Using Fee Shifting to Promote Fair Use and Fair Licensing

Peter S. Menell
Berkeley Law

Ben Depoorter

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Using Fee Shifting to Promote Fair Use and Fair Licensing

Peter S. Menell* and Ben Depoorter**

The fair use doctrine seeks to facilitate socially optimal uses of copyrighted material. As a practical matter, however, cumulative creators, such as documentary filmmakers and many contemporary musicians, are often reluctant to rely on the fair use doctrine because of its inherent uncertainty, the potentially harsh remedies for copyright infringement, and the practical inability to obtain effective preclearance rights. Moreover, copyright owners have no obligation under existing law to respond to a cumulative creator's inquiry. Thus, a familiar refrain in professional creative communities is "if in doubt, leave it out."

In this Article we propose a novel mechanism that would afford a limited, cost-effective process for preclearing works, promote fair negotiation over cumulative uses of copyrighted works, and reduce the exposure of cumulative creators to the inherent risks of relying on copyright's de minimis and/or fair use doctrines. Under this mechanism, a cumulative creator has authority to make a formal offer of settlement to use copyrighted material for a project. If the copyright owner does not respond to the offer, the cumulative creator would be permitted to use the work provisionally by paying the settlement amount into escrow. If the copyright owner rejects the proposed license fee and sues for infringement, the copyright owner will bear the cumulative creator's litigation costs if (1) the court
determines that the use of the material qualifies as fair use, or (2) the court determines that the fair use doctrine does not excuse the use but the cumulative creator’s offer of settlement (the proposed license fee) exceeds the amount of damages that the court determines to be appropriate. In the former case, the escrow amount is returned to the cumulative creator. In the latter case, the copyright owner receives the infringement award from the escrow account, and the remainder returns to the cumulative creator.

Our fair use fee-shifting proposal encourages copyright owners to take settlement offers seriously and negotiate around the fair use doctrine’s inherent uncertainties. In so doing, this mechanism protects the reliance costs of cumulative creators, reduces transaction costs, and discourages holdout behavior. Overall, our mechanism should enrich cultural production by increasing the use of copyrighted content in follow-on works while fostering markets for cumulative creativity and providing fair compensation to copyright owners of underlying works.

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Copyright law grants authors the exclusive right to copy, adapt, and distribute their works, among other rights, in order to promote progress in expressive creativity.\(^1\) By granting exclusive rights in copyrighted works, however, copyright law increases the cost to subsequent creators of incorporating elements from the vast array of works in which copyright subsists. Thus, copyright law inhibits the creative process to the extent that new generations of artists face substantial uncertainty in determining the scope of copyright protection\(^2\) or encounter high transaction costs in obtaining licenses to use copyrighted works.\(^3\) Because every generation of artists is inspired by and borrows from prior authors,\(^4\) copyright rules and institutions should strive to find a healthy balance between the legal protection of copyright holders, on the one hand, and the ease of access to their works by cumulative creators—such as documentary filmmakers and remix musicians—on the other.\(^5\)

In its search for this balance, copyright law uses limiting doctrines, exemptions, and statutory licenses to facilitate creative uses without requiring consent from copyright holders. The *de minimis* doctrine, for instance, excuses copyright infringements when the extent of the transgression is trivial.\(^6\) The fair use doctrine\(^7\) recognizes "a privilege in others than the owner of the copyright" constituting an implied consent by the author "to a reasonable use of his copyright works . . . as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts."\(^8\) The "cover" license permits anyone, upon the payment of a compulsory license, to record and

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distribute a musical composition that has previously been released to the public under the authority of the copyright owner.\textsuperscript{9}

In theory, these copyright limitations facilitate socially optimal uses of copyrighted works without undermining the incentives of copyright holders. Such uses may enhance the incentives of the creators of underlying works by generating renewed or expanded interest in their works. The greater attention can increase expected revenue for creators in a manner that reduces transaction costs. Without these doctrines, cumulative creators might forgo uses that expand interest in an underlying work due to excessive infringement risk or substantial costs of negotiating permission.

The \textit{de minimis} doctrine applies to very limited uses of materials, while more extensive "transformative" uses receive special consideration under the fair use doctrine,\textsuperscript{10} especially when the use does not adversely affect the commercial market of the borrowed copyrighted work.\textsuperscript{11} The cover license does not permit cover artists to change the "basic melody or fundamental character of the work," but authorizes close adaptations of the borrowed work to the cumulative creator's style.\textsuperscript{12}

As a practical matter, however, these doctrines fail to provide adequate balance between the rights of current copyright holders and the stimulation of future works. Scholars suggest that the \textit{de minimis} doctrine has become narrow and vague,\textsuperscript{13} making it difficult to establish whether a certain use will qualify, and one court has categorically excluded sampling of sound recordings.\textsuperscript{14}

\textsuperscript{9} 17 U.S.C. § 115.

\textsuperscript{10} See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."); Blanch v. Koons, 467 F.3d 244, 251–53 (2d Cir. 2006); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608–15 (2d Cir. 2006). See generally Pierre N. Leval, \textit{Toward a Fair Use Standard}, 103 HARV. L. REV. 1105, 1111 (1990) (coining the "transformative" term to explain the fair use privilege: "the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original").

\textsuperscript{11} See 17 U.S.C. § 107(4) (referring to "the effect of the use upon the potential market for or value of the copyrighted work"); Harper & Row, 471 U.S. at 566 (noting that the fourth factor of fair use, market impact, "is undoubtedly the single most important element of fair use."). For empirical evidence, see Barton Beebe, \textit{An Empirical Study of U.S. Copyright Fair Use Opinions}, 1978–2005, 156 U. PA. L. REV. 549 (2008) (observing that the fourth factor of the fair use test is the most decisive factor in a majority of fair use judgments).

\textsuperscript{12} 17 U.S.C. § 115(a)(2) ("A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.").


\textsuperscript{14} See Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799–805 (6th Cir. 2005). The effective requirement to clear all samples has had a profound effect on sampling and creative arts. See generally KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE
Similarly, the open-ended fair use standard is plagued by substantial uncertainty. Because of the inherent subjectivity of the multi-factor fair use test and the variability of this test’s application by judges and juries, it is exceedingly difficult for many cumulative creators to predict whether a use will qualify as fair use. Furthermore, copyright law lacks workable preclearance institutions for determining the boundaries of copyright protection before investments are sunk and risks ventured.

Cumulative creators are often reluctant to rely on the fair use doctrine in particular. They worry about the doctrine’s inherent uncertainty, financing and insurance issues, the potentially harsh remedies for copyright infringement, and the practical inability to obtain effective preclearance of rights. They can

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16. See Leval, supra note 10, at 1105–06.

17. See Menell & Meurer, supra note 2, at 12, 24–25, 38.

18. Prior to 2007, standard insurance policies for film projects specifically excluded coverage for the use of any copyrighted material for which the insured did not have a written release. See MICHAEL C. DONALDSON, CLEARANCE AND COPYRIGHT 29, 363–67 (3d ed. 2008). The major insurers began offering a “fair use rider” in 2007, although the coverage requires clearance of clips by an approved clearance attorney, can be expensive, and can come with additional restrictions. See id. at 365 (noting that the Media/Professional policy requires a letter from the Stanford Fair Use Project stating that the use of unlicensed material meets the fair use criteria set forth in the Documentary Filmmakers’ Statement of Best Practices in Fair Use and that the Stanford Fair Use Project would defend any copyright infringement claim relating to the unlicensed materials on a pro bono basis).

19. Risk aversion is especially strong among independent artists who do not have the means to litigate expensive copyright claims. On the asymmetric effect of uncertainty in copyright law, see PATRICIA AUVERDIEHEDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004) (exploring the copyright-clearance challenges faced by documentary filmmakers); DONALDSON, supra note 18, at 29 (“Even documentaries, which are usually in the public interest, should not cavalierly incorporate uncleared footage from the films of others. Clear your film clips with a license or solid fair-use opinion from an attorney approved by the E&O [Errors and Omissions] insurance companies in advance because lawsuits are expensive. It can be even more expensive to remove a section of your film at some point in the future if a court rules against you.”); James Gibson, Risk Aversion and Rights Accretion in
try to seek licenses from the copyright owners of underlying works, but such owners have no obligation under existing law to even respond to a cumulative creator’s inquiry. Thus, a familiar refrain in professional creative communities is “if in doubt, leave it out.”

The difficulty and cost of clearing rights have become increasingly salient as advances in digital technology have reduced the costs of creating and distributing expressive works. In one notable example, Jonathan Caouette produced a documentary film about his struggles growing up with a mentally ill mother for a mere $218, but faced clearance costs of over $200,000 for music rights. In other cases, prohibitive clearance costs prevent works from being distributed publicly. For instance, *Eyes on the Prize*, acclaimed as “the most sophisticated and most poignant documentary of African-American history ever made,” was not publicly available for years because the producers could not afford exorbitant soundtrack costs, which included use of the arguably copyright-protected song “Happy Birthday” during the celebration of Dr. Martin Luther King Jr.’s birthday.

The lack of balanced rules and institutions for clearing rights and enabling cumulative creativity hurts cumulative creators, owners of underlying works, and the public. Our cultural heritage is impoverished when doctrinal uncertainty prevents artists from engaging in fair uses. But copyright owners as a group lose out as well. If copyright clearance obstacles induce the “if in doubt, leave it out” credo, potential licensing revenues are forsaken. Similarly, when works are driven underground, everyone can lose. For instance, *The Grey Album*—a riveting mix of the Beatles’ *White Album* and Jay-Z’s *Black Album* by the artist Danger Mouse—was one of the most talked-about albums in 2004, but it was never officially released to the public and no record company ever made a penny on it.

In an attempt to address these issues, this Article proposes a novel mechanism that would afford a limited, cost-effective process for preclearing works; promote fair negotiation over cumulative uses of copyrighted works; and reduce cumulative creators’ exposure to liability from relying on the fair use doctrine in the vast gray area that exists. Under our mechanism, a

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22. See Ramsey, supra note 20.

cumulative creator would have authority to make a formal offer of settlement to use copyrighted material for a project. If the copyright owner does not respond to the offer, the cumulative creator would be permitted to use the work provisionally by paying the settlement amount into escrow. If the copyright owner rejects the proposed license fee and sues for infringement, the copyright owner bears the cumulative creator's litigation costs if (1) the court determines that the use of the material qualifies as fair use, or (2) the court determines that the fair use doctrine does not excuse the use but that an injunction is not justified under the *eBay v. MercExchange* equitable balancing test, and the cumulative creator's offer of settlement (the proposed license fee) exceeds the amount of damages that the court determines to be appropriate. In the former case, the escrow amount is returned to the cumulative creator. In the latter case, the copyright owner receives the infringement award from the escrow account and the remainder returns to the cumulative creator.

Our fair use fee-shifting proposal encourages copyright owners to take settlement offers seriously and negotiate around the fair use doctrine's inherent uncertainties. Moreover, by shielding cumulative creators against litigation costs when they have extended a fair licensing offer, our proposal should induce greater push back against unreasonable licensing demands and rights accretion in copyright law. In so doing, this mechanism affords cumulative creators the ability to reach a reasonable licensing deal at lower transaction costs and greater assurance that their investment will not be vulnerable to opportunistic holdout behavior. Overall, our mechanism should enrich cultural production by increasing the use of copyrighted content in follow-on works while fostering markets for cumulative creativity and providing fair compensation to copyright owners of underlying works.

Part I begins with an analysis of how copyright law's current configuration impairs cumulative creativity by discouraging resort to copyright's limiting doctrines and exposing cumulative creators to potentially disproportionate infringement remedies. It also briefly discusses the lack of preclearance institutions that could reduce some of the uncertainty facing cumulative creators. Part II presents our fee-shifting proposal, modeling the cumulative creativity problem and analyzing stakeholder decisions under both the existing copyright law framework and our fee-shifting proposal. It also relates our mechanism to existing fee-shifting provisions in copyright law and in other areas of law, and examines the broader potential impact of our proposal on copyright licensing interactions. Part III focuses on the effects our proposal

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24. 547 U.S. 388, 391 (2006) ("[A] plaintiff seeking a permanent injunction must satisfy a four-factor test . . . (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.")
would have on the incentives and behavior of stakeholders—cumulative creators, copyright holders, and courts—and addresses potential objections.

I. THE TENSION BETWEEN PRIMARY AND CUMULATIVE CREATIVITY

Copyright law serves the instrumental function of promoting the production and distribution of expressive creativity by granting authors a number of exclusive rights over their creative works. The copyright law system affords authors of original works potent legal remedies against unauthorized reproduction and distribution of copyrighted works to deter such activities. This is deemed necessary since, without legal protection, it is difficult to exclude nonpaying consumers from the use and enjoyment of stories, movies, music, and other creative works.

Exclusive rights backed by strong penalties for their violation, however, generate a profound tension with the overarching goal of promoting creative expression: they increase the costs of accessing and using prior works by subsequent creators. As has always been the case, and perhaps even more so in the digital age, creativity is a cumulative process where current generations...

25. The intellectual property clause of the U.S. Constitution states that the ultimate goal of copyright law is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8; see also Feist Publ’ns v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts."); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather [they are] ... intended to motivate the creative activity of authors... and to allow the public access to the products of their genius... ").


27. The implicit understanding is that the marketplace will generally undersupply creative works that are costly to produce due to the low cost of reproducing and distributing such works, especially in the Internet age. In some instances, however, lead-time advantages, reputation effects, and indirect means of appropriability (such as advertising) can in some cases afford authors sufficient reward to create. See Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031 (2005); Peter S. Menell, Tailoring Legal Protection for Computer Software, 39 STAN. L. REV. 1329 (1987).


29. On the relationship between the incentive effects of copyright law and the public’s access to copyrighted works, see Michael Abramowicz, An Industrial Organization Approach to Copyright Law, 46 WM. & MARY L. REV. 33 (2004) (showing that, as the number of existing works increases, copyright law should promote access to works while focusing less on the incentives of authors); Robert P. Merges, Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 CALIF. L. REV. 1293 (1996) (noting that rigid property rules can in some circumstances lead to efficient licensing institutions that make copyrighted works more accessible); Christopher S. Yoo, Copyright and Product Differentiation, 79 N.Y.U. L. REV. 212 (2004) (showing that if copyright enhances the incentives to create new works, additional entry into content markets might drive down prices and increase the access to copyrighted works for consumers).
of artists are inspired by and borrow from prior authors. Creative ideas are rarely entirely original as all authors are influenced by the works, environment, and culture that have shaped their intellect. As a result, "[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Both scientists and artists stand on the shoulders of giants, for "[n]o man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection." Copyright law consequently presents a dilemma to copyright owners. While current copyright holders might prefer the most expansive rights and strongest remedies, every author recognizes that he or she is potentially "a later author [who] might want to borrow material," which makes a more balanced, flexible copyright system preferable for promoting expressive creativity generally.

This tension between the protection of exclusive rights through robust remedies and the encouragement of creativity generally manifests prominently in the context of derivative works. The Copyright Act grants authors the exclusive right to adapt their protected works. This right to prepare derivative works affords copyright owners tremendous market reach by extending the scope of copyright protection to merchandise (t-shirts, toys, etc.), sequels, translations, and, in some contexts, characters. Yet by reserving to original authors the exclusive right to prepare derivative works, copyright law potentially inhibits the creativity of others due to transaction costs and authors' potential noneconomic motivations for blocking others from building on their

30. On the cumulative nature of creative production, see supra note 4.
32. Id. at 619 ("Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copy-right?").
33. William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325, 333 (1989) (observing that "[t]o the extent that a later author is free to borrow material from an earlier one, the later author's cost of expression is reduced; and, from an ex ante viewpoint, every author is both an earlier author from whom a later author might want to borrow material and the later author himself"); see also Bridgeport Music, Inc. v. Dimension Films, LLC, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002) (noting that "the purposes of copyright law would not be served by punishing the borrower for his creative use"), rev'd, 383 F.3d 390 (6th Cir. 2004).
work. Any subsequent author who draws upon a prior work for inspiration risks running afoul of a prior author's derivative work right. Consequently, subsequent authors face the prospect of being enjoined from exploiting prior creativity, even if their use of only a fragment of the underlying work is found to be infringing. Copyright holders' potential veto power over cumulative creators' use of copyrighted material renders access and use of those works more expensive and the investments in creating cumulative works especially risky.

In order to prevent the chilling effect of copyrights on subsequent creativity by others, copyright law contains a number of important limiting doctrines. The de minimis rule, for instance, excuses minor uses of copyrighted works, and the fair use doctrine affords somewhat greater leeway for "transformative" works. In practice, the applicability of these doctrines, as well as some statutory exemptions and compulsory licenses, can be difficult to assess. These uncertainties impede cumulative creators in determining their freedom to use prior works. Furthermore, copyright law has thus far failed to develop efficient institutions to enable cumulative creators to assess and work around their risks. The resulting inadequacies of these rules and institutions have diluted the efficacy of copyright's limiting doctrines and thereby undermined the fundamental balance needed to optimally promote both original and cumulative creativity.

A. Copyright's Uncertain Limiting Doctrines and Potentially Disproportionate Remedies

The Coase Theorem teaches that resources will be allocated efficiently when legal rules are clear and transactions are costless. Current copyright law badly violates both of these premises. Cumulative creators face a tremendous challenge in assessing the boundaries of the key limiting doctrines. Furthermore, the costs of making an error, even a small one, can be severe. These uncertainties surrounding both limiting doctrines and remedies make it very difficult for potential cumulative creators and copyright owners to determine the zone of legitimate use of creative works. This drives up the costs of bargaining, which undermines the freedom for cumulative creators to operate and impairs the licensing marketplace. This Section focuses on three critical elements affecting this marketplace: (1) the de minimis doctrine, (2) the fair use doctrine, and (3) copyright remedies.

36. 17 U.S.C. § 502 (authorizing injunctive relief against infringing works when injunctive relief is deemed "reasonable to prevent or restrain infringement of a copyright").

1. The Erosion of the De Minimis Doctrine

The *de minimis* defense is based on the legal maxim *de minimis non curat lex*, which means "the law does not concern itself with trifles." The concept of *de minimis* is "part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." In the field of copyright law, alleged copyright infringers can invoke the doctrine to excuse uses of a copyrighted work that are so trivial that the legal system will not impose consequences. The *de minimis* doctrine may also be invoked when it can be demonstrated that the alleged copying falls below the substantial similarity threshold.

While the doctrine potentially provides a limited safe harbor for cumulative creators who seek to borrow minimal portions of copyrighted material, the uneven application of the doctrine has substantially eroded its protections. First, courts have infused the doctrine with open-ended and vague standards. The "principle [of] trivial copying" is now linked to the more elaborate analysis of whether substantial elements are copied. The latter requires an examination of both the "qualitative and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole." The quantitative test is hard to predict since determinations are made on a case-by-case basis. Moreover, even a quantitatively minimal amount of borrowing may fall outside the doctrine’s scope if a court determines that the material qualitatively represents the “heart” of the work.

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41. *See Ringgold*, 126 F.3d at 74–76 (stating that “copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity”). Additionally, *de minimis* is sometimes invoked in the context of a fair use defense when deciding on the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Id. at 75 (quoting with added emphasis 17 U.S.C. § 107(3) (1994)).

42. *See Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004).

43. *Id. at 1195; see also Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (quoting *Ringgold*, 126 F.3d at 75); Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

Second, one circuit has excluded sound recordings from the scope of the doctrine entirely. In Bridgeport Music, Inc. v. Dimension Films, the court categorically excluded from de minimis protection a two-second sample looped on a lower pitch and extended to about sixteen seconds in a rap song. In a questionable interpretation of § 114(b) of the Copyright Act, the Sixth Circuit held the doctrine inapplicable to literal copying of sound recordings. Accordingly, the court mandated to recording artists, "[g]et a license or do not sample" when engaging in physical takings of sound recordings.

As a result of these developments, the de minimis concept provides cumulative artists only a trivial and highly unreliable freedom to incorporate portions of copyrighted works in new works.

2. The Uncertain Scope of Fair Use

The fair use doctrine provides an affirmative defense to copyright infringers for "fair" reproductions of copyrighted works for purposes such as criticism, commentary, news reporting, teaching, scholarship, and research. Fair uses are evaluated by courts on the basis of an open-ended set of factors that includes: (1) the purpose and character of the use, including whether it is used for commercial or nonprofit educational purposes; (2) the nature of the copyrighted work itself; (3) whether the section used constitutes a substantial portion of the work as a whole; and (4) the effect of the use upon the potential market for, and value of, the copyrighted work.

Fair use is considered critical to copyright law's fundamental purpose of promoting the progress of knowledge and learning and a "necessary part of copyright law." Since its inception, however, the fair use doctrine has been criticized as being "notoriously difficult to predict" and a cause of "significant ex ante uncertainty."

46. The dispute involved a sample of a guitar riff from a Funkadelic album as used by the rap group N.W.A. See Sykes, supra note 45, at 768-69.
47. See Bridgeport, 383 F.3d at 398.
48. Id.
51. See Lydia Pallas Lauren, Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems, 5 J. INTELL. PROP. L. 1, 4 (1997) ("[Fair use is] [o]ne of the most important counterbalances to the rights granted to copyright owners.").
53. See Liu, supra note 15, at 574, 577-80 (proposing to reform current fair use doctrine by limiting analysis to only first and last of four factors, instead of replacing analysis altogether as some scholars have recommended). The doctrine of fair use has been under attack for at least seventy
Although the Supreme Court has suggested that the common law method of fair use would ultimately produce a set of clarifying rules,\textsuperscript{55} this has not transpired. The body of fair use precedents contains many reversed decisions, split panels, and inconsistent opinions.\textsuperscript{56} Given that the outcome of every fair use decision rests on a case-by-case application of a multi-factor reasonableness inquiry that cannot be definitively resolved until litigated and appealed, cumulative creators cannot rely heavily on the doctrine, particularly in close cases. A fair use determination depends on too many variables, there is no express guidance on how the various factors should be weighed or balanced by judges,\textsuperscript{58} and a diverse set of policy concerns affect each of the fair use factors.\textsuperscript{59} The erratic path of fair use case law has led some scholars to conclude that "it is now virtually impossible to predict the outcome of fair use cases."\textsuperscript{60}

This uncertainty significantly increases the potential exposure of cumulative creators to copyright liability. Take, for example, the risks faced by producers of movies and television shows that display copyrighted materials in their backgrounds. In one case, the use of an artistic poster as part of scenery years. See Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (tagging the doctrine as "the most troublesome in the whole law of copyright").

54. See Carroll, supra note 15, at 1095; see also GOLDSMITH, supra note 15, at § 12.1 ("No copyright doctrine is less determinate than fair use"); Hick, supra note 15, at 497 ("[T]he fair use doctrine provides us with very little direction in making legal or ethical decisions.")

55. See Campbell v. Acuff-Rose Music, 510 U.S. 569, 596 (1994) (Kennedy, J., concurring). But cf. id. at 577 (majority opinion) (noting that "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis").

56. See Gideon Parchomovsky, Fair Use, Efficiency, and Corrective Justice, 3 LEGAL THEORY 347, 348 (1997) (conclusion based on review of the case law). Some scholars, however, suggest that clear patterns in the judicial application of the doctrine can be discerned. See Beebe, supra note 11, at 554 (highlighting historical pattern which suggests that the fourth, market impact factor is highly decisive); Samuelson, supra note 15, at 2541 (2009) (identifying subject-related patterns that make fair use more coherent and predictable).

57. See Liu, supra note 15, at 574 ("Fair use is a classic example of a multi-factor test. The outcomes of multi-factor tests are notoriously difficult to predict. In part, this results from the sheer number of factors that can influence the determination.").

58. See Leval, supra note 10, at 1106-07 (1990) ("Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright." (footnotes omitted)).

59. See, e.g., Beebe, supra note 11 (systematically evaluating published fair use decisions); Nimmer, supra note 15, at 281 (lamenting that "Congress included no mechanism for weighing divergent results against each other and ultimately resolving whether any given usage is fair").

60. See Parchomovsky & Goldman, supra note 13, at 1496 & n.65 ("[E]ven at a [high] level of generality, there is little more that can be usefully said about the division between fair and unfair uses in practice: The 'know it when you see it' nature of the analytic approach in this context simply precludes such observations.") (quoting R. Polk Wagner, The Perfect Storm: Intellectual Property and Public Values, 74 FORDHAM L. REV. 423, 426-27 (2005)); see also Nimmer, supra note 15, at 278-84 (employing a statistical analysis to demonstrate the unpredictability of the fair use doctrine).
appearing in the background of a television sitcom for less than thirty seconds did not qualify as fair use, but in another, the display of artwork in the background for sixty seconds did. One court held the display of unpublished photographs in the background of a scene in the movie Seven to be de minimis, whereas another court enjoined the recreation of a picture of a torture chamber in a few relatively short scenes of the film 12 Monkeys.

As a result of the fair use doctrine's pervasive uncertainty, cumulative artists are reluctant to rely on it. Moreover, because fair use is an affirmative defense to copyright infringement, the prospective litigation costs involved in proving that an unauthorized use qualifies as fair use may deter creative authors from including potentially infringing works in the first place.

3. Copyright's Potent Remedies

Copyright's sturdy and highly discretionary infringement remedies compound the uncertainties surrounding copyright's limiting doctrines. As a result, cumulative creators must be extremely cautious in their use of copyrighted works. Even a small transgression may trigger the enjoining of an entire film costing millions of dollars, in addition to the imposition of statutory damages of up to $150,000 per infringed work.

As an exclusive right, copyright law provides for the award of injunctive relief. Historically, courts have routinely granted injunction for copyright infringement. A temporary injunction preventing distribution or communication of a work will typically be ordered if a plaintiff establishes a prima facie case of both valid copyright and infringement. Similarly, because compensatory damages are considered inadequate and future infringements are generally expected to continue without intervention, permanent injunctions are commonly issued in copyright infringement decisions.

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61. See Ringgold v. Black Entm't Television Inc, 126 F.3d 70 (2d Cir. 1997).
66. See 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[A][1][b] (Matthew Bender ed., 2013) ("Given their antecedents in equity, preliminary injunctions are sometimes reflexively labeled an 'extraordinary remedy.' Nonetheless, in actual practice their issuance is actually ordinary, even commonplace." (footnotes omitted)); § 14.06[B][1][b][i] ("[T]raditional formulations have held that it is no bar to issuance of an injunction that plaintiff has available to it a legal remedy of uncontested damages. Indeed, the traditional formulation goes further, to characterize as an abuse of discretion the denial of a permanent injunction when liability has been established and there is a threat of continuing infringement." (footnotes omitted)).
67. See id. § 14.06[A][1][b].
68. See id. § 14.06[B][1][b][i].
As a result, minor and innocent infringements can put the investment of cumulative artists at risk. An alleged copyright infringement can prevent the distribution of a major Hollywood movie just prior to release, notwithstanding large expenditures on advertising and promotion. A few seconds of unlicensed copyrighted materials in the background of a documentary film can prevent broadcasting of the entire film.

In a 2006 decision, the Supreme Court recognized the harsh and inefficient ramifications of automatic injunctions in intellectual property cases. In eBay Inc. v. MercExchange, LLC, the Court held that courts must balance the traditional equitable factors supporting an award of injunctive relief—irreparable harm, inadequacy of money damages, balance of hardships, and public interest—in patent and copyright cases. It remains to be seen how significantly the eBay standard will affect the propensity of courts to order injunctive relief in copyright cases. Although one early empirical study indicates that the eBay decision has not had a significant effect, both the Second and Ninth Circuits have recognized that eBay altered the standard for awarding injunctive relief in copyright cases.

Although the threat of an injunction in copyright cases involving relatively modest effects on the copyright owner may have been lessened by the eBay case, copyright owners nonetheless retain the threat of costly litigation. Often when a copyright infringement claim arises, cumulative artists and other stakeholders have already sunk considerable investments into a creative production. This significantly weakens the cumulative creators' bargaining position vis-à-vis the copyright holder. From an ex ante perspective, the relatively broad availability of injunctive remedies contributes to the "when in doubt, leave it out" attitude.

The risk of liability for disproportionate statutory damage awards further discourages building on the work of others without an express license.

69. See, e.g., Woods, 920 F. Supp. at 62 (enjoining distribution of the film 12 Monkeys based on the unauthorized use of a graphic work for a set design used in a relatively small portion of the film).
70. See Claudia Eller, Warner Bros. and Fox Settle 'Watchmen' Copyright Dispute, L.A. TIMES, January 16, 2009, at 1 ("The companies had been urged by a federal judge, who made a preliminary ruling in December that Fox owned 'Watchmen's' copyright, to settle before a hearing next week when he would decide whether to block Warner's distribution of the film.").
71. See Ramsey, supra note 20.
73. Id.
74. See Jiarui Liu, Copyright Injunctions After Ebay: An Empirical Study, 16 LEWIS & CLARK L. REV. 215, 215 (2012) ("[E]mpirical evidence shows that the majority of post-eBay decisions on copyright injunctions have totally ignored the eBay decision as well as the four-factor test advocated therein.").
75. See Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 980 (9th Cir. 2011) (endorsing the Second Circuit's approach); Salinger v. Colting, 607 F.3d 68, 74-75 (2d Cir. 2010) (holding that "our Circuit's longstanding standard for preliminary injunctions in copyright cases . . . is inconsistent with the 'test historically employed by courts of equity' and has, therefore, been abrogated by eBay").
Copyright law has long afforded copyright owners the right to recover statutory damages and attorney's fees for copyright infringement.\(^{76}\) The justifications for such relief were the difficulties detecting infringement and proving monetary loss.\(^{77}\) The Copyright Act of 1976 provided statutory damages in the range of \$250 to \$10,000 per infringed work, with the top end rising to \$50,000 per work for willful infringement.\(^{78}\) Congress doubled the amounts in 1988.\(^{79}\) As concerns about online enforcement emerged in the 1990s, Congress ramped up the statutory damage range to \$30,000 per infringed work and up to \$150,000 per infringed work for willful infringement in 1999.\(^{80}\) Notwithstanding the terms of the Copyright Act, which plainly state that statutory damage awards would be set in the discretion of trial judges, the Supreme Court nonetheless held that the Seventh Amendment required juries to determine statutory damages in copyright cases where a party requested a jury trial.\(^{81}\) This had the practical effect of substantially increasing the uncertainty surrounding statutory damage awards.\(^{82}\)


\(^{78}\) See Pub. L. No. 94-553, § 504(c), 90 Stat. 2541, 2585 (1976) (current version at 17 U.S.C. § 504(c) (2012)).


\(^{81}\) See 17 U.S.C. § 504(c)(1) (2012) (providing for statutory damages "in a sum of not less than $750 or more than $30,000 as the court considers just") (emphasis added); § 504(c)(2) (expressing that the "court in its discretion" may increase the range to $150,000 upon a finding of willfulness, or else the "court in its discretion" may decrease the range to $200 for innocent infringement) (emphasis added).


Together these remedies expose a cumulative creator to a penalty that can far outweigh the harmful effects of the infringing use on the copyright owner. As a result, prospective borrowers of creative works might simply decide to forgo the use of prior material. Some scholars have suggested that courts should pay particular attention to the uncertainties surrounding limiting doctrines and their effect on cumulative creators in determining the relief granted for infringement. Nonetheless, the uncertainties surrounding limiting doctrines and the extensive remedies potentially available for even modest infringement pose a significant risk.

B. Copyright's Lack of Preclearance Institutions

Ideally, the uncertainties highlighted in the previous Section could be addressed at the front end of the creative process to avoid unnecessarily risking large investments in production, marketing, and distribution. Land developers, for example, are typically required to obtain early zoning approval for substantial projects and nonstandard land uses. These processes unfold before construction begins, although after investment in designing the project. In some other contexts, such as tax and securities, government agencies provide opinion letters and other assurances that clarify uncertain regulations and thereby reduce the risk of loss.

Various scholars have proposed the creation of a “Fair Use Board” to afford creators the opportunity to preclear uses or at least obtain some immunity for uses that were favorably vetted by an expert body. Similarly, various proposals have been floated to immunize uses of so-called orphan works—works that might still be protected by copyright but for which the cumulative creator cannot, after a good-faith effort, locate the rightful copyright owner to seek permission. Other scholars have proposed bright-line “fair use

84. See Samuelson & Wheatland, supra note 76.
85. See Parchomovsky & Goldman, supra note 13, at 1498 (“[As a result of these remedies] the expected cost faced by unauthorized users is likely to far exceed the expected, often quite modest, benefit.”).
86. See Menell & Meuer, supra note 2, at 45–46.
87. See id. at 23–25, 38 (discussing the virtues of preclearance institutions for promoting development of tangible and intangible resources).
89. See Orphan Works Act of 2006, H.R. 5439, 109th Cong. (limiting remedies against users who “performed and documented a reasonably diligent search in good faith to locate the owner of the infringed copyright”); Joshua O. Mausner, Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency, 12 J. TECH. L. & POL’Y 395, 398 (2007); cf. REGISTER OF
'harbors' to provide assurance in particular settings. Such proposals would certainly relieve some of the risk faced by cumulative creators, but would entail their own costs and complexities. Thus far, none of these proposals has been adopted.

Nor can cumulative creators feasibly obtain a judicial declaration that a use is fair. Federal courts lack the constitutional authority to issue advisory opinions. Therefore, in order to seek a declaratory judgment, a cumulative creator would have to face some "definite and concrete" jeopardy rising to the substantial controversy required by the U.S. Constitution for federal jurisdiction. But this will rarely arise where a copyright owner merely declines to respond to a request for a license. The Copyright Act creates no affirmative duty to license or to respond to a license request. Only if the copyright owner were to threaten suit or engage in some other conduct that created "definite and concrete" jeopardy would the opportunity to seek declaratory relief arise.

But even if the cumulative creator could get a federal court's attention, the costs and time delay of litigating the fair use question would be prohibitive in all but the most significant contexts—for example, a famous director working on a large-budget film who insisted on using a particular underlying work for which the copyright owner refused permission. Even a district court ruling would not end the matter. Given the vague contours of fair use doctrine, the cumulative creator would need to endure appellate review to be secure. Few creative projects have that budget and temporal flexibility.

Thus, the idiosyncratic nature of creative products, the realities of creative production, and the lack of feasible means of clearing rights short of an express license expose cumulative creators to substantial infringement risk with potentially large liability. While photographic and clip archives, such as Corbis Images, are available, the prices are relatively high and terms of use overly restrictive for the modest or transformative uses that many cumulative creators wish to make. Insurance markets for these risks are inchoate, leaving the cumulative creators with a choice between extremes: use the copyrighted work and run the risk of the entire project being blocked or leave it out. For many


90. See, e.g., Parchomovsky & Goldman, supra note 13.


92. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2012).

93. See MedImmune, 549 U.S. at 127.


95. See DONALDSON, supra note 18, at 363.
projects—especially those with financing that is contingent on avoiding foreseeable risks—it is a Hobson’s choice: if in doubt, leave it out.

II. COPYRIGHT FEE SHIFTING: A PROPOSAL

As the foregoing analysis has demonstrated, cumulative creators cannot easily utilize the *de minimis* doctrine or the fair use privilege due to the inherent uncertainties of these doctrines, the potentially disproportionate and dire ramifications of choosing wrongly, and the lack of preclearance institutions. Although we support the development of new institutions to provide greater certainty for cumulative creators, the costs and timing of proposed administrative mechanisms and procedures could well discourage many worthwhile projects. Nor are we optimistic that categorical safe harbors can provide the subtle balance needed to insulate the broadest range of noninfringing fair uses and encourage efficient licensing of uses that fall outside of the safe harbors.

We also worry that fair use is not the only or the most effective way to induce the optimal level of cumulative creativity. There are cumulative uses of copyrighted works that are desirable, but that should incur some charge for passage into the marketplace. Because of concerns for both freedom of expression and efficiency (i.e., transaction costs), we do not go so far as those scholars who believe that all use should be “fared” use;\(^6\) however, we do see the optimal creativity problem not simply as determining whether a use falls within the ambit of the inherently vague fair use doctrine. The social problem also entails promoting fair pricing at minimal transaction costs.

We propose using a fee-shifting rule modeled after Rule 68 of the Federal Rules of Civil Procedure and taking advantage of the post-*eBay* remedial regime to enhance the market for cumulative creativity. This mechanism would provide cumulative creators with some leverage to get copyright holders’ attention. By making a credible offer of settlement at the outset of a project, the cumulative creator would invite a negotiation and potentially limit their exposure should the copyright owner choose to later bring suit.

We should emphasize at the outset that we do not view this mechanism as a panacea or as a substitute for other adjustments to copyright law, institutions such as the Fair Use Board, or categorical safe harbors. Rather, our proposal would complement those reforms. But our proposal does have the virtue of promoting market exchange and minimizing transaction costs for avoiding or resolving disputes. While our proposal does not ensure that all meritorious cumulative projects will go forward, it would likely reduce the number of such

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projects that never see the light of day. And over time, this mechanism can be expected to generate the development of private licensing institutions and markets that further promote fair use and fair licensing.

We begin our analysis in Section A by specifying the structure of the typical bargaining problem in copyright. To do so, we use a relatively straightforward extensive-form game from a real world example: the challenge faced by a filmmaker seeking to use a small clip from The Simpsons television series in a documentary about the life of opera stagehands. Section B describes the strategic choices faced by the filmmaker under two scenarios: (1) the pre-eBay regime and (2) the post-eBay regime—the current system. Section C presents our fee-shifting mechanism and compares it to the prior regimes both statically (examining the shifts in individual stakeholder decision making that would occur) and dynamically (examining the effects our proposal might have on the dynamics of the copyright licensing market).

A. Modeling the Cumulative Creativity Problem

The cumulative creativity problem can usefully be structured as a multi-stage game featuring two private actors (the cumulative creator and the copyright owner) and a court system. The game revolves around whether the cumulative creator will use in her production a copyrighted work owned by someone else.

To make this construct more vivid, we will use Jon Else as our not-so-hypothetical cumulative creator. Mr. Else produced and directed numerous acclaimed documentary films. Else is thinking about capturing stagehands’ backstage life during the operatic performance of Richard Wagner’s “Ring Cycle,” a daunting set of four operas that requires extraordinary focus and stamina between idle periods. During one of the respites, Else captures the exhausted stagehands watching The Simpsons, the hit Fox television series, on a small television screen. He cherishes this “wonderful[,] droll cultural moment” in which “two stagehands play[,] checkers while the gods are singing about destiny and free will and Marge and Homer are arguing on the television set.” But the documentary filmmaker is not sure whether including this short, small scale, low resolution clip in an hour-long drama about the life of stagehands would infringe Fox’s copyright in the television series.

We make the modest assumption that in the absence of transaction costs, including any dispute resolution costs, the use of this clip is economically efficient. That is, the “wonderful[,] droll cultural moment” adds value to the production and does not detract from the value of Fox’s copyrighted work. That does not resolve how the social surplus is divided. It could, either exclusively

97. See Faculty, John Else: Professor and North Gate Chair in Journalism, UNIV. CAL. AT BERKELEY GRADUATE SCH. OF JOURNALISM, http://journalism.berkeley.edu/faculty/else/.

98. AUFDERHEIDE & JASZI, supra note 19, at 17.

or in part, go to Else and his investors, return to Fox, or flow through to the viewing public. Thus, in addition to any total social welfare effects—which could become negative when transaction costs are brought into the analysis—the legal regime may also affect the distribution of any surplus (or costs).

Figure 1 illustrates the multi-stage strategic game that an economically “rational” filmmaker would make in this situation. The first decision node represents Else’s initial choice: does he seek a license or not?

If Else decided to run the clip without seeking a license, he runs the risk that Fox will sue for copyright infringement. Under the scenario in which Fox does not sue, we can calculate a three-part payoff function: the value to Else and his investors \((V_E)\), which is likely to be modest (although enough such powerful clips can be the difference between a good review and mediocre review); the effect on Fox \((V_F)\) which is likely minimal; and the effect on the public at large \((V_P)\) witnessing the clip in Else’s documentary, which is individually small but potentially significant when accumulated across a potentially large audience. If Fox does sue, then we are in a much more complex scenario and set of payoff functions. Both Else and Fox will face significant litigation costs. The court system will incur the costs of adjudicating the case. A court might preliminarily and/or permanently enjoin distribution of

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100. We place “rational” in quotations because we have abstracted away from the costs of evaluating this complex set of calculations.
the film, as well as award damages and attorney’s fees. But as with all litigation, a settlement might emerge. Only one thing is clear: the lawyers will profit. But this will not increase efficiency. It will merely redistribute value from the parties and the public to the lawyers.

Else will need to consider all of these factors in determining whether to seek a license. And Fox might decide that the value of having a reputation for asserting its rights could increase its overall licensing revenues, although at costs to the public at large from the chilling effects on cumulative creators. Rather than fully specify the explicit payoff functions, it will be sufficient to represent this scenario with an explosion—as that is how it will feel to Else and his investors, the public at large, and possibly even Fox.

These prospects would lead a cumulative creator in Else’s position to at least consider seeking a license. The very act of seeking a license entails some costs because this is a fairly specialized transactional area. Else would likely need to retain a lawyer experienced in the industry to identify the relevant people at Fox to initiate the offer. There are transaction costs associated with specifying the use in relation to the overall project, the nature of the use, and the market for the documentary.

Going up this branch, Else must decide whether to ask for a covenant not to sue or put some real money on the table to secure a license. The higher the licensing fee (L), the more likely that a deal would be struck. From a social welfare standpoint, the licensing fee is simply a transfer payment. Should a deal be struck, the total social welfare is \( V_E + V_F + V_p \) less the transaction costs \( (TCE + TCF) \).

Fox, however, is under no obligation to even respond. If it doesn’t, Else is faced with the choice of whether to use the clip without the license. If he decides against using the clip, he has already incurred the transaction costs that may have gone into seeking the license, and the public loses the value from the “wonderful[,] droll cultural moment.” Fox neither loses nor gains anything directly. If Else opts to use the clip anyway, he is in nearly the same situation that he faced when he used the clip without seeking permission. The only difference is the additional, already-sunk, transaction cost of seeking a license. Fox then faces the choice of whether to sue, with similar ramifications.

This exercise highlights the relevant trade-offs and the role of transaction costs in the ultimate equilibrium. It is easy to see how this scenario yields the pragmatic business norm of “if in doubt, leave it out.” Excluding this small clip is unlikely to exert a major effect on the overall worthiness of the project. Leaving it in results in a nontrivial probability of injunctive relief, expensive litigation, and exposure to statutory damages. The overall calculus would depend on the costs of finding a substitute clip, the costs of making a change in the production after litigation ensues, litigation costs, financing risk, the availability and cost of insurance, and risk aversion, among other factors. Nonetheless, it is clear that cumulative creators face a difficult choice.
B. Strategic Analysis Under Traditional and Current Regimes

Until relatively recently, cumulative creators faced uncertainty over the application of the fair use doctrine but relative certainty over the principal remedy: injunctive relief. Until the Supreme Court's 2006 decision in eBay v. MercExchange, copyright owners could expect to obtain injunctive relief against infringing uses in almost all cases, as illustrated by the 12 Monkeys case. Although a few cases made reference to denying a permanent injunction, no court had ever applied that approach in a reported decision.

For purposes of our framework, that meant the explosion was particularly risky for cumulative creators. In essence, if copyright owners defeated a fair use argument, they obtained veto power over exploitation of the cumulative creation unless the defendant could excise the infringing portion. In the terms of the classic Calabresi and Melamed framework, the copyright owner could enforce its entitlement with a property rule.

And this is the predicament that Jon Else faced in the actual documentary production process, which took place in the late 1990s. He chose the upper branch and obtained permission from Matt Groenig, producer of The Simpsons. But he also needed permission from Fox, and that pursuit illustrates the transaction costs of licensing copyrighted works. Fox first requested $10,000 for use of a four-second clip. Else was able to whittle that number down to $7,000 by explaining that this documentary was being made for public television. Fox then raised concerns over whether Else would sell the entire work. Because it was near the end of production and the financing was nearly dry, Else opted to "leave it out" and replaced the Simpsons clip with a shot of a film that he owned. For that, he joked that he would "burn in journalistic hell."

The Supreme Court's 2006 eBay decision has the potential to reduce the draconian ramifications of losing a fair use dispute. By rejecting automatic injunctions in intellectual property disputes in favor of the equitable balancing test, the Court invigorated the use of a liability rule in intellectual property

105. See Ramsey, supra note 20.
106. See id.
107. id.
108. id.
109. id.
110. The equitable balancing test requires:
cases. This shift in the remedial standard affects the cumulative creator's analysis in two respects. First, it reduces the holdout risk by requiring the copyright holder to prove that he has suffered irreparable harm, that monetary damages are inadequate, that the balance of hardships is in his favor, and that the public interest would not be disserved by an injunction that engenders the loss of cultural moments among other benefits of cumulative creativity. Second, the shift should make copyright owners more open to working out a licensing deal upfront because an injunctive remedy is less certain.

It seems unlikely, however, that the eBay shift alone will dramatically alter the clearance challenge facing cumulative creators. The shift lessens the likelihood an explosion will realize its full potential, but cumulative creators remain exposed to significant risk. It also remains to be seen whether industry practices are changing as a result of the eBay decision. The effects are likely to be felt mostly at the margins. For example, Fox might have been more amenable to Else's offer in a post-eBay world. On the other hand, Fox's interest in being perceived as a tough negotiator could well swamp any eBay-related considerations. What is clear is that Fox left money on the table, the public lost out on a "wonderful[,] droll cultural moment," and Else will "burn in journalistic hell" as a result of copyright law's pathological equilibrium.

C. The Fee-Shifting Alternative

One reaction to the Else-Simpsons story is that society needs a way for cumulative creators like Else to obtain authoritative determination at an early enough time in the production process to enable use of copyrighted material—whether fair or fairly priced—to go forward. And in a Coasean world where transaction costs are nonexistent, that result would magically obtain. But we do not live in that world. Dispute resolution and/or negotiation of these matters cost substantial resources and often cannot happen quickly enough.

We believe that a constructive, albeit partial, solution lies in shifting those transaction costs—by reallocating litigation fees—in such a way that copyright owners are motivated to take timely, good-faith settlement offers seriously. Under what is referred to as the British rule, a party who prevails in litigation is entitled to indemnification from the losing party for litigation costs. In the United States, however, a prevailing party is not generally entitled to recover attorney's fees. Yet a number of federal and state statutes, in fields ranging from civil rights to consumer and antitrust law, allow plaintiffs to recover

A plaintiff to demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny such relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.

attorney's fees in order to encourage private enforcement. Similarly, federal and state courts have the power to indemnify the litigation costs of prevailing parties who have been burdened by frivolous or otherwise abusive litigation.

Our mechanism most closely resembles an exception to the prevailing American rule for allocating litigation costs, Rule 68's "offer of judgment" provision in the Federal Rules of Civil Procedure. Under Rule 68, a defendant who makes a settlement offer at least fourteen days before the date set for trial, and has that offer declined, can recover its costs incurred after making the offer if the ultimate judicial determination is more favorable to the defendant than the offer. Most circuits, however, have resisted the application of the rule to "prevailing parties" in copyright disputes based on the rationale that § 505 of the Copyright Act authorizes fee awards only to prevailing parties. Because a defendant who has had judgment entered against it (even if the defendant's settlement offer exceeded the amount of the judgment) is not a "prevailing party," courts are not able to award attorney's fees to a defendant who does not prevail on liability in copyright cases. Furthermore, Rule 68 only applies after litigation is under way—and only to costs incurred after the settlement offer is made.

Under our variation, cumulative creators could trigger a fee-shifting rule by making a bona fide licensing offer at any time. If the creator believes that

111. For an overview, see ALAN J. TOMKINS & THOMAS E. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS (1986).
112. Examples include Federal Rules of Civil Procedure 11 (frivolous and improper pleadings) and 37 (discovery abuse).
113. FED. R. CIV. P. 68 ("At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. . . . If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.").
114. See 17 U.S.C. § 505 (2012) ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."). In Marek v. Chesny, 473 U.S. 1, 10 (1985), the Supreme Court held that courts may award attorney's fees to a nonprevailing party under Rule 68 only when fees are defined as costs in the underlying statute. Reading § 505 of the Copyright Act to characterize attorney's fees apart from costs, several courts have ruled that attorney's fees can only be awarded in copyright cases to the prevailing party, essentially nullifying an important thrust of Rule 68. See Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc., 265 F.3d 638, 645–47 (7th Cir. 2001); Boisson v. Banian Ltd., 221 F.R.D. 378, 382 (E.D.N.Y. 2004); Bruce v. Weekly World News, Inc., 203 F.R.D. 51, 56 (D. Mass. 2001); Sparaco v. Lawler, Matusky & Skelly, 201 F.R.D. 335, 336–37 (S.D.N.Y. 2001). But see Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997) (awarding defendant attorney's fees where the jury's award came in below the defendant's pretrial offer); Lucas v. Wild Dunes Real Estate, Inc., 197 F.R.D. 172, 177–78 (D.S.C. 2000).
115. What happens if the marketplace for a cumulative work changes over time such that the fair licensing fee increases beyond what the cumulative creator placed in escrow? One approach to the problem would be to ask whether the initial escrow amount was reasonable based on the foreseeable value of its work at the time that the cumulative work was created. Alternatively, the test could be dynamic, encouraging cumulative creators to increase (or possibly decrease) the escrow amount over time as more information becomes known about the appropriate licensing amount. The latter rule
the use qualifies for fair use, the offer price could be zero. If the copyright owner does not respond to the offer, the cumulative creator would be permitted to use the work provisionally by paying the settlement amount into escrow. If the copyright owner rejects the proposed license fee and sues for infringement, the copyright owner will bear the cumulative creator’s litigation costs if the court determines that (1) the use of the material qualifies as fair use or (2) the fair use doctrine does not excuse the use, but the cumulative creator’s escrowed license fee exceeds the amount of damages that the court determines to be appropriate under an eBay liability rule. In the former case, any escrow amount is returned to the cumulative creator. In the latter case, the copyright owner receives the infringement award from the escrow account and the remainder returns to the cumulative creator. If the court finds against fair use and concludes that the proposed license fee is below the liability award or that an injunction should issue against the use, then the cumulative creator would have to pay the full liability costs in addition to their own litigation costs.\textsuperscript{116}

The following two Sections analyze the impact our fee-shifting mechanism would have on both individual copyright licensing negotiations and the overall copyright licensing market. Section 1 compares our proposed rule to the existing regime through the lens of decisions made by individual stakeholders—cumulative creators, copyright holders, and courts. Section 2 explores the dynamic effects of the proposed fee-shifting regime on copyright licensing markets driven by those same stakeholders.

1. \textit{Comparative Static Analysis: Effects on Individual Decision Making}

We can examine the effects of the proposed fee-shifting regime by revisiting Jon Else’s strategic choices in deciding whether to use the \textit{Simpsons} clip in his documentary about opera stagehands. To make the problem more concrete, assume litigation costs for each side of $100,000 to take this matter through trial.\textsuperscript{117}

\textsuperscript{116} Our proposal implements a one-way fee shifting in favor of the defendant. We believe that the traditional British rule of two-way fee shifting is less appropriate in this context because (a) cumulative creators are likely to be more risk averse than professional copyright holders that receive license requests on a regular basis; (b) the background copyright rules (i.e., potent remedies) favor copyright owners; and (c) copyright owners will have discretion to accept or decline settlement/licensing offers. \textit{See generally} Avery Katz, \textit{Measuring the Demand for Litigation: Is the English Rule Really Cheaper?}, 3 J.L. ECON. \& ORG. 143 (1987) (discussing the effects of two-way fee-shifting rules).

\textsuperscript{117} This might seem large given how little is at stake. Yet the median attorney’s fees and costs of taking a copyright case with less than $1 million in damages at stake through trial is $350,000. \textit{See AM. INTELL. PROP. LAW ASS’N, REPORT OF THE ECONOMIC SURVEY I-165} (2011). It is possible that a matter such as this could be resolved more quickly and inexpensively as a result of a preliminary injunction motion. On the other hand, many fair use cases are taken through appeal.
Under the proposed fee-shifting regime, cumulative creators are more likely to make some offer to the copyright owner to establish a baseline for recovering fees. Else could simply offer zero based on his view that the use of a four-second, small-size, low-resolution clip was fair use. If he wanted to hedge his bet, which a risk-averse producer is wont to do, he could offer $500 as a good-faith gesture.

His offer would shift the game to Fox. Fox has somewhat more incentive to consider the offer seriously than under the current regime because it could have to pay Else's attorney's fees if it declines the offer, proceeds to trial, and fails to obtain an injunction or a judgment of greater value.118

Furthermore, Fox should take seriously the possibility that Else would mount an effective defense. Although litigation could well be ruinous for Else and his investors, there is a much better chance (relative to the status quo) that he will be able to recover his costs. The award of fees would not be discretionary if he prevailed. Moreover, there may well be law firms, public domain activists, or legal clinics willing to handle this litigation given the much greater prospects of full attorney's fee recovery. We can also imagine emergent insurance pools, possibly subsidized by free expression advocates, contributing to Else's defense as a means of insulating cumulative creators from abusive copyright owners.

Thus, Fox should be more willing to accept Else's offer or to propose a serious counteroffer. In either case, the parties achieve or at least move closer to a relatively low-cost resolution of the matter, helping Else to avoid "burning in journalistic hell" and the public to enjoy the "wonderful[,] droll cultural moment."

As reflected below by Figure 2's directional arrows, the proposed fee-shifting regime would unquestionably increase the likelihood of cumulative creators making fair uses than under the current regime. The figure also demonstrates a greater likelihood that cumulative creators will make licensing offers, even at a zero price (essentially a claim of fair use). Copyright owners are more likely to consider those offers seriously because the possibility of having to pay a defendant's attorney's fees lessens the economic value of an infringement claim: to garner any economic benefit, a plaintiff would need not only to prevail on the merits, but to win damages exceeding a previously tendered licensing fee. In essence, our proposal, in conjunction with eBay, enables a cumulative creator to prevail if the proposed use is fair or if the licensing offer is fair.

118. In economic terms, our one-way fee-shifting mechanism increases the expected costs of litigation to the copyright holder. See generally Avery Wiener Katz, Indemnity of Legal Fees, in 5 ENCYCLOPEDIA OF LAW & ECONOMICS 63 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (providing an overview of the economic literature on fee shifting).
FIGURE 2: Strategic Analysis of Cumulative Creativity Under a Fee-shifting Regime

A version of this dynamic may actually have played out in the Second Circuit litigation over Dorling Kindersley Publishing’s *Grateful Dead: The Illustrated Trip*. The cumulative creator assembled over 2,000 images with explanatory text into a vivid collage/anthology of the Grateful Dead’s cultural history. Seven of the images that the publisher sought to include were concert posters and a graphic work on a concert ticket, the copyrights to which were owned by Bill Graham Archives. The anthology shrunk these images to be relatively small components of particular pages containing a variety of images and text.

Kindersley initially sought permission from Graham Archives to reproduce the images. The parties failed to reach a license agreement and Graham Archives sued. In light of the Supreme Court’s indication that a refusal to grant a license does not bear on fair use determinations, it is perhaps telling that the Second Circuit recounted the effort to negotiate a license in its decision. It might plausibly be inferred that the court believed that Graham Archives was engaging in holdout behavior, notwithstanding that Second Circuit precedent could well be interpreted to favor a narrow interpretation of

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119. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).
120. *Id.* at 607.
fair use in the context of “claims that copyright in a visual work has been infringed by including it within another visual work.” Nonetheless, the Second Circuit in turn interpreted those precedents narrowly in ruling that Kindersley’s use of the entirety of these works, albeit in miniaturized form and for a somewhat different purpose, fell within the fair use privilege.

We believe that the proposed fee-shifting rule would encourage cumulative creators to lay the foundation, through good-faith license requests, for courts to more transparently police holdout behavior.

2. Dynamic Analysis: Effects on Licensing Market Development

Perhaps the more significant effects of the proposed regime will be on how copyright owners approach the entire licensing enterprise. Until relatively recently, there has been notable reluctance on the part of major copyright owners—those who control the most iconic cultural works—to participate at all in the marketplace for cumulative creativity. This has been driven in part by their intense desire to control all commercial uses of their works. The existing copyright regime has unwittingly supported this effort through doctrinal uncertainty, high litigation costs, and potent remedies.

The proposed fee-shifting rule promises to use litigation costs against unreasonable copyright holders by empowering cumulative creators and investors to use the high cost of litigation against holdout behavior. In conjunction with the demise of the mandatory injunction rule, the Rule 68-type mechanism would allow courts to more easily police the fair use marketplace. This could bring about a different, but possibly even more profitable, marketplace for copyright owners and cumulative creators. Rather than devoting their resources to costly and uncertain enforcement litigation, copyright owners can more efficiently develop convenient licensing markets for their catalogs of copyrighted materials. In much the way that Professor Rob Merges suggested that property rules can promote contracting into liability regimes, a fee-shifting regime built around bona fide licensing offers can fuel a robust marketplace for cumulative creativity.

122. See Ringgold v. Black Entm’t Television, 126 F.3d 70, 74-76, 79-80 (2d Cir. 1997) (“[V]isual works are created, in significant part, for their decorative value, and, just as members of the public expect to pay to obtain a painting or a poster to decorate their homes, producers of plays, films, and television programs should generally expect to pay a license fee when they conclude that a particular work of copyrighted art is an appropriate component of the decoration of a set.”).

123. See Bill Graham Archives, 448 F.3d at 605.

124. See Merges, supra note 29.

III.
FEED SHIFTING AND COPYRIGHT’S STAKEHOLDERS

Our proposal seeks to effectuate copyright law’s intended balance between protecting pioneering creators and empowering subsequent creators in the imperfect world of uncertain standards and costly enforcement. Here we examine the effect of our proposal on the principal stakeholders in copyright disputes and address potential objections.

A. Cumulative Creators

How does our proposal affect the incentives and likely behavior of cumulative creators when they seek to use copyrighted material?

Currently, a cumulative creator might acquiesce to an unreasonable license request in order to remove the risk of incurring litigation expenditures. Creators who actually engage in such behavior have created a trend of so-called “fared uses” in which cumulative creators and follow-up artists, in order to avoid litigation costs, agree to settlement offers even if copyright law does not require payments.126

Our proposal eliminates the concern of litigation expenditures, ex ante, for cumulative creators. Cumulative creators who tender a fair offer or who know that they do not owe any royalties are safeguarded against any prospective litigation costs.127

But might our fee-shifting proposal induce some risk-averse cumulative users into offering positive license payment offers for legitimate, fair uses in order to shield themselves from litigation costs at a later stage?128 Some might contend that a fee-shifting mechanism would penalize cumulative creators by requiring them to pay a price for an entitlement—the fair use privilege—that the law affords them. This potential criticism overlooks three essential

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126. Bell, supra note 96. Several scholars have pointed out how new technologies and legal uncertainties contribute to a troubling trend where users of copyrighted materials pay for legitimate uses of copyrighted material. As documented by Professor James Gibson, risk-averse users of copyrighted materials often prefer to pay a license in order to avoid the unpleasant, expensive prospect of litigating a fair use determination in court. See Gibson, supra note 19, at 890. Similarly, Professor Molly Van Houweling has found that the cost of litigation has a disproportionate effect on independent artists for whom litigation costs are high relative to the total value of the project. See Van Houweling, supra note 19. The situation is different for end users who do not have vested investments at stake. See Depoorter, supra note 15, at 1849–54 (arguing that loss aversion and cognitive dissonance might make file sharers more risk-seeking).

127. In this regard, “a rule authorizing defendants but not plaintiffs to make offers of judgment redistributes wealth from plaintiffs to defendants in disputes that are entirely or partly over damage.” Katz, supra note 118, at 79 (referencing George L. Priest, Regulating the Content and Volume of Litigation: An Economic Analysis, 1 SUP. CT. ECON. REV. 163 (1982)); Geoffrey P. Miller, An Economic Analysis of Rule 68, 15 J. LEGAL STUD. 93, 95 (1986).

128. It is possible that cumulative creators that offer a large license fee as an insurance measure could lead a judge to think that the use must not be fair if the cumulative creator is willing to put so much money on the table. On the other hand, the cumulative creator is not obliged to make the use if the copyright owner declines the offer.
attributes of our proposal. First, every entitlement implicitly entails social costs—the costs of determining whether the privilege applies. Given the inherent uncertainties surrounding fair use determinations, our proposal affords cumulative creators a useful tool for hedging the risks inherent in building upon others' protected works. Second, our mechanism affords cumulative creators the option of claiming fair use expressly and using a zero licensing offer to opt-in to a favorable fee-shifting regime. If a cumulative creator is convinced that the use of the copyrighted material constitutes fair use, such a zero price licensing offer operates as a shield against litigation costs should the copyright owner sue. As a result, our proposal may in fact induce greater push back by cumulative creators against unnecessary license payments and rights accretion in copyright law. Third, and more generally, we expect our proposed fee-shifting regime to operate principally in those areas where cumulative creators "leave it out" under present law. It would also offer a form of insurance against future litigation costs and assist cumulative creators in attracting skilled practitioners to defend alleged fair uses.

Finally, note that our proposal does not stand in the way of other adjustments to the copyright system, such as the creation of preclearance institutions, to adjudicate these inevitable issues. But those institutions have their own costs. The reality is that society could easily spend a substantial percentage of its Gross National Product running every cumulative creation on YouTube up the appellate ladder. We could call it the "Full Employment Act for Copyright Lawyers." But as law and economics scholars have recognized since at least the time of Coase,\textsuperscript{129} such an equilibrium is not socially optimal. An efficient allocation of resources incorporates dispute resolution costs. Our proposal has the substantial virtue of moving a potentially large percentage of cumulative creativity disputes out of the "when in doubt, leave it out" and costly adjudication buckets and into relatively low-cost and timely risk sharing through a transfer payment.

\textit{B. Copyright Holders}

How do copyright holders fare under our proposed fee-shifting mechanism? Note that our proposal has no effect whatsoever on the substantive rights of copyright holders. A copyright holder is free to decline settlement offers and seek recourse in court. Our proposal merely increases the expected costs of turning down reasonable settlement offers. As a result, our fee-shifting mechanism induces copyright owners to take seriously reasonable licensing offers received from cumulative creators. In other words, since a copyright holder will have to reimburse an opponent's costs if he or she rejects a reasonable offer, our proposal provides copyright holders with added incentives

\textsuperscript{129} See Coase, supra note 37.
to accept license proposals likely to be deemed fair by courts.\textsuperscript{130} As a result, our proposed mechanism makes it less likely that copyright holders will seek extortionate or egregious licensing fees from creative artists.\textsuperscript{131}

Of course, because the outcome of copyright infringement cases is subject to uncertainty, our one-sided fee-shifting proposal\textsuperscript{132} does increase the expected costs of copyright owners when they refuse a license payment they consider insufficient.\textsuperscript{133} There are, however, justifications for shifting to copyright owners the burden of assessing a licensing offer's reasonableness. First, under current law, copyright owners have no affirmative duty to respond to offers to license—in fact, copyright owners can strengthen their position by adopting a wait-and-see approach as the stakes for and investment of cumulative creators increase. In this regard, our fee-shifting proposal returns some balance to copyright law. Second, because copyright owners tend to be professionals with expertise in negotiating licenses (e.g., publishing houses, record labels, and movie companies), they are typically adept at evaluating licensing offers. Experience with licensing practices enables copyright owners to better evaluate whether a given settlement offer is likely to be upheld in court and, consequently, to take measures to remove the risk of indemnifying the litigation costs of the prospective licensee.

Finally, one might argue that our proposal provides opportunities for cumulative creators to strategically shift the litigation costs to content holders. Rather than seeking a good-faith license agreement, perhaps cumulative creators might make lowball offers with the sole goal of obtaining the benefits of fee shifting. Our proposal protects against this tactic by triggering shifting of fees only if the cumulative creator puts into escrow a license offer that equals or exceeds the judicially determined award at the time of litigation. Given this conditional aspect of our fee-shifting mechanism, cumulative artists have every

\textsuperscript{130} Of course, we describe above how the fair use doctrine and other copyright limitations are subject to significant uncertainty. Indeed, if it is difficult to determine whether a use is permitted or whether a particular license proposal is reasonable, this uncertainty will likely affect the behavior of parties. Because such uncertainty disproportionally affects risk-averse parties, our fee-shifting mechanism is one-sided: only copyright holders/plaintiffs are subject to the risk of indemnifying the other party in the litigation.

\textsuperscript{131} On the deterrent effect of fee shifting on frivolous litigation, see D. Rosenberg & S. Shavell, \textit{A Model in Which Suits Are Brought for Their Nuisance Value}, 5 INT'L REV. OF LAW & ECO\textsc{n} 3 (1985).

\textsuperscript{132} Our proposal shifts in favor of defendants only because a two-way fee-shifting system increases the risks of litigation to both parties. We regard two-way fee shifting as less suitable in this context because (a) most independent cumulative creators are more risk-averse than sophisticated copyright holders that regularly receive license requests and (b) because our proposal seeks to correct the imbalances described in Part II (lack of incentive for copyright holders to respond in time and strong remedies). See also supra note 116.

\textsuperscript{133} In this regard, our proposal has the same effect as the traditional Federal Rule of Civil Procedure 68. For an economic analysis of Rule 68, see Miller, supra note 127 and George L. Priest, \textit{Regulating the Content and Volume of Litigation: An Economic Analysis}, 1 SUP. CT. ECON. REV. 163 (1982).
incentive to make offers that are likely to be deemed fair. In fact, they can partially self-insure by making offers that are more generous. As a result, our proposal does not induce unreasonable, lowball offers by subsequent creators, and copyright holders do not have any reason to respond to such offers.

CONCLUSION

The substantial literature on fair use has focused much of its attention on trying to improve the quality of adjudication and the inherent difficulty of applying an amorphous and subjective test. While getting better answers is a worthy goal, it overlooks the costs of litigating an inherently subjective rule's application and the adverse ramifications for creative expression. It also overlooks the objective functions of the key constituencies affected by copyright law—creators and the public. Filmmakers and hip-hop artists do not wake up each morning with the goal of prevailing in fair use litigation. Rather, they seek to produce art that appeals to the public. Fair use litigation is and will always be a messy business. For that reason, much is to be gained by encouraging entities with the best information about the gains from trade to resolve their differences efficiently—early in the production process and at low transaction cost.

As this Article has explained, copyright owners can be encouraged to come to the table early in the production process via adoption of a fee-shifting rule that enables cumulative creators to recover their litigation costs if it is determined that (1) their use of a copyrighted work is fair, or (2) their licensing offer equals or exceeds what a court determines to be an appropriate liability. As this rule becomes established, industry norms will increasingly accommodate fair negotiation of copyright licenses, thereby promoting fair use of copyrighted works, cumulative creativity, and fair licensing.