the development of rights-clearinghouse services. Three services bear mention. First, under the leadership of Lessig, Creative Commons has facilitated the emergence of the sharing economy (that Lessig praises) by enabling content owners to signal their willingness to share their content on specified terms and conditions that, in many cases, are amenable to a wide variety of creative uses.<sup>171</sup> Second, the Copyright Clearance Center has developed a service called RightsLink, which allows the easy licensing of online content;<sup>172</sup> RightsLink manages the order, billing, accounting, and royalties for access to news services such as *The New York Times*, *The Wall Street Journal*, *Time*, *USA Today*, and *The Economist*.<sup>173</sup> In short, RightsLink operates as the American Society of Composers, Authors, and Publishers (ASCAP) for the digital journalist.<sup>174</sup> In so doing, it mitigates the transaction costs once inherent in licensing requests and, in some cases, explicitly grants permission for specific uses of content while clarifying which uses might cause the content owner to take legal action. Third, iCopyright operates in a manner similar to RightsLink, providing means by which users can share stories with their friends and ensuring that the relevant advertising is also shared.<sup>175</sup>

### C. The Economic Rationale for Sharing Content

What drives content owners to voluntarily offer user privileges? Content owners do not grant users access and use privileges out of altruism or benevolence. Rather, they do so in response to economic

<sup>169</sup> See LESSIG, *supra* note 151, at 68–83.

<sup>170</sup> See SHAPIRO & VARIAN, *supra* note 110.

<sup>171</sup> For a discussion of the importance of this development, see Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 196–200 (2004).

<sup>172</sup> See *RightsLink*, COPYRIGHT CLEARANCE CENTER, <http://www.rightslink.com/overview/> (last visited on Aug. 28, 2010).

<sup>173</sup> *Rightslink-Enabled Publishers*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com/viewPage.do?pageCode=rlu5-n> (last visited on Aug. 28 2010).

<sup>174</sup> For a discussion of ASCAP and its significance, see Merges, *supra* note 118, at 1329–40 (“ASCAP, the American Society of Composers, Authors, and Publishers, . . . one of the largest performing rights societies[,] . . . acts as a central depository that allows members to control public performances of their works.”).

<sup>175</sup> See Mike O’Donnell, *iCopyright’s Advertiser-Supported Free Uses: What They Mean to Users, Publishers, and Advertisers*, ICOPYRIGHT (Mar. 15, 2006), <http://info.icopyright.com/icopyrights-advertiser-supported-free-uses-what-they-mean-to-users-publishers-and-advertisers>.

pressures. In fact, content owners regularly choose to concede certain portions of their dominion over copyrighted expression out of pure self-interest.<sup>176</sup> In the present context, four kinds of economic pressure have led content owners to adopt the measures discussed in the preceding sections: customer demands, competition among content providers, competition from illegal downloading, and the rise of the creative-commons project and the open-source movement. We will discuss each in turn.

As our discussion of the Spore video game demonstrates, customer reactions are a powerful motivation for businesses to provide user privileges. In a world where the Internet facilitates widespread dissemination of criticism (in the Spore case, through the Amazon.com user-based reviews), businesses ignore customer concerns about DRM at their peril. By contrast, Apple's ability to develop a system of digital-music distribution that largely respected consumer expectations about user privileges—and its interest in pushing the bounds of DRM restrictions even further by calling for DRM-free music—helps explain its success in the digital realm. Similarly, those who allow access to digital content as a means of increasing audience interest—say, through the use of a copyrighted song in a YouTube video or on a fan website like “Lostpedia”—will experience marketplace rewards unattainable by content owners that tightly restrict access to their creations. More generally, user expectations of receiving such access may build over time and distill into a powerful social norm that might constrain the behavior of content owners interested in restricting use privileges.<sup>177</sup>

User concerns are amplified in an environment where firms can easily adopt the DRM restrictions imposed by their competitors. Notably, the competition among content owners is very likely to motivate some firms to expand user privileges to increase their revenues either from direct fees or from advertising. This is especially true in the Internet economy where the volume of users is positively correlated with revenues and attracting “eyeballs.” Given that the marginal cost of reproducing and distributing digital content is close to zero, there is often a temptation to grant users limited access to digital content as a

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<sup>176</sup> We do not take our argument that far, but one commentator has argued that this incentive removes the need for any fair use doctrine in the digital world. See Ben Fernandez, Note, *Digital Content Protection and Fair Use: What's the Use?*, 3 J. ON TELECOMM. & HIGH TECH. L. 425, 451 (2005) (“In sum, ‘fair use’ in the digital world will mean an artificially created set of rights, whereas the ‘fair use’ of the analog world arose out of necessity.”).

<sup>177</sup> See Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49, 109 (2006) (“Perhaps the single most important precondition for the adoption of fair use-friendly DRM is neither legal nor technological, but cultural. The emergence of a public consensus that DRM should protect fair use, and that a technological lockdown of creative works is no longer acceptable, will do much to spur reform.”).

means of enticing them to purchase additional rights and privileges. Consequently, where segments of the content industries are highly concentrated and collusion among firms may suppress the pressure to compete on providing more consumer-friendly digital rights,<sup>178</sup> users may face additional restrictions.

Yet, even in concentrated industries, user privileges will probably not disappear from the scene. First, as illustrated by the Spore and AP examples, user complaints create a powerful counterweight to a firm's autonomy in setting its digital-rights policy. Second, more liberal access to content—in some cases, being of the freemium variety—may enhance the value of the overall product. Third, content owners must address the challenge of illegal use of content, and, as others have noted, that very pressure that finally spurred the music industry to cooperate with Apple in making available licensed access to digital music. By contrast, the effort solely to use “sticks” to protect copyrighted content—e.g., lawsuits—may even lead to entrenchment on the part of illegal downloaders and may reinforce social norms of non-compliance, thereby generating only a very limited deterrent effect.<sup>179</sup> Consequently, without “carrots” in the form of use privileges, content owners will find themselves fighting a losing battle. Although embedding user privileges in DRM may not save the content industry in the long run from the threat of digital piracy, the content industry will probably encourage some users to opt for illegal methods of distribution by failing to accommodate consumer demands. Because illegal use is likely to remain ubiquitous in the foreseeable future, this alternative will probably continue to exert pressure on content owners to offer users opportunities to copy and adapt copyrighted materials.

The final competitive pressure that content owners must address comes from the creative-commons project and the open-source movement. The user-friendly licensing platforms that lie at the heart of these creative groups constitute an important check on the ability of content owners to offer lopsided terms to users.<sup>180</sup> In particular, the creative-commons project established licensing options that exert considerable influence on all content owners. Notably, even content own-

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<sup>178</sup> Coordinated action to curb competition violates the antitrust laws and therefore runs the risk of heavy penalties when it results from an “agreement”—as opposed to merely conscious parallel conduct. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007).

<sup>179</sup> Compare Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577 (2006) (discussing how public legal sanctions can affect social norms and deter violations), with Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1157–58 (2005) (“[P]ushing hard against the existing norms of [experienced] users backfires and emboldens the preexisting anticopyright norms that enforcement intends to combat.”).

<sup>180</sup> See CREATIVE COMMONS, <http://creativecommons.org> (last visited Aug. 28, 2010); OPEN SOURCE INITIATIVE, <http://www.opensource.org> (last visited Aug. 28, 2010).

ers who do not partake in the creative-commons approach must take account for the terms that the creative-commons project offers to users and adjust their own terms accordingly. Licensing options embedded in the creative-commons project may eventually become an outlet for the social norms arising from the user expectations we described above. In that sense, they may operate as “sticky defaults”<sup>181</sup>—i.e., norms and expectations of users that content owners must cater to—and thereby shape the terms offered to users in all copyright-related transactions.

### III

#### THE NEXT STEP FOR DIGITAL COPYRIGHT POLICY

Given the experimentation with user privileges afforded by some owners and distributors of digital content, the challenge of any regime designed to advance the purposes of the fair use doctrine is to encourage this development while not undermining valuable marketplace experimentation. In that sense, we agree with Robert Merges’ observation that “private action, and not just government policy, can augment the public domain.”<sup>182</sup> We also endorse the view that government policy can be calibrated to spur—or, “nudge,” as Richard Thaler and Cass Sunstein have put it<sup>183</sup>—private actors to take actions that will facilitate increased access to digital content. In this spirit, we recommend that Congress induce content owners to accommodate user needs by adopting a framework of responsive regulation to augment competition among content owners over the creation and provision of user privileges.

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

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<sup>181</sup> See generally Omri Ben-Shahar & John A.E. Pottow, *On The Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

<sup>182</sup> Merges, *supra* note 171, at 184.

<sup>183</sup> See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Penguin Books rev. ed. 2009) (2008).

### A. The Principles Underlying Our Proposal

In this subpart, we explain how the case studies in Part II provide a path forward beyond a focus on reforming the fair use doctrine as such. We contend that the measures adopted by content owners to provide greater freedoms to users are not a fleeting anomaly. Rather, such voluntary measures are likely to continue to develop and may constitute a blueprint for moving beyond the conventional notion of fair use. As we explain, the motivations of content owners to offer user privileges are not likely to disappear in the future. This does not mean, however, that we have blind faith in the content industry or that we are against any form of regulatory intervention. In fact, the opposite is true. Yet, we are strongly of the opinion that before adopting more intrusive regulation, formalizing a right to hack, or creating new administrative bodies to engage in expensive review of fair use claims, it is more advisable and prudent to spur the motivation of industry participants to afford users freedoms with regard to proprietary content through a framework of adaptive regulation. This can be achieved through two simple measures: first, requiring content owners to adopt and implement a set of user privileges, and second, decreeing that content owners conspicuously publicize these privileges.<sup>184</sup>

We believe that our proposed regime will provide an impetus for content owners to come up with reasonable access and use standards and innovative technological ways of implementing them.<sup>185</sup> As we see it, the privileges that content owners adopt will compete with one another in the marketplace and, over time, will lead to new use equilibria through a process of experimentation. Requiring content providers to conspicuously state their access and use policies will reinforce the competition by notifying both users and other content providers of other companies' policies. In combination, the two prongs of our scheme will work to facilitate the development of industry-wide standards, norms, and practices for providing access to digital content with a menu of different approaches becoming widely available.

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<sup>184</sup> This aspect of our proposal resembles a suggestion made by Tim Wu, who called on copyright owners to publicize a list of uses for which they will not bring infringement suits. See Wu, *supra* note 111, at 633–34. A principal difference between his proposal and ours, of course, is that our scheme is mandatory and involves a regulatory regime superintended by the FTC.

<sup>185</sup> The need for such a mandated disclosure regime reflects the fact that a famous theoretical conjecture about product disclosures—that all firms will disclose the quality of their product, even if it is unfavorable in some fashion, because of an “unraveling” effect whereby firms will make such disclosures to avoid being perceived as providing a lower quality product than they really do—does not actually bear out in practice. See Oliver Board, *Competition and Disclosure*, 57 J. INDUS. ECON. 197, 198 (2009) (“[I]t seems clear that full disclosure is not forthcoming in practice [absent governmental regulation].”).

As previously explained, many companies are already developing opportunities for users to access digital content and use it creatively.<sup>186</sup> Many other companies, however, have failed to take those steps. As a policy matter, the question is thus whether the case studies we have highlighted are outliers or are a basis for believing that companies are willing and interested in giving up some control over their content to allow users to develop the content creatively. Even if sharing digital content and providing greater user privileges is in the interests of content owners and distributors, we recognize that not all content owners and distributors necessarily will actively support fair uses. Nonetheless, there are compelling reasons to believe that an increasing number of content owners will continue to offer various use privileges in the future. We now proceed to elaborate on these reasons.

### 1. *Overcoming the Inertial Force Against Sharing Content*

A core public policy rationale for nudging private actors is that they often fail to respond to an issue out of inertial force (even when failing to do so is against their self-interest).<sup>187</sup> In the analog world, content owners never had to take any affirmative action to facilitate fair uses; they merely declined to sue parties using their copyrighted content. As such, companies were never forced to engage in self-reflection as to the economic value of facilitating fair uses. In the digital world, moreover, companies concerned with the threat of piracy have developed a strong attachment to DRM systems that can protect their content from being “Napsterized.” Taken together, the legacy of not having to afford access to content to facilitate user privileges and the prevailing perception of the need to implement restrictive DRM systems to protect content from being copied create an environment where facilitating user privileges is not a natural concern for content owners and distributors.

The developing awareness of the rationale for recognizing user privileges—and the lack of a widespread commitment to doing so—parallels the state of Internet privacy in the late 1990s. At that time, many companies did not think to develop policies that specified what level of protection, if any, they afforded the data consumers entered on their websites. This lack of protection for privacy, as Shapiro pointed out, was irrational insofar as companies that did not assuage consumer concerns on this score risked reinforcing the then-emerging concerns that engaging in electronic commerce would be antithet-

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<sup>186</sup> See *supra* Part II.

<sup>187</sup> See THALER & SUNSTEIN, *supra* note 183, at 43–44, 103–17.

ical to privacy.<sup>188</sup> Nonetheless, companies were not quick to embrace the need for such policies until the FTC highlighted the importance of the issue. In particular, the FTC urged service providers to disclose to their customers relevant terms of service and nudged the industry to do so by conducting a series of high-profile studies evaluating the extent of disclosure of Internet privacy policies by e-commerce websites.<sup>189</sup> As Peter Swire has reported, those reports spurred a huge increase in adoption of such policies, with the share of websites posting privacy policies increasing from sixteen percent to eighty-eight percent over the course of two years.<sup>190</sup>

The healthy nudge by the FTC in the privacy realm contrasts with more overbroad action taken by Congress with respect to the Gramm-Leach-Bliley Act's (GLBA) privacy regime.<sup>191</sup> Like the FTC's privacy initiative, Congress focused on an important policy concern: the failure of many financial institutions to adopt privacy policies making explicit how they handled sensitive customer information. A salutary benefit of this law was that it required banks to develop privacy policies on how they handled financial information and gave consumers the opportunity to opt out of whatever regime the bank adopted for sharing information. Significantly, for many financial institutions, the enactment of GLBA inspired them to undertake the task of determining what their privacy policy should be.<sup>192</sup> In retrospect, however, Congress made two crucial errors in enacting the law: (1) failing to provide any guidance or requirement that banks make available the relevant terms and conditions of their privacy policies in language consumers could understand; and (2) requiring that the financial institution regularly mail out the entire privacy policy, which could be as long as twenty pages. The two problems are related because the failure to specify any understandable disclosure terms led the financial institutions to mail out large policies that consumers were very unlikely to read or understand.<sup>193</sup>

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<sup>188</sup> See Carl Shapiro, *Will E-Commerce Erode Liberty?*, HARV. BUS. REV., May–June 2000, at 189, 198–99 (reviewing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)).

<sup>189</sup> See generally Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041 (2000).

<sup>190</sup> PHILIP J. WEISER, *EXPLORING SELF REGULATORY STRATEGIES FOR NETWORK MANAGEMENT: FLATIRONS SUMMIT ON INFORMATION POLICY 23* (2008), available at <http://www.silicon-flatirons.org/documents/publications/summits/WeiserNetworkManagement.pdf>.

<sup>191</sup> See 15 U.S.C. §§ 6801–6809 (2006).

<sup>192</sup> As Peter Swire explained, this is the critical value of the Gramm-Leach-Bliley Act's privacy regime. See Peter P. Swire, *The Surprising Virtues of the New Financial Privacy Law*, 86 MINN. L. REV. 1263, 1264–65 (2002).

<sup>193</sup> See, e.g., Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy* 42–44 (Law & Econ. Research Paper Series, George Mason Univ. Sch. of Law., Paper No. 04-19, 2004), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/04-19.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/04-19.pdf).

The privacy-disclosure regimes implemented by the FTC and the GLBA suggest several important principles for the design of the regime we have in mind for providing consumers with user privileges in the digital world. First, even where firms may have an economic interest in promoting their consumer-friendly offerings, they may adhere to old practices (e.g., not adopting a privacy policy or not affording consumers with express user privileges). Second, government nudging—whether the informal strategy used by the FTC with respect to privacy policies or the formal requirement imposed by the GLBA—can overcome this inertial force. Third, for disclosure regimes to be meaningful and effective, they must ensure that the relevant notices are understandable. In the case of online privacy policies, this is often a concern. Indeed, on account of the lack of any standardized forms for disclosure, many policies are almost impossible to understand without a law degree; some surveys suggest, for example, that only one percent of high school-educated consumers can understand privacy policies of large companies.<sup>194</sup> By contrast (and as discussed below), standardized forms for nutritional labeling information provide for much greater levels of public understanding of the relevant information.

## 2. *The Importance of Competition and Experimentation*

A central premise of our proposal is that a government-standardized or government-mandated form of access to digital content to promote greater user privileges would, at least at this point in time, be a mistake. In principle, a government agency could develop a regulatory architecture that would welcome competition and experimentation either by requiring companies to propose access opportunities to determine if they are fair or by mandating a specific type of access that companies could seek a waiver from if they proposed an equally acceptable alternative.<sup>195</sup> Requiring front-end proposals or allowing back-end waivers, however, would be very resource intensive. By contrast, if companies have an interest in promoting user privileges and can be nudged to do so, a simple requirement that companies adopt some digital-rights policy and specify the policy in understandable terms and conditions might suffice to protect consumers. Moreover, given the technological dynamism and uncertainty as to how compa-

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<sup>194</sup> Louise Story, *F.T.C. Takes a Look at Web Marketing*, N.Y. TIMES, Nov. 2, 2007, at C8.

<sup>195</sup> This model is what the Federal Communications Commission (FCC) used in implementing the “broadcast flag” regime, which requires companies accessing over-the-air digital transmissions to adopt a technology reasonably likely to protect the relevant digital content. See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 403–05 (2005). The D.C. Circuit later invalidated this regime on the ground that the FCC lacked authority to mandate this requirement. See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 704–05 (D.C. Cir. 2005).

nies can provide such opportunities, this approach also has the added virtue of promoting experimentation that may prove valuable and facilitate the emergence of alternative standards.<sup>196</sup>

In the digital rights management context, the FTC is already focusing on the importance of enhanced consumer disclosure of limitations imposed on digital content. Notably, the FTC is mindful of the temptation for businesses to position themselves as providing consumer-friendly content in principle but using loopholes and tactics to evade such a commitment in practice. Warning businesses against such an approach, FTC official Mary Engle explained that “[i]f your advertising giveth and your [end user licensing agreement] taketh away, . . . don’t be surprised if the FTC comes calling.”<sup>197</sup> Even if companies do not use bait-and-switch tactics, companies may still bury the details of particular DRM schemes.<sup>198</sup> The most notably abusive DRM system was Sony/BMG’s use of a “rootkit” to spy on its customers without telling them,<sup>199</sup> gaining the company a black eye in the marketplace and an FTC sanction.<sup>200</sup> In the wake of that episode, some commentators have focused on the need for the FTC to be more active in this area and to require more effective disclosure of DRM restrictions.<sup>201</sup>

To provide consumers with a greater level of awareness as to the user privileges that digital-information goods provide, we propose a requirement that a digital-rights policy statement accompany the distribution of digital products. To facilitate more effective comparisons between alternative products, the FTC would be charged with developing some basic terms and conditions (say, for example, the number of copies, the opportunity to deauthorize a previous copy, and the opportunity to remix and use a digital work) that companies would need to disclose in an understandable fashion. Companies would not,

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<sup>196</sup> At present, developers of digital-rights management systems continue to ask different questions with considerable debate on what are the right questions. See, e.g., Fred von Lohmann, Elec. Frontier Found., *Reconciling DRM and Fair Use: Preserving Future Fair Uses?* 1 (Apr. 2002) (abstract available at <http://www.cfp2002.org/fairuse/lohmann.pdf>) (arguing that developers should ask not “‘tell me what fair use requires, and I’ll built it in’ but rather ‘how can I build something that permits a variety of as-yet unknown uses, so that courts can decide whether those future uses are fair’”).

<sup>197</sup> Nate Anderson, *FTC: We’ll “Come Calling” About Deceptive DRM*, ARS TECHNICA (Mar. 35, 2009, 4:15 PM), <http://arstechnica.com/tech-policy/news/2009/03/ftc-well-come-calling-about-deceptive-drm.ars> (quoting FTC Acting Deputy Director Mary Engle).

<sup>198</sup> See *id.* (“While companies rarely lie about what a particular DRM scheme will do, plenty are willing to bury that information, knowing that consumers won’t be happy about the limitations.”).

<sup>199</sup> See Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures?*, 6 J. ON TELECOMM. & HIGH TECH. L. 41, 52 (2007).

<sup>200</sup> See Agreement Containing Consent Order, *In re Sony BMG Music Entm’t*, File No. 062-3019, at 5–6 (F.T.C. Jan. 30, 2007), available at <http://www.ftc.gov/os/caselist/0623019/070130agreement0623019.pdf>.

<sup>201</sup> See, e.g., Samuelson & Schultz, *supra* note 199, at 69–73.

of course, be limited in any respect as to what substantive terms and conditions they could adopt, and the companies would be free to add additional information in their disclosure statements.

Three consumer benefits will likely emerge from the FTC's involvement in our proposed regime. First, the development of a standardized disclosure statement will prevent content providers from trying to obscure their policies or understate their limitations. Second, our proposed system will make it easier for consumers to compare the privileges offered to them by different content providers. Third, the FTC's involvement will make the disclosure of digital rights more credible by convincing consumers that the disclosed policies are genuine and that the FTC will hold the firms accountable if they do not follow the policies.

To appreciate the potentially beneficial impact of a government-mandated disclosure regime, consider the impact of the FDA's nutritional-labeling regime. As Ellen Goodman concluded: "It was the regulation that created a market for nutritional information that now appears to be strong."<sup>202</sup>

In the case of copyrighted content, consumers are interested in digital works that give them greater levels of freedom. Nonetheless, consumers may not readily appreciate how to assess the particular types of restrictions that are or are not in place, and many firms may not disclose such limitations in an understandable fashion. Recall the Spore example,<sup>203</sup> where many consumers likely had to first purchase the product before realizing that it was unduly restrictive. Given the popularity of that game, and the ensuing uproar, the company changed its stance, thereby protecting those consumers.<sup>204</sup> For less popular products, consumers who are unable to ascertain the relevant limitations up front are far less likely to benefit from public pressure. By imposing a labeling regime requiring standardized and understandable disclosures of use privileges, our proposal is likely to spur the types of competition and changes in user behavior witnessed in case studies like the nutritional labeling context.<sup>205</sup>

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<sup>202</sup> Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 139 (2006); see also ARCHON FUNG ET AL., ASH INST. FOR DEMOCRATIC GOVERNANCE & INNOVATION, HARVARD UNIV., *THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES EFFECTIVE?* 16–17 (2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=766287](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=766287) (noting that nutritional labeling requirements "helped [food companies] justify charging higher prices for healthier foods and helped them improve their corporate images").

<sup>203</sup> See *supra* Part II.A.4.

<sup>204</sup> See *supra* text accompanying notes 146–47.

<sup>205</sup> For another example of the impact of nutritional labeling, consider the marketing of low fat salad dressings before the passage of the Nutritional Labeling and Education Act (NLEA):

In addition to providing for a greater level of competition, our model also encourages technological experimentation. In the case of fair use, where the nature of the right itself is intentionally malleable, encouraging experimentation both in the conception of the privilege as well as in its implementation in the digital environment is particularly appropriate. By contrast, approaches that call on the government to be active in an early stage of digital content's development in setting forth a specific approach risk selecting a suboptimal standard.<sup>206</sup> As an initial matter, asking government officials to play a prescriptive role in setting standards can tax their expertise. Moreover, as noted above, such a project may also yield to rent-seeking pressures and give rise to a standard that would actually restrict—as opposed to facilitate—competition in this area.

### 3. *Government as Norm Entrepreneur*

As we conceive of the FTC's role in administering our proposed model, we do not believe that it should function merely as a neutral party in the face of competition and experimentation on the part of firms developing user privileges for digital content. Rather, the FTC can act—as it did in the privacy context—as a “norm entrepreneur.”<sup>207</sup> This model envisions the FTC participating actively in the ongoing discussion about what forms of access are appropriate, seeding suggestions for industry actors to adopt or reject.

As discussed below, norm entrepreneurship can operate effectively in conjunction with self-regulation and is particularly appropriate where a technology is still developing and policymakers are uncertain as to how it will develop. For a recent example of this model, consider former Federal Communications Commission (FCC) Chair Michael Powell's embrace of “Internet freedom.”<sup>208</sup> In so doing, he commenced the FCC's oversight of this area by setting forth

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Of those firms selling salad dressings with low fat content (6 grams per serving or lower), all voluntarily disclosed fat information on product labels; of those selling salad dressings with high fat content (13 grams per serving or more), only 9% chose to disclose. There can be little doubt that fat content is a quality characteristic in this market. Staff at the Food and Drug Administration and others predicted substantial changes in consumer behavior following the introduction of mandatory disclosure[.] . . . [and studies show] that the sales of high-fat salad dressings did indeed decline after the NLEA was implemented.

Board, *supra* note 185, at 198 (citation omitted).

<sup>206</sup> For a discussion of the risks inherent in government standard setting, see NUCHTERLEIN & WEISER, *supra* note 195, at 239–60, 407–29.

<sup>207</sup> This term appears to stem from Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030–31 (1996). See also Hetcher, *supra* note 189, at 2046 (applying the term to the FTC in the context of Internet privacy policies).

<sup>208</sup> See generally Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5 (2004).

“guiding principles” for the industry. These norms, which emerged from a series of discussions with firms that developed applications operated on broadband networks, were not mandated, and providers were free to adopt them or not. But given the popular appeal of these principles, almost all industry players chose to adopt them, paving the way for them to be adopted later as formal legal requirements.<sup>209</sup> Had serious concerns about the wisdom or practical feasibility of such norms emerged, however, the FCC would probably not have later adopted them.

### B. Stage Two: “The Shotgun Behind the Door”

For the reasons we explained, there is strong ground to believe that companies will respond favorably to a government nudge and offer user privileges. Yet, there is also reasonable ground for skepticism. As we noted, many industry executives grew up without internalizing the value of granting additional freedom to users—i.e., they left users and courts to develop the notion of fair use in the analog world. More recently, industry executives have adopted an almost single-minded focus on protecting their content from piracy. Consequently, the program we have in mind is likely to be most effective if the content industry recognizes that the program reflects an opportunity for the industry to demonstrate its own ability to provide for user privileges in the digital age.

If the competitive forces we described fall short of generating a socially desirable equilibrium, Congress should be ready to step in with a more aggressive regime. At this stage, Congress would prescribe specific accommodations and, again, assign the power to enforce compliance to the FTC. Under such a scenario, Congress will have the important benefit of the experimentation that took place in stage one of our proposal. Notably, the information gathered during that stage will provide Congress with invaluable information about the range, or menu, of possible accommodations. More importantly, perhaps, it will furnish Congress with real-world data about how users responded to the various privileges they were offered.

If Congress must move to stage two, it will not have to grope in the dark to develop a set of regulatory requirements. Rather, it will have real-world data at its disposal to help it come up with carefully tailored regulations. Further, the experience gained in stage one will make Congress less susceptible to potential misrepresentations by industry participants as to the feasibility of various user accommoda-

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<sup>209</sup> The actual adoption of these principles took a somewhat convoluted path: the FCC originally adopted them as nonbinding principles but later enforced them in an adjudicative context. For a discussion of these events, see Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 561–69 (2009).

tions. Consequently, any regime that Congress develops will, in all likelihood, outperform rival proposals that call for an immediate intervention that prescribes behavior by content owners.

Critically, our two-stage design has another virtue: the possibility of moving to stage two can guarantee success at stage one and, somewhat ironically, obviate the need for a more far-reaching intervention. If Congress can make a credible threat to intervene should the industry fail to accommodate reasonable user privileges, *actual* intervention may not be necessary. Hence, we recommend that Congress make clear its intent to intervene if the industry fails to adopt adequate user-privileges standards on its own.<sup>210</sup>

The willingness of an industry to regulate itself is often dependent on the belief that there is, as famously put in the securities-regulation context, a “shotgun behind the door.”<sup>211</sup> In discussing this phenomenon, Ian Ayres and John Braithwaite explained that “[r]egulatory agencies will be able to speak more softly when they are perceived as carrying big sticks.”<sup>212</sup> The question in this case is what sticks the FTC could be perceived as carrying. After all, a formal requirement to adopt a digital-rights policy—e.g., one that makes clear the scope of user privileges—does not ensure that such a policy is reasonable or consistent with existing judicial guidance. Consequently, in enacting our proposal, we recommend that Congress enact a parallel requirement that would mandate the FTC to conduct comprehensive examinations of digital-rights policies, evaluate the extent to which they approximate existing fair use jurisprudence, and examine competing proposals to provide user privileges in the digital age.<sup>213</sup>

In implementing such a requirement, the FTC would be well advised to study the cases we discussed in our informal survey (as well as

<sup>210</sup> The European Union adopted a regime that made this threat explicit. In particular, Article 6(4) of its Copyright Directive provided that, if content owners fail to provide for fair use opportunities, member states must take “appropriate measures” to ensure that rights holders enable lawful users of copyright works. Council Directive 01/29, art. 6(4), 2001 O.J. (L 167) 10, 17 (EU). For a discussion of the merits of this model, see generally Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629 (2008).

<sup>211</sup> See Walter Werner, *The SEC as a Market Regulator*, 70 VA. L. REV. 755, 764 (1984) (quotations omitted).

<sup>212</sup> IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 6 (1992); see also WOLFGANG SCHULZ & THORSTEN HELD, HANS BREDOW INST. FOR MEDIA RESEARCH, GERMAN FED. COMM’R FOR CULTURAL & MEDIA AFFAIRS, *REGULATED SELF-REGULATION AS A FORM OF MODERN GOVERNMENT B-9* (2001), available at <http://www.humanrights.coe.int/Media/documents/interim-report-self-regulation.pdf> (“Even representatives of industry bodies confirmed that self-regulation only works if there is a threat of state intervention, such as in the shape of industry standards in case of failure of a code or sanctions imposed on enterprises that have infringed a rule (the so-called ‘heavy stick in the background’).”).

<sup>213</sup> These competing proposals would include those discussed *supra* Part I.

others) and carefully evaluate their successes and failures. These cases will provide the FTC with valuable information about the appropriate design of a possible regulatory regime in this context. Specifically, the FTC would be able to draw on the various models adopted by content providers to devise a new regulatory strategy. Given that our long experience with fair use has failed to yield a precise definition of the doctrine (or even a shared understanding), it would be a herculean task for the FTC to specify a set of rules designed to bind content owners. As for any effort to conceptualize the contours of user privileges, the best way for the FTC to fill the information void is to rely on practices that emerged in the real world and to use them as a basis for enacting future regulation should such regulation become necessary. As to the effectiveness of its enforcement effort, the FTC should also evaluate whether its regime is having the intended impact, and, if not, the FTC could propose that Congress authorize more severe measures in the face of noncompliance.<sup>214</sup>

#### CONCLUSION

We are still in the early stages of the digital revolution. Ten years after the enactment of the DMCA, however, it is clear that the threat to user privileges in the digital world is not merely a hypothetical concern. Nonetheless, even in the face of the heated criticisms of the DMCA, we believe that the more ambitious reform proposals are premature and that Congress should enact a less intrusive oversight regime designed to protect and advance user privileges in the digital age.

The core premise of our proposal is that a series of pressures will lead content owners to provide consumers with greater use privileges. To be sure, these pressures are not necessarily inexorable, and we acknowledge that our survey in Part II—which underscores the salutary impact of such pressures—is only partial and its implications are contestable. Nonetheless, in the face of ambiguous evidence and encouraging signs, we believe that our model provides a sounder course for policymakers. It allows, to the extent that a nudge and norm entrepreneurship can suffice, the market to develop strategies for providing consumers with greater use privileges. If such means are ultimately unsuccessful, our proposal will have allowed and en-

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<sup>214</sup> One such possibility would be the imposition of a “penalty default” of an extremely lenient toleration of fair use on those firms that failed to adhere to the FTC’s disclosure requirement. For a discussion of the role of penalty defaults in changing conduct for the better and in eliciting socially valuable information, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 90–95 (1989). Such a response is used in other contexts, such as mineral leases, where owners who fail to file a statement of claim can surrender all preexisting legal rights as a result. See *Texaco, Inc. v. Short*, 454 U.S. 516, 529 (1982).

couraged the valuable experimentation that will inform the selection of a more effective interventionist strategy for protecting user privileges in the digital world.

