

THE KIDS ARE ALRIGHT: APPLYING A FAULT LIABILITY
STANDARD TO AMATEUR DIGITAL REMIX

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INTRODUCTION

The term “remix” is used mainly in a digital context, although there is nothing inherently digital about remix. For instance, fan fiction, a widely discussed form of remix, has developed into an important cultural phenomenon in the past forty years, clearly exhibiting a non-digital incubation period.¹ Nevertheless, the digital revolution has been

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1. See generally HENRY JENKINS, *TEXTUAL POACHERS* 162–77 (1992); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L. REV.* 651

transformational because the dramatic decrease in cost and ease of use of digital tools combined with a massive increase in availability of digital content to use as fodder for remixing has resulted in an explosion in the production of remix works.²

Remix is a development of great cultural importance. Speaking purely aesthetically, digital remix allows for easy blending of genres of content—music, video, text, photos, etc. not previously possible. Thus, not only is there the promise of more content from new sources but also wholly new forms of content. Leading media theorist Henry Jenkins aptly refers to the result as “convergence culture.”³ Politically speaking, remix facilitates democratic participation in the creation of culture to an extent not seen since the mega-media titans took over cultural production nearly a century ago.⁴ That this creative work is produced and shared by millions of everyday people cannot help but have desirable broad ramifications, as a variety of commentators have noted.⁵

Digital remix is fraught with legal implications as well. On the one hand, it is a significant new source of original content, and accordingly, its emergence serves the fundamental goal of copyright, which is conventionally said to be the promotion of creative work.⁶ On the other

(1997) (discussing the increased use of fan fiction).

2. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1500–03 (“Web 2.0 applications now allow ordinary people to create expressive works of their own and to share them immediately with millions of others. In a recent Deloitte survey of 2,000 Internet users ranging in age from thirteen to seventy-five, close to half said they had created content—blogs, music, photos, videos, and Web sites—for others to view online. In 2008, the number of blogs alone exceeded 112 million (although some may not be active). Nearly seventy percent of the people polled said they viewed the UGC of others.”); see also Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 870 (2009).

3. HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 16 (2006). The roots of remix are in collage and thus can be traced back to one of Picasso’s early periods. See Tate, Glossary: Collage, <http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=70> (last visited Sept. 30, 2010); Guggenheim Collection, Collage, http://www.guggenheimcollection.org/site/concept_Collage.html (last visited Sept. 30, 2010). Linguistic convention has yet to settle on one term. In usages roughly synonymous with the term, “remix,” one sees “user-generated content,” “UGC,” “mash-ups,” and “appropriation art.” To further the confusion, but hopefully for a point, I will introduce the term “amateur-generated content,” for reasons that will become apparent.

4. JENKINS, *supra* note 3, at 135–37.

5. See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 67 (2008) (explaining the democratic effects of read/write culture; *id.* (“For those of us who are not Posner and not Gil, the Internet is the one context that encourages the ethic of democracy that they exemplify. It is the place where all writing gets to be RW. To write in this medium is to know that anything one writes is open to debate.”)); Lee, *supra* note 2, at 1504 (“UGC greatly facilitates both the freedom of speech and the freedom of the press.”); Tushnet, *supra* note 1, at 655–58 (explaining the personal utility derived from fan created fiction).

6. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); see Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV.

hand, because creating remix requires digital content as raw material, and much of this will naturally be owned by others and used without their (express authorized) consent, the issue of copyright infringement arises naturally.

By the lights of a number of commentators, copyright law, at least in its current manifestation in the United States, is ill-suited to optimally regulate remix. Perhaps the most pervasive and troubling fear expressed among theorists is the potential for a “chilling effect” on the production of remix—particularly amateur remix—caused by a lethal combination of unenforceable legal doctrine and well-funded, aggressive corporate content owners.⁷ To the extent that this concern for chilling effects is well-grounded, the issue is raised as to how copyright law might be altered in order to better regulate the exploding phenomenon that is remix. In this Article, I consider three alternatives. The first alternative is developed by leading Internet theorist Lawrence Lessig in an important and well-regarded recent book aptly entitled, *Remix*.⁸ Quite strikingly, he argues that remix should be legalized.⁹ I will develop an alternative policy proposal that is equally, if not more, sweeping in its scope but which is also more practical and which coheres better with other aspects of copyright policy.

The form of my argument has both positive and normative components. The positive legal argument is that, properly understood, amateur remix is predominantly fair use already.¹⁰ As such, it is legal already, not just at the margin but in the main. Thus, one of the three ways to legalize remix discussed in this Article is simply to provide the correct legal analysis—the legal truth shall set these unauthorized users free. Implicit in this claim, but worth noting explicitly, is the fact that while Lessig seeks to develop new policy for all remix, my concern is amateur-generated remix. The importance of drawing this distinction will become apparent in the course of this Article.

With regard to the normative argument, I will suggest that copyright law should abandon its sole reliance on a strict liability standard for infringement and instead incorporate a tripartite liability standard, as is the

513, 517 (2009).

7. Steven A. Hetcher, *Hume’s Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963, 966 (2009) (“Because fan fiction and remix works build upon preexisting commercial works, typically without authorization, these latter works are potentially subject to infringement liability. Not surprisingly, creators of fan fiction and remix sometimes live in fear that their creations will cause them to be sued. This is bound to have, as the phrase goes, a ‘chilling effect’ on these creators.”). See generally *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (involving issuance of a takedown notice regarding a video of a YouTube member’s child dancing to a Prince song); LESSIG, *supra* note 5 (explaining the increase in copyright litigation both in the United States and Europe).

8. LESSIG, *supra* note 5 (discussing why our current copyright laws need to be changed).

9. LESSIG, *supra* note 5, at 254 (“[W]e need to restore a copyright law that leaves ‘amateur creativity’ free from regulation.”).

10. To lay my jurisprudential cards on the table, here I am adopting a Holmesian standard of law as a prediction of what courts will do. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

case in tort law generally. Most important, I will argue that a fault standard will often be the appropriate standard to apply in the context of amateur digital remix. This proposed expansion in applicable liability standards will involve a rethinking of the normative desiderata that undergird copyright. There was a time when copyright policy was, in effect, treated as a form of industrial policy. Professor Jessica Litman has set out in detail the manner by which the 1976 Copyright Act was predominantly shaped by the set of relevant industry actors most likely to be financially impacted.¹¹ The story is that Congress largely accepted the set of rules that resulted from this *modus vivendi* of the combined content industries.¹² In other words, the Copyright Act is aptly viewed as an instance of industrial policy set into law by a compliant Congress. One of the ancillary conclusions from the following discussion is that viewing the ambit of copyright appropriately regulated as industrial policy can no longer be justified—if it ever was—in the new media landscape in which great numbers of everyday technology users have become what commentators refer to as “creator/consumers.”¹³

The monolithic economic framework that typically undergirds industrial policy is simply inadequate to correspond to the normative complexity that emerges when millions of everyday citizens are directly

11. See generally Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) (discussing how historically copyright legislation has been formed by affected interest groups bargaining among themselves).

12. See Tim Hering, Comment, *Users and Abusers: Has the Distinction Been Legislated out of Copyright?*, 83 OR. L. REV. 1349, 1356–59 (2004). Hering describes the 1911 lawsuit surrounding the motion picture industry’s release of *Ben Hur*, a film based on a General Lew Wallace book. *Id.* at 1357. The Supreme Court found in favor of the publisher, causing the movie industry to seek a change in copyright law. The movie industry then put forth a bill to amend the Copyright Act in 1912. *Id.* There was initially little common ground between interested industry groups. The House of Representatives responded by encouraging industry parties “to negotiate privately and return with what they thought would be a fair solution.” *Id.* In March of that year, the parties came to an agreement and subsequently submitted a proposal to the House. *Id.* “[D]espite concerns over some of the proposals in the new bill, it was enacted with only minor changes.” *Id.* Hering explains that, “It is under this method of interest group wrangling that the current copyright statute was born.” *Id.* at 1359. He adds that the 1976 Copyright Act “bore some of the same hallmarks of its predecessor [the 1909 Copyright Act]: the Act’s provisions spoke to the narrow interests of individual copyright owners rather than to the general guiding principles of copyright.” *Id.*

13. Steven A. Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 875–76 (2008) (“The credo of modern art is art for art’s sake; this is UGC for UGC’s sake. There may be important implications of this fact for core issues of copyright as copyright assumes that people create due to the incentive provided by legal protections afforded by copyright law. Ergo, if no incentive is needed because people are motivated for art’s sake—so to speak, to create UGC—then the protections afforded by copyright law may be unnecessary . . .”). See generally Jacqueline D. Lipton, *Copyright’s Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. (forthcoming 2010) (manuscript on file with author), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1597757_code691672.pdf?abstractid=1574460&mirid=1 (Select “One-Click Download” link) (noting the blurring lines between consumers and creators).

and significantly impacted by policies such as those that govern amateur remix. In particular, I will argue that owners of copyprotected works should no longer have the right to prevail in infringement suits against amateur remixers simply by establishing unauthorized copying of protected content (at least when the facts suggest a lack of “substantial certainty” of injury of a sort required for an intentional tort).¹⁴ The justification for this doctrinal shift will be derived by applying the sort of fairness arguments that have won the day—or rather, the modern era—in tort generally. Introducing elemental fairness concerns in this context will be seen to have classical adherents as ideologically diverse as Justice Oliver Wendell Holmes Jr., on the one hand, and Justice Benjamin Cardozo, on the other, and contemporary adherents as ideologically diverse as Judge Richard Posner and Professor William Landes, on the one hand, and Professors Jules Coleman, John Goldberg, and Benjamin Zipursky, on the other hand.¹⁵ As will be shown, taking fairness seriously in this manner has the salutary effect of mitigating or eliminating the purported “chilling effects” from the threat of infringement liability for the preponderance of amateur digital content, although this will be a (welcome) consequence of, rather than a justification for, taking fairness seriously.¹⁶

The connection between taking fairness seriously and legalization of remix is as follows: The implication of applying a fault standard to putatively tortious behavior is that such behavior, sans negligence, is perfectly legal. The digital realm is united with the physical realm in which driving a car is legal so long as one does not negligently injure another. Thus, we have our third route to legalization of remix—the first, espoused by Lessig; the second, implicit in a proper understanding of fair use doctrine as applied to amateur digital remixing activities in the main; and a third, implicit in the policy proposal to expand and modernize the liability standard in copyright infringement.

Part I of this Article will examine Lessig’s proposal to legalize remix. Part II will set out the first stage for the competing policy proposal to expand the number of liability standards in copyright by examining the broader theoretical connections between copyright infringement and tort liability generally. Part III will distill these top-down theoretical insights into a form applicable to a fair use analysis of amateur digital remix. The importance of this examination will be seen in Part IV, as the legal fact that

14. See *infra* note 212 and accompanying text.

15. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928). On the duty toward unforeseeable victims, the court wrote:

One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

Id.

16. For a discussion of these chilling effects, see Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited Sept. 30, 2010).

amateur digital content is predominantly a fair use is essential to understanding both why Lessig's proposal fails and why the alternative succeeds.¹⁷

I. LESSIG'S ARGUMENT FOR LEGALIZING REMIX

Lessig's overall policy position on remix follows from his view that remix is in essence a victimless crime and moreover one with important social benefits. Under this set of assumptions, it is not surprising that Lessig is able to reach the conclusion that legal rules should support rather than impede remix culture to the full extent of legalizing the activity.¹⁸ Lessig focuses on music mash-ups to make this point. He discusses the music mash-up artist, Girl Talk, who told Lessig in an interview that he could not understand why anyone would want to stop his music, since unlike "bootlegging," it was not hurting anyone.¹⁹ Lessig notes, "Why anyone 'should' was a question I couldn't answer."²⁰ As this statement indicates, Lessig can discern no harm from the activity such that anyone would want to stop it. Indeed, throughout the book, Lessig fails to acknowledge any harm that might result from remix. *Silencio non est disputandum*. Lessig instead emphasizes the manner in which remix culture creates social benefits. Lessig supports this final assumption through a variety of remarks. He claims that,

[Remix] touches social life differently. It gives the audience something more. Or better, it asks something more of the audience. It is offered as a draft. It invites a response. In a culture in which it is common, its citizens develop a kind of knowledge that empowers as much as it informs or entertains.²¹

Combining the above premises, Lessig derives the policy conclusion that remix cultural practices should not be impeded but instead supported by legal rules.²²

As the previous argument indicates, Lessig's policy conclusion about remix turns crucially on his claim that remix is criminal. Lessig fails to acknowledge, however, that this claim is contestable. Therefore, it will be necessary to look in depth at the set of arguments Lessig offers to support his understanding of remix as criminal activity. If Lessig is right, we are in the midst of a crime wave on a massive scale—one that has a generational

17. For an account of regulation through more informal means, see Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1874–91 (2009).

18. See LESSIG, *supra* note 5, at 254 ("[W]e need to restore a copy right law that leaves 'amateur creativity' free from regulation."); see also text accompanying note 9.

19. LESSIG, *supra* note 5, at 13.

20. *Id.*

21. *Id.* at 85.

22. See *supra* text accompanying note 9.

component. On Lessig's account, it is young people, "kids," who are by and large a generation of criminals.²³ Lessig is sympathetic, viewing these "kids" as victims of the era in which they have come of age.²⁴ Note, moreover, that since it is the emergence of ever easier to use technologies that is creating a secular trend toward this brand of criminal behavior, a sobering implication of Lessig's argument is that future generations of kids will be increasingly inclined toward a life of crime.

Lessig's assumption that the rising kids of this generation are criminals itself follows from two assumptions: first, that unauthorized remixing of online digital content is criminal; and second, that the rising generation of kids use their computers largely for remixing activities. Regarding both assumptions, Lessig writes,

In a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?²⁵

In a statement that highlights the second assumption, Lessig claims that we should "reform the rules that render criminal most of what your kids do with their computers."²⁶

Lessig further argues that turning kids into criminals will have deleterious effects on them and on society, as kids will learn to disrespect the law and consequently engage in more criminal activities.²⁷ Lessig writes,

I worry about the effect this war is having upon our kids. What is this war doing to them? Whom is it making them? How is it changing how they think about normal, right-thinking behavior? What does it mean to a society when a whole generation is raised as criminals?²⁸

Lessig goes so far as to suggest that this generational turn toward crime may become dangerous: "I then want to spotlight the damage we're not thinking enough about—the harm to a generation from rendering criminal what comes naturally to them. What does it do to them? What do they then do to us?"²⁹

Comparing remixing to file-sharing, Lessig asks,

23. LESSIG, *supra* note 5, at xvii.

24. *Id.* at xviii.

25. *Id.*

26. *Id.* at 19.

27. *Id.* at xvii.

28. *Id.*

29. *Id.* at 18.

Should we continue the expulsions from universities? The threat of multimillion-dollar civil judgments? Should we increase the vigor with which we wage war against these “terrorists”? Should we sacrifice ten or a hundred to a federal prison (for their actions under current law are felonies), so that others learn to stop what today they do with ever-increasing frequency?³⁰

Lessig argues that the criminal status of remix has other deleterious social consequences as well, such as deterring the development of new forms of literacy. He argues,

[T]he law as it stands now will stanch the development of the institutions of literacy that are required if this literacy is to spread. Schools will shy away, since this remix is presumptively illegal. Businesses will be shy, since rights holders are still eager to use the law to threaten new uses.³¹

Reasonably taking it as the implicit premise that institutions of literacy should not be deterred, Lessig concludes that laws against remix culture should be dispensed with in order to avoid these undesirable outcomes.

As each of the above instances indicates, the cornerstone of Lessig’s overall argument is the claim that amateur remix is criminal activity. Thus, it is essential to determine the accuracy of Lessig’s legal analysis of remix because if he is wrong regarding its criminality, then there may be no reason to fear the undesirable social consequences he foretells. I will argue that Lessig’s claim that amateur remix is criminal is incorrect. In Part III, I will argue that this is true for the simple reason that significant amounts and types of remix works are in fact fair uses. A use that is fair is not an infringement and a fortiori not a criminal infringement.³² In order to fully appreciate the role of fair use in this argument and subsequently in the proffered alternative, it will be necessary to engage in some fundamental analysis into the theoretical underpinnings of copyright infringement.

30. *Id.* at xviii.

31. *Id.* at 108.

32. *See generally* 17 U.S.C. § 107 (2006) (providing that fair use does not constitute copyright infringement). Moreover, even if remix sometimes failed to qualify as fair use, there is a strong argument that the creators of these works will not be subject to criminal liability under the No Electronic Theft (NET) Act because remix work would rarely meet the \$1,000 threshold value and in many cases the work’s owner would have difficulty proving there was willful infringement as required under the statute. Hetcher, *supra* note 17, at 1899–990 & n.114. Lessig does not discuss the NET Act despite the fact that it added criminal provisions for non-commercial activities and thus on its face is salient in the context of remix, much of which is non-commercial. As stated in *Using Social Norms*, “Lessig’s frequent references to the criminalization of a generation imply a belief that these remixers do, or will, violate the NET Act.” *Id.* at 1899–1900 n.114; *see, e.g.*, LESSIG, *supra* note 5, at 283–84 (arguing that children have been branded “pirates” and comparing them to Soviet “black marketeers”).

Next, it will be clarifying to provide the first stage of the two-stage argument that will be propounded as an alternative to Lessig's proposal that remix be legalized. This first stage provides an argument for changing the liability standard in copyright. Once this position has been developed, discussion will then return to the topic of fair use in the context of amateur remix. The connection between these strands of argument is that it turns out that remix is the factual setting that is most supportive of the need for a tripartite liability standard, as it is in the context of amateur remix that fair use goes from being the exception to being the rule. I will argue that this shift has direct implications for the relevance of applying a fault standard because unauthorized uses in this context are no longer substantial certainties but instead mere risks.

II. COPYTORT & AMATEUR DIGITAL REMIX

I coin the term "copytort" to make a point about what I see as the lack of sophistication in copyright theorizing with regard to certain issues that are only best understood by bringing to bear elements of tort law and theory. In short, copytort is copyright that takes tort seriously. The following discussion will only develop as much copytort theory as is necessary for the present purpose, namely, the development of a more sophisticated understanding of amateur digital remix. In the concluding remarks, I will indicate some directions in which copytort, understood as a top-down theoretical approach, can be, and should be, further developed. This is in keeping with a methodological approach first developed elsewhere.³³

Part II.A below will draw some basic connections between tort and copyright. Part II.B will then discuss the emergence of the fault standard in tort law generally and the normative evolution in tort law that brought about this emergence. Part II.C will then focus on abnormally dangerous activities, as they have traditionally served as an exception to the fault liability rule in tort generally, and thus, the issue arises as to whether copyright infringement is especially deserving of this minority rule for parallel reasons.

Finally, the last Part II.D will examine trespass to land, which has often been invoked as an apt comparison when the strict liability rule is invoked in copyright.³⁴

A. *Background Connections Between Tort and Copyright*

Copyright infringement is a tort.³⁵ In light of this uncontroversial legal fact, it is odd that, as a practical matter, copyright and tort law have little to

33. See generally STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* (2004) (arguing that legislators must consider social norms in order to effectively create copyright laws).

34. See generally Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 66-68 (2009).

35. "Courts have long recognized that infringement of a copyright is a tort, and all persons concerned therein are jointly and severally liable as such joint tort-feasors." *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923).

do with one another on an overt, doctrinal level. Lawyers are not typically taught to see the tort-related aspects of copyright. This claim is verified by the fact that copyright casebooks say little with regard to tort and tort casebooks say little with regard to copyright.³⁶ This lack of conceptual overlap is unfortunate, however, as confusion may result. For instance, by failing to recognize copyright infringement as within the ambit of tort, tort scholars make statements about tort generally that would not be so obviously true were they to explicitly include copyright into the underlying subject matter under purview. For example, tort commentators sometimes note that recovery for pure economic loss is restricted in tort.³⁷ Copyright infringement is presumably not considered when these comments are made. Recovery for economic loss is a core remedy in copyright, along with statutory damages.³⁸ It is clear, then, that failing to take notice of copyright infringement carries the potential to lead astray commentary on tort. We will see that the reverse is true as well—that copyright can benefit from incorporating a more sophisticated understanding of tort law.

The first issue is whether there might be a sound explanation for the disconnect between copyright and tort. One possible explanation for why tort and copyright are not much discussed together is because the former is a common law creation while the latter is a statutory creation. If this is the explanation, it is curious to note that standard definitions of tort do not include a common law origin as essential.³⁹ A tort is aptly described as an injury for which civil redress is available.⁴⁰ Such civil redress could come via statute instead of common law, however. In short, the fact that tort happened to emerge in the common law is no reason to think that such emergence is essential to tort. It is basic philosophical error to mistake coincident features with essential features.⁴¹ Punitive damage caps are perhaps the most important instance of this phenomenon.⁴² Once again, the

36. For example, the dominant casebook in tort, *Prosser*, contains no copyright cases, nor is copyright infringement an entry in the book's index. Nor do the indices of leading copyright casebooks contain entries for core tort concepts such as "fault" or "negligence."

37. MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 268 (6th ed. 1996) (noting that "the courts have not protected economic interests as extensively as those involving physical security of [a] person and property . . .").

38. 17 U.S.C. § 504(a) (2006) (providing the remedies for copyright infringement include the copyright owner's actual damages and any additional profits of the infringer or statutory damages).

39. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 14 (2d ed. 2008) (explaining "[t]ort law need not be judicial in origin"). The authors then give a series of examples of statutes creating and defining the "general parameters of tort liability." *Id.*

40. *Id.* at 3 ("In sum, to commit a *tort* is to act in a manner that the law deems wrongful toward and injurious to another, such that the other gains a right to bring a lawsuit to obtain relief from the wrongdoer (or *tortfeasor*). *Torts* in turn refers to a collection of named and relatively well-defined legal wrongs that, when committed, generate a right of action in the victim against the wrongdoer.").

41. Cf. Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 908 ("[C]orrelation is not causation . . .").

42. See generally American Tort Reform Association, Punitive Damages Reform,

reverse is true as well; important copyright doctrines have emerged through common law processes. This is true for two of the most important and contentious doctrines in American copyright law: the doctrine of fair use and the set of doctrines that together make up indirect or secondary infringement.⁴³ The overall point is that just as tort law is becoming more statutory, copyright law has a longer, more diverse history as a common law phenomenon than is commonly noted. Thus, any seeming common law versus statutory law divergence in origin between the two appears not to provide a conceptual basis for failing to seek a richer synthesis of tort and copyright.

Another possible explanation is that these two areas of the law have little in common because the underlying subject matter is fundamentally different. Traditional tort concerns things tangible while copyright concerns things intangible. Tort law at its core is about sticks and stones and breaking bones while copyright is about the evanescent notions of unauthorized use of intangible expression. These types of property may reasonably be thought to obey fundamentally different laws. As property scholars going back to John Locke have long noted, a fundamental defining feature of property is scarcity.⁴⁴ By contrast, creative works have no natural scarcity; once they exist, they exist for all unless copyright law, encryption, or some other means of creating an artificial scarcity can be devised.⁴⁵ Thus, while copyright infringement may be a tort in some formal sense, yet, in practical terms, the divergent characteristics of tangible versus intangible property may mean that copyright and tort have little in common. On closer inspection, however, this argument is faulty. Tort has long protected intangible interests such as reputation and privacy.⁴⁶ Thus, the distinction between tangible and intangible interests does not provide a

<http://www.atra.org/issues/index.php?issue=7343> (last visited Sept. 30, 2010) (illustrating the various states' statutory tort reform with respect to punitive damages).

43. See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61–63 (1911) (recognizing a form of contributory copyright infringement); *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4,901) (establishing the common law doctrine of fair use); 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.04[A][3] (rev. ed. 2010) (discussing the longstanding common law origins of contributory infringement).

44. Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1258–59 (2000) (“Property is scarce. Real property is finite, and while opportunities to increase the total amount of personal property are being continuously discovered, individuals have access to, at any one time, a limited amount of personal property.”); see JOHN LOCKE, *OF CIVIL GOVERNMENT: THE SECOND TREATISE* 24 (Wildside Press 2008).

45. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 58–59 (2001) (explaining that, “[I]nformation is naturally nonrivalrous. If you use it, I still have as much left as before. It is also naturally nonexcludable.”). In turn, the law creates a monopoly right to remedy this problem. See also Hetcher, *supra* note 7, at 975 (“Creative works are non-rival in their consumption in as much as consumption by one person does not mean there is any less—of a book, for instance—to be consumed by another person.”).

46. See, e.g., 3 RESTATEMENT (SECOND) OF TORTS §§ 558–59 (1977) (discussing tort law protection of reputation under the cause of action for defamation); *id.* § 652A (discussing tort law protection of privacy from invasions of privacy).

rationale for jettisoning the project of seeking a better integration of tort and copyright.

Surely, it is evidence that better integration is needed when one considers that a core battle in tort jurisprudence between the economists, the corrective justice theorists, and the civil recourse theorists⁴⁷ finds almost no echo in copyright law. Yet the distinctions that divide these theorists⁴⁸ would appear to have purchase in copyright as well.⁴⁹ For example, to the extent that the purpose of tort is to allow victims of injuries to seek corrective justice for their injuries, a parallel justification would easily translate to copyright infringement—namely, the private cause of action for infringement provided by the statute can be seen as providing a mechanism for owners of infringed upon works to seek corrective justice or civil recourse for the wrong done to them.⁵⁰

We see, then, that the jurisprudence of copyright is insufficiently fine-grained. There is an important debate in tort regarding the possibility that private tort suits as a whole are inefficient such that it would be welfare maximizing to administrate injuries in a different manner altogether, such as a social insurance system of the sort maintained in New Zealand. Coleman, for instance, has defended a corrective justice account of tort liability, and yet is open to a New Zealand model as well.⁵¹ For Goldberg and Zipursky, by contrast, the right to seek civil redress for private wrongs is at the core of what tort is about, and thus, it would not be an alternative to move to a system such as the New Zealand model that by-passes the availability of private redress.⁵² The obvious question is raised: say, if Goldberg and Zipursky are right, doesn't this entail that the civil recourse

47. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695–99 (2003).

48. See, e.g., Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1540 n.48 (2006) (construing that civil recourse theorists assert that “[a] private right of action against another person . . . exists only where the defendant has committed a legal wrong against the plaintiff and thus violated her legal right” as overbroad (quoting Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5 (1998))); Zipursky, *supra*, at 56 (“This point applies in the context of every kind of tort. Someone who uses another’s property without consent, absent some justification, has trespassed and invaded another’s legal rights in his property whether or not she ultimately compensates him.”).

49. See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (explaining how copyright law should promote efficient allocation of resources).

50. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 324–26 (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 2–3 (1999). See generally Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995) (arguing that tort law instantiates a political conception of fair loss allocation).

51. John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1515 (2002) (“Rather, it is to note that the later Coleman, armed with a deep and subtle appreciation of tort as a practice tied to a conception of justice, is no less anxious than the early Coleman to avoid embracing tort. Even as he now gingerly embraces tort, Coleman is looking past it, eyeing New Zealand, wondering whether we ought to be there instead.”).

52. *Id.* at 1517 (“Tort and its underlying principle of corrective justice are ours; we are stuck with them, and we are left to explain and understand them.”).

rationale be applied to copyright as well? And if not, why not? The question is whether copyright infringement might as well be administered as a social insurance system rather than by means of private causes of action. If copyright is to become more normatively sophisticated, it must take these sorts of debates to heart. Currently, copyright law does not do so. Instead, it presents a normatively flat world in which all policy questions reduce to determining the proper scope of the property right. The justification as to why copyright owners are given a private cause of action and the details of what this remedy provides are justified in terms of social welfare.⁵³ By contrast, the whole point of tort is to ask a sort of normative question that is more subtle such that its answer does not directly implicate particular theories of property. To better appreciate this distinction, note that the debates that divide, say, corrective justice theorists from economists or even from one another do not typically reduce to squabbles regarding, for example, whether one is a Lockean property theorist or not.

Consider next a second and perhaps more fundamental failure of copyright doctrine to address the level of sophistication found in tort generally. The failure can again be discerned most straightforwardly by looking at the structure of casebooks in tort, which traditionally divide up the subject matter according to the tripartite liability standards of intentional torts, negligence torts, and strict liability torts.⁵⁴ Once this core distinction is noted, an interesting fact becomes immediately apparent, namely, that this tripartite liability structure does not carry over into copyright. As is stated, *de rigueur*, by courts and commentators, copyright infringement is a strict liability tort.⁵⁵ Not only is it a strict liability tort, but this fact appears to be taken for granted. Tort casebooks typically seek to provide some sort of policy rationale for the three standards.⁵⁶ By contrast, it is typical in copyright to simply state the fact that infringement is a strict liability standard, without further explanation.

53. The instrumentalist justification for doing so is that the property rights will provide stronger protection to owners in a regime in which the owners will have a legal means to pursue infringers and thus hopefully deter the infringements in the first place. On an economic/utilitarian justificatory model, all rationales in the end are public—e.g., serving the greater good, public welfare, etc. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1445–48 (1989). As such, on this model, a private cause of action such as granted under § 501 is viewed as allowing owners to function as private attorneys general. The logic of giving the enforcement right to the owner of the property right is based on the venerable and plausible assumption that individuals tend to act so as to promote their self-interest. The Walt Disney Company is most interested in Disney's self-interest and thus giving Disney a private cause of action, rather than say Viacom or the California attorney general, is most likely to lead to the most zealous defense of Disney's copyrights.

54. See, e.g., FRANKLIN & RABIN, *supra* note 37, chs. II, VII, XII.

55. *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (describing copyright infringement as a "strict liability tort"). This general rule predates the Copyright Act of 1976. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) ("Intention to infringe is not essential under the [1909] act.").

56. See, e.g., FRANKLIN & RABIN, *supra* note 37, chs. II, VII, XII.

One might naturally assume that the reason for this is that the rationale for a strict liability standard is somehow obvious such that it is not in need of explanation or justification. Nothing could be further from the truth. Instead, a basic question must be addressed: why is copyright law bereft of liability standards that are based on negligence or intentional wrongdoing? Given that the fault standard is most pervasive in tort law generally, then other things equal, should we not expect to see the same in the domain of copyright infringement as well, and if not, why not? What, if anything, about copyright justifies the exceptional treatment? The choice of a liability standard is not an inconsequential point of law, but just the opposite. A strict liability standard strongly favors copyright owners over unauthorized users—or in tort terms, victims over injurers—as they may prevail in litigation without establishing either negligence or intentional wrongdoing by the defendant. Framing the issue in this light, it is obviously equally true that the general rule in tort favors defendants. In other words, there is no neutral rule; either rule favors one class of potential litigants over the other. At least one finds a justification for the latter rule in general tort doctrine.⁵⁷ The salient question for present purposes is the divergence in treatment across legal subject matter areas. This divergence leads us to the discussion in Part II.B. There are different forms of argument one might offer with regard to determining appropriate liability standard or standards for copyright law. The previous discussion lends support for developing a form of coherence argument for extending fault liability to copyright.

B. *The Emergence of the Modern Fault Standard in Tort*

Early tort law did not tease out a fault standard, *per se*. The earliest form of action was trespass, which offered a tort remedy for direct and forcible injuries.⁵⁸ In other words, the question asked was not whether the injurer acted in a faulty manner but whether her action caused the injury directly and forcibly. The other main so-called ancient form of action was trespass on the case.⁵⁹ Trespass on the case provided a cause of action for injuries less direct or forcible. Although trespass on the case was one of the early introductions of a fault requirement for recovery, in practice, courts may have presumed injurious conduct to be wrongful.⁶⁰

57. 2 RESTATEMENT (SECOND) OF TORTS § 328A, cmt. b (1965) (“[S]uch exceptional cases are limited, in general, to legislative enactments, or to relations in which the defendant has undertaken some special responsibility for the safety of the plaintiff or his property. It is not within the scope of this Restatement to state when such special relations may exist.”). Indeed, the rule is found in all U.S. jurisdictions.

58. *See id.* § 158.

59. *See generally* Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (discussing “trespass on the case”).

60. *See* Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 19–21 (1970); *see also* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 104 (1908).

The negligence or fault standard replaced trespass as the dominant standard, however.⁶¹ While the trespass rule traces its beginnings to Medieval England, the fault standard itself is of more recent origin.⁶² This origin is often put in the early to mid-19th Century. Professors Anthony J. Sebok, Goldberg, and Zipursky trace a line of thinking from earlier cases that lead into leading cases such as *Brown v. Kendall*⁶³ and eventually flowers with *MacPherson v. Buick Motor Co.*⁶⁴

The rationales given for ushering in the fault standard have come in the form of moral arguments. Coleman writes, “In the received view, the substitution of fault for causation marked an abandonment of the immoral standard of strict liability under Trespass (which, after all, imposed liability without regard to fault) in favor of a moral foundation for tort liability based on the fault principle.”⁶⁵ The essence of the moral argument is that it is unfair to hold the injurer liable for injuries that were not her fault. If she is not morally responsible for them, why should she be financially responsible?

As stated, the previous argument is deontological in form. Law and economics scholars have also justified the move to the fault standard from an economic or utilitarian perspective.⁶⁶ Posner writes, “Perhaps, then, the

61. See *Brown v. Collins*, 53 N.H. 442, 451 (1873) (rejecting strict liability in favor of the negligence rule); *Losee v. Buchanan* 51 N.Y. 476, 488 (1873) (“No one in such case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person.”); see also *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (holding that strict liability is only imposed when the high degree of risk associated with an activity cannot be eliminated through due care).

62. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 350 (3d ed. 2005) (“The old common law had very little to say about personal injuries caused by careless behavior. A good many basic doctrines of tort law first appeared before 1850; but it was in the late nineteenth century that this area of law (and life) experienced its biggest spurt of growth.”).

63. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850) (“[W]hat constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.”).

64. GOLDBERG, SEBOK & ZIPURSKY, *supra* note 39, at 59, 760–64, 843 (analyzing the history of and reprinting excerpts from *Kendall* and *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

65. Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 1), 1 L. & Phil. 371, 374 (1982).

66. In normative legal scholarship, an economic approach is sometimes contrasted with a “moral” approach. See, e.g., Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 292–93 (2007). On a more sophisticated approach, however, an economic approach is not viewed as an alternative to a moral explanation but instead as an alternative moral explanation, in particular, a consequentialist one that is grounded in either utilitarianism or some variant, such as wealth maximization. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–34 (1972); Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 908 (2001).

dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.”⁶⁷ Posner makes this claim not merely in an abstract normative sense. Famously, he argues that the best explanation of tort law doctrine is attributable to its welfare-promoting characteristics.⁶⁸ Thus, we see that both teleologists and deontologists argue that the path of the law has been from strict liability to fault liability for reasons that are compelling from each of the two dominant normative perspectives: deontology and utilitarianism.

My present concern is not whether these are convincing arguments from a top-down normative perspective. For present purposes, what matters is that the fault standard won out in the case law. This doctrinal development is of interest because it raises the obvious question: if a heightened moral sensitivity toward fairness and social welfare dictated a move to the fault standard in tort generally, then why not in copyright as well? Is it that the same moral arguments do not apply for some reason, or is there some other explanation?

To answer these questions, the place to begin is with the orthodox rationales that have been provided for a strict liability rule in copyright. Leading hornbook author Marshall Leaffer argues, “The customary explanation for excluding innocence as a defense to copyright infringement is that, as between the copyright owner and the infringer, the infringer is better placed to avoid the error.”⁶⁹ This justification is inadequate from the

67. Posner, *supra* note 66, at 33. Other economists argue that strict liability causes actors to take too much precaution and for potential creators to take too little precaution against being injured. In effect, strict liability turns injurers into insurers of victims’ losses and creates a moral hazard as potential victims are not incentivized to take due care to avoid being injured. See Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 349–61 (1996). It should be noted that there have been defenders of the morality of strict liability. The best known example is Richard Epstein. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 40 (1985).

68. Posner, *supra* note 66, at 32–33.

69. MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 476 (3d ed. 1999); see *ABKCO Music, Inc. v. Harrison Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983) (“[A]s a practical matter, the problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders.”); PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 8–9 (1994) (“An author’s right to ward off unauthorized copying of his work is much like a homeowner’s right to keep trespassers off his land.”); 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.08 (rev. ed. 2010) (“Innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personalty. In each case, the injury to a property interest is worthy of redress, regardless of the innocence of the defendant.”). This claim begs the question because Congress did not intend a certain level of protection, per se, but instead the level of protection that serves to promote the larger goals of copyright—promotion of the arts and sciences. The obvious problem with this claim is that it also begs the question as to why conversion is an apt analogy in the first place. Conversion is an intentional tort and thus to the extent that some infringements are best characterized as accidental, the analogy fails. 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 8.1, at n.1 (3d ed. 2005) (“This rule is dictated by the more general rule that innocence is no defense to an action for copyright infringement.”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L.

perspective of modern tort law, however. To see this, consider a common type of tort fact pattern: inadvertently hitting a pedestrian while driving an automobile. Now, imagine two different ways in which this might happen. In the first, the victim runs out into the street and the driver is unable to stop in time despite the fact that she is not driving too fast for conditions and is paying attention to the road. In the second, the driver hits the pedestrian because the driver is not paying attention to her driving but is instead text messaging for some casual, non-emergency reason. In both cases, it is indeed true that the driver is in the better position to avoid the injury for the simple reason that she could alternatively have stopped her car in time to avoid the collision. To invoke a venerable tort doctrine, the driver had the “last clear chance” to avert the injurious collision.⁷⁰

What distinguishes these two scenarios is that in the former, the driver is without fault, both morally and by the lights of tort law; while in the second scenario, the driver has both committed a moral wrong and will be found legally liable due to her negligent behavior that led to the accident. It is clearly negligent behavior for a driver to hit a pedestrian for no better reason than that she was distracted from the road due to text messaging. The distinction at issue in abstract tort terms is that between faulty versus non-faulty, accidental injuries to others.

What is surprising is that this defining distinction of tort law is simply absent from copyright law despite the fact that copyright infringement is agreed by all to be a tort. Once one bears this distinction in mind, the question for Leaffer’s rationale for strict liability in copyright is the following: why should the mere fact that the infringer is better placed to avoid the injury be sufficient for liability?⁷¹ Shouldn’t it matter whether the injurer was acting in a faulty manner in causing the injury? It does in regular tort; why not in copytort? We see then that arguing from first principles ensconced in modern tort doctrine, we are led to the conclusion that the liability standard for copyright infringement should incorporate a fault standard, as it is conventionally thought to be immoral to make someone liable for injuries that occurred through no fault of her own. A copyright-centric rationale such as Leaffer’s simply fails to address the fault issue.

In copyright, the distinction is papered over with the notion of “innocent infringement,” which is contrasted with “intentional infringement.”⁷² In this manner, copyright doctrine is seeking to manage

REV. 139, 180 (2009) (“[N]otice does little for authors save for negating an innocent infringement defense, which does not provide a full defense to infringement but rather serves only to mitigate statutory damages.”).

70. “Last clear chance” refers to the doctrine that a plaintiff who committed contributory acts of negligence may nonetheless recover damages against a defendant who had the last opportunity in time to avoid the damage. *See* 2 RESTATEMENT (SECOND) OF TORTS §§ 479–80 (1965).

71. LEAFFER, UNDERSTANDING COPYRIGHT LAW, *supra* note 69, at 476.

72. *Compare* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (finding former Beatle George Harrison to be an innocent infringer when he unintentionally and unconsciously copied the tune of another song), *and* N. Music Corp. v. Pacemaker Music Co., No. 64 Civ. 1956, 1965 U.S. Dist. LEXIS 6864, at *3 (S.D.N.Y. Nov. 5,

with two piles in which to lump injuries for which redress may be owed, instead of three. It would be as if tort law attempted to manage with only intentional torts and unintentional, that is, innocent torts. This will not do in modern tort law, which, once the intentional injuries are set aside, insists upon asking of the unintentional ones, that is, the accidental ones, whether the accident was the result of faulty or negligent behavior on the part of the injurer. What is missing in copyright law is a notion of *accidental infringement*, per se—an infringement that is not intentional yet which must still be evaluated for fault.

C. *Abnormally Dangerous Activities*

It is at this juncture in the overall argument that remix, and in particular amateur remix, merits reentry into the discussion. I will argue below that it is in the context of amateur remix that it is most fitting to characterize infringements as accidental. Before progressing to this discussion, however, there is yet more groundwork to be laid. The findings of the above discussion are so startling as to demand a second look before moving on. The best means of doing this is by raising the following possibilities. Within traditional tort law, exceptions to the fault rule have long been recognized. Thus, we must look at these in order to determine whether a parallel rationale might be at work for copyright infringement. The paradigmatic types of fact pattern in tort that have merited exceptional treatment are injuries caused by dangerous activities such as using or keeping explosives or wild animals, on the one hand, and trespass to land, on the other hand.⁷³ The *First Restatement of Torts* utilized the category of “ultrahazardous” activities while the *Second Restatement of Torts* refers to “abnormally dangerous” activities.⁷⁴ Looking at the law regarding these sorts of activities will give us a better understanding as to whether copyright infringement may be plausibly understood to fall within the ambit of the strict liability exception as it is found in tort law.

Under the *First Restatement*, if one injured another while engaging in an ultrahazardous activity, one’s actions would be held to a strict liability standard.⁷⁵ Under the *Second Restatement*, as noted above, the wording

1965) (“[I]f copying did in fact occur; it cannot be defended on the ground that it was done unconsciously and without intent to appropriate plaintiff’s work.”), with *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 545 U.S. 913, 941 (2005) (reversing summary judgment and remanding for further proceedings on whether defendants were liable for intentionally inducing infringement).

73. Compare *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 514 (2d Cir. 1931) (applying strict liability where explosives were held in quantity in a dangerous place), and *Mills v. Smith*, 673 P.2d 117, 120 (Kan. Ct. App. 1983) (affirming strict liability on defendant owners for injuries suffered by a minor inflicted by a lion), with *United States v. Osterlund*, 671 F.2d 1267, 1267–68 (10th Cir. 1982) (applying trespass liability where defendant’s residence encroached on land owned by plaintiff).

74. Compare 3 RESTATEMENT (FIRST) OF TORTS § 520 (1938), with 3 RESTATEMENT (SECOND) OF TORTS § 520 (1977).

75. 3 RESTATEMENT (FIRST) OF TORTS § 520 (1938) (“An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be

was changed to the test for “abnormally dangerous” activities.⁷⁶ That *Restatement* calls for courts to apply a multi-factor test, which includes the following factors:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.⁷⁷

Courts and commentators have generally agreed that there is no magic number of these elements that must be satisfied.⁷⁸

Consider how these factors would apply to amateur digital content. The first factor requires a “high degree of risk of some harm to the person, land or chattels of others.” This factor contains two operative parts: first, the high degree of risk of some harm; second, the person, land, or chattels of others. The first part will often be satisfied in infringement cases as the factor merely calls for some harm, as the focus is on the degree of risk, not the degree of severity of the harm. Amateurs as unauthorized users of copyrighted content may indeed sometimes cause harm. For instance, a pornographic remix of a *Harry Potter* movie may taint the characters if the remix is disseminated to the public and widely viewed. As to whether there is a “high degree of risk,” while this phrase is left undefined, it certainly seems possible in some instances. Using the same example, there would appear to be a high degree of risk of at least some harm from a pornographic remix of a *Harry Potter* movie. The key point, however, is that this would be judged on a case-by-case basis, and it appears that the vast run of amateur remix would cause no harm. A different story might pertain to commercial remix, but it is Lessig’s goal to assimilate the arguments for commercial and amateur remix—not mine.⁷⁹

eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.”).

76. 3 RESTATEMENT (SECOND) OF TORTS § 520 (1977).

77. *Id.*

78. See *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991), amended by 817 P.2d 1359 (Wash. 1991); see also 3 RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977) (“In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily.”).

79. Lessig downplays the distinction between commercial and non-commercial uses. LESSIG, *supra* note 5, at 55. Lessig compares jazz musicians of old and their tolerated practice of improvising on works of others and asks rhetorically why the same should hold for the contemporary parallel, music mash-ups: “Why should it be effectively impossible for an artist from Harlem practicing the form of art of the age to commercialize his creativity because the costs of negotiating and clearing the rights here are so incredibly high?” *Id.* at 105. His response, “The

A good bit of evidence as to how the U.S. Copyright Office views harm can be seen in its *Report on Orphan Works* and legislative proposal.⁸⁰ While this document has not passed into law, it is highly significant because the document acknowledges that it would often be the case that there would be no damages, even were the owner of the orphan work to surface.⁸¹ Given that everyday Internet users are capable of grabbing content from a seemingly unlimited variety of sources of online content, there is likely to be a good deal of usage of orphan works in amateur remix. Sometimes the ownership of this work will be evident, as is especially true for mainstream commercial culture such as film, music, and books. But often as well, content will be found from sources that provide no ownership information. Thus, these sorts of remix will be comprised of de facto orphan works, and judging from what the U.S. Copyright Office has stated, “reasonable damages” will often be little or nothing.⁸² In the Report, the U.S. Copyright Office goes so far as to provide a special note concerning non-commercial works.⁸³

The second factor is the “likelihood that the harm that results from it will be great.” The *Restatement* does not define “great,” but the sorts of harms the *Restatement* considers as paradigmatic examples include being injured by dynamite.⁸⁴ As just noted, typically there will be no harm. So, moreover, there will typically not be great harm. But unlike Lessig, I acknowledge that great harm is possible, say, if a slightly altered copy of a newly released movie were made available online.

The third factor considers the “inability to eliminate the risk by the exercise of reasonable care.” One response to this factor is that it shows the inapplicability of the whole framework to copyright infringement, which, one might argue, is by its nature akin to an intentional tort, such that it makes no sense to talk about eliminating risk. One might argue, for example, that when the DJ who goes by the name Girl Talk copies a song in order to use it in a mash-up, it makes no sense to ask whether he could have eliminated the risk through reasonable care. The unauthorized copy was not the accidental by-product of some other action like accidentally hitting a pedestrian while driving. Rather, it was his intention to make the unauthorized copy.

answer is: for no good reason, save inertia and the forces that like the world frozen as it is.” *Id.* In other words, these remix artists should be able to “commercialize” their “creativity.” *Id.* The following remark is further evidence that Lessig seeks to legalize commercial remix as well: “There should be a broad swath of freedom for professionals to remix existing copyrighted work . . .” *Id.* at 255.

80. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (2006).

81. *Id.* at 86–87, 115–19.

82. *See id.* at 49–50.

83. *Id.* at 82.

84. *See Catholic Welfare Guild, Inc. v. Brodney Corp.*, 208 A.2d 301, 301, 303–04 (Del. Super. Ct. 1964) (applying strict liability to defendant where plaintiff’s property was damaged from defendant’s explosive blasting across the street).

Based on the above discussion, there is a plausible rejoinder to this argument, which is that it is often most accurate to see unauthorized copying of a third party's work as accidental in nature.⁸⁵ For instance, this would seem like the most felicitous manner to view instances of so-called "innocent infringement."⁸⁶ The preeminent case involving innocent infringement is *ABKCO Music, Ltd. v. Harrisongs Music, Ltd.*⁸⁷ The court was clear that it did not think the defendant intended to make an infringing copy. The court noted that this was an instance of "subconscious copying."⁸⁸ Commentators have focused on the element of defendant's knowledge when discussing this case.⁸⁹ Note, however, that it is meaningful to ask whether there was an inability to eliminate the risk by the exercise of reasonable care. Indeed, it would appear the defendant might well have avoided the risk. It is not that the unconscious copying was of an obscure song. Rather, it was a hit song by well-known artists who would have been recognized by many people with exposure to the work, particularly so, one would think, for people in the music business.

The duty that negligence law sets is for actors to take due care to avoid causing harm to others. Thus, one might copy without authorization and yet take reasonable care to avoid the risk of harm. This is arguably an apt description of the norm in the fan fiction community, which has been an early and venerable source of amateur-generated content.⁹⁰ The norm proscribes commercialization of fan works.⁹¹ One reason to do so is to avoid the potential to cause market harm to the owner's work. In negligence terms, this can be characterized as an attempt to exercise due care to avoid harm through infringement.⁹²

85. Tort law distinguishes between accidental and intentionally harmful activities. For instance, in *Cole v. Hibberd*, No. CA94-01-015, 1994 WL 424103, at *2 (Ohio Ct. App. 12 Dist. Aug. 15, 1994), the court noted that the plaintiff could not choose which cause of action it preferred, that there was a fact of the matter as to whether the injury was caused intentionally or accidentally. Behavior online and in virtual worlds, for example, is bringing about more accidental infringements. Amateur machinima is a good example of an emerging behavior, much of which is plausibly fair use, with the implication that, that which is not may be accidental infringement. Alex Pham, *Straight from Video*, L.A. TIMES, Oct. 11, 2005, <http://articles.latimes.com/2005/oct/11/business/fi-machinima11> (describing the machinima technique of creating movies using the digital characters from video games as controlled by their gamers turned directors).

86. See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998–99 & n.12 (2d Cir. 1983).

87. *Id.*

88. *Id.* at 997 (affirming the trial court's conclusion "that the substantial similarity coupled with access constituted copyright infringement, even though subconsciously accomplished").

89. Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 133 (2002).

90. JENKINS, *supra* note 1 at 162–77.

91. See Casey Fiesler, Note, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 752 (2008) (noting two situations in fandom where attribution is considered important).

92. Note that it does not matter if defendant consciously sought to exercise due care—as was famously argued by Holmes long ago, negligence is an objective standard. O.W. HOLMES, JR., THE

There may, however, be situations in which there is an inability to eliminate the risk of harm. For example, in the case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*, it was arguably substantially certain that by publishing the work from former President Gerald Ford's book in its magazine that *The Nation* would injure Ford in light of the specific agreement between Ford and *Time* that *Time* would not publish the work if it appeared elsewhere first.⁹³ While the editor of *The Nation* would not have been privy to this agreement, as a magazine editor, it is likely fair to say that he was "substantially certain" that this particular sort of harm would result.⁹⁴

Contrasting the above two sorts of fact patterns demonstrates why the dichotomy of intentional infringement versus innocent infringement offered in copyright doctrine is not sufficiently fine-grained. The category of intentionally wrongful activity adequately captures the defendant's actions in *Harper & Row*, but clearly, it is inadequate to characterize the copying that occurred in *Harrisongs* as simply innocent. It is innocent if by this we mean simply that there was not a substantial certainty of injury and thus no intentional tort. But if the term "innocent" is used this broadly, then the driver who accidentally runs down the pedestrian while text messaging is innocent as well, inasmuch as her injurious act was not intentional.

The fourth factor considers the "extent to which the activity is not a matter of common usage." How this factor applies would depend on the details of the unauthorized copying. In *Harper & Row*, for example, the editor of *The Nation* had the explicit goal of "scooping" *Time* magazine on the juiciest bits of Ford's autobiography, namely, those facts surrounding Ford's presidential pardon of Richard Nixon.⁹⁵ This is a very different type of activity from, say, the sorts of activities lauded by Professor Henry Jenkins of teenagers writing fan fiction based on well-known characters.⁹⁶ This sort of activity is very common while the behavior engaged in by *The Nation* is not. Indeed, there is every reason to believe that these sorts of

COMMON LAW 112-13 (1881).

93. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985) ("Time's cancellation of its projected serialization and its refusal to pay the \$12,500 were the direct effect of the infringement. . . . Rarely will a case of copyright infringement present such clear-cut evidence of actual damage."). The Second Circuit certainly treated the harm as direct and imminent. *Id.* at 545.

94. As discussed below, there are two means to satisfy the intentionality requirement for an intentional tort. One can explicitly intend some outcome, such as that one's hand comes into forcible contact with another's nose, or second, one can intend some other outcome, but yet the injurious, tortious outcome is "substantially certain" to result. 4 RESTATEMENT (SECOND) OF TORTS § 825 (1979).

95. *Harper & Row*, 471 U.S. at 542-43. To get a sense of the powerful thrust of amateur-generated content, one need only go online and search about for the quickly growing body of amateur works that draw from the *Twilight* book and film series. See, e.g., Lipton, *supra* note 13 (analyzing four case studies relating to the *Twilight* franchise).

96. JENKINS, *supra* note 3, at 131 ("Fans are the most active segment of the media audience, one that refuses to simply accept what they are given, but rather insists on the right to become full participants.").

amateur creative activities will continue to become more common as a function of technical advances. Thus, technological advance creates a secular trend against such activities being subject to a strict liability standard by the lights of general tort doctrine, inasmuch as it creates a secular trend toward their production, such that they increasingly become a matter of “common usage.”⁹⁷

In light of this factor, consider a venerable explanation for strict liability doctrine developed by Professor George Fletcher in his famous article, *Fairness and Utility in Tort Theory*.⁹⁸ He first notes that the notion of ultrahazardous or unreasonably dangerous activities cannot be the core explanation of strict liability as tort law applies a fault rule for injuries that result from driving automobiles despite the fact that this is clearly a dangerous activity.⁹⁹ Fletcher’s explanation for when tort law applies a strict liability rule relies on the purported non-reciprocal nature of the risks created in certain types of activities, such as blasting. The more common an activity becomes, the more likely it is that a larger degree of reciprocity of risk comes about in which the same social groups both create risks for others due to their engaging in the activity and are themselves subjected to the same sort of risks due to engaging in the activity.¹⁰⁰ In this light, we can view the so-called “democratization” of content creation, which is commonly viewed as a hallmark of Web 2.0. Because the creation of amateur digital content is an increasingly pervasive activity, on the basis of Fletcher’s reciprocity argument, one would predict that the risks produced by creators would become increasingly reciprocal, and thus, there would be ever less reason to apply a strict liability standard.

The fifth factor considers the “inappropriateness of the activity to the place where it is carried on.” Once again, this factor would appear to vary depending on the type of unauthorized copying. Consider a website such as the one run by Heather Lawver, a teenager who maintained a website for children to post fan fiction about *Harry Potter*.¹⁰¹ A particular posting to this site surely could not be characterized as inappropriate to the place where it was carried on given that the very purpose of the site was to serve as a venue for such works. Indeed, this factor highlights one of the aspects that makes cyberspace so pregnant with possibility—that new places can be created for new forms of activity such that, almost as a matter of definition, the sort of activity at issue is appropriate to the place.¹⁰²

97. As noted earlier, it is increasingly common to make references such as “creator/consumer.” See *supra* note 13 and accompanying text.

98. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

99. *Id.* at 543–44.

100. *Id.*

101. Heather L. Lawver, *The Daily Prophet Needs Your Help!*, <http://www.dprophet.com> (last visited Oct. 1, 2010).

102. *But see* CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 196–202 (2008) (discussing the website meetup.com, which allows users to set up affinity groups of their own choosing). While the meetup.com website was okay with groups for witches and stay-at-home moms, another website made the decision to censor a group for anorexia. *Id.* at 197, 200, 203–05.

Finally, the sixth factor looks to the “extent to which its value to the community is outweighed by its dangerous attributes.” For example, as already noted, Jenkins and others have argued persuasively that amateur remix may have great positive social value.¹⁰³ Professor Rebecca Tushnet argues that it has social value due to the fact that its non-commercial nature means that types of works that would otherwise not be created are created.¹⁰⁴ The importance of Tushnet’s point is that it implicitly resists at least one reading of the *Bleistein* non-discrimination principle, which can be read to say that the copyrightability of a work should not discriminate against some forms of content as compared to others. Tushnet is doing precisely this and, in the present writer’s opinion, properly so. Her claim, in effect, is not just that more creative content will be produced but that content of a new and different sort will be produced.¹⁰⁵ Surely, it is a better reading of the constitutional dictate to promote the arts and sciences that this builds in some notion of diversity and quality of content as well as simply a quantitative notion of incentivizing more content creation.

On the other hand, once we open the Pandora’s box of judging the quality or social value of content, we must be open to the prospect of socially harmful content as well. For instance, Professor Ann Bartow has plausibly argued that amateur-generated pornography has a negative social value and should be recognized as such.¹⁰⁶

What are we to conclude, then, from this application of the *Second Restatement’s* § 520 multi-factor test for copyright infringement? As illustrated, there is not one typical sort of situation. In general, however, amateur-generated content does *not* fit the overall profile for strict liability torts based on the § 520 test. We cannot allow the intricacies of the multi-factor test to be the trees through which we lose the forest of the basic sense of the test, which is to apply the strict liability standard to the sorts of activities that are inherently dangerous in the sense that there is a real risk of significant harm and that this risk cannot be dampened through precaution.¹⁰⁷ As I will argue in the next Part, it is typically not the case

103. JENKINS, *supra* note 1, at 278–80.

104. See Tushnet, *supra* note 6, 521 n.20. There is a line of thought in copyright policy that courts should not engage in the qualitative analysis of particular works. This is generally described as the *Bleistein* Doctrine. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903); see also Miriam Bitton, *Trends in Protection for Informational Works Under Copyright Law During the 19th and 20th Centuries*, 13 MICH. TELECOMM. & TECH. L. REV. 115, 131 n.75 (2006). The application of factor (f)—the sixth factor—begs the question as to whether the *Bleistein* Doctrine is tenable, at least in this context.

105. Tushnet, *supra* note 6, at 526–36.

106. Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 812–16 (2008).

107. See *Luthringer v. Moore*, 190 P.2d 1, 5–6 (Cal. 1948) (holding that the question of whether a case is a proper one for imposing strict liability is one of law for the court to decide and applying the strict liability standard to an activity it deemed ultrahazardous); see also 3 RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977) (“The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is

that there is a real risk of significant harm that cannot be reduced through the exercise of due care and so a vast amount of amateur digital content would be excluded from consideration for a strict liability rule on these grounds. Regarding the issue of whether the risk can be dampened through greater precaution, whether this factor is even applicable will depend on the manner in which the amateur digital content was created. As noted above, this factor is inapplicable when the unauthorized copying is intentional, but not all unauthorized copying is most aptly characterized as intentional. While the question of due care is, in general, alien to copyright discourse, for the reasons discussed above, this lacunae is unwarranted and in need of amendment in an approach to copyright that takes tort—particularly accidental infringement—seriously, especially in a world of exploding amateur digital content in which authors increasingly create risk of harm to others but there is not an intention to harm.

D. *Copytrespass*

As mentioned above, the second venerable type of behavior that receives a strict liability standard in traditional tort is trespass to land.¹⁰⁸ In copyright cases and commentary, the analogy is sometimes drawn between trespass to land and copyright infringement. However, what are we to make of this comparison? Typically, when this comparison is brought up, it is in what I would characterize as a conclusory legal fashion, i.e., the comparison is drawn because both sorts of behavior have a strict liability standard attached to them. This fact, qua positive legal fact, is uncontroversial. The harder question is whether these sorts of activities are similar in some intrinsic way that would explain the fact that they each share the exceptional liability standard. Strict liability for land trespass would not justify strict liability in copyright given that one might as well point to the fact of fault liability for trespass to chattel as a justification of fault liability in copyright.¹⁰⁹ In other words, even assuming that trespass is an apt analogy, why think trespass to land is more apt than trespass to chattel?

The obvious first question to ask is what is the justification for the strict liability rule in real property law? The rule has been justified as in keeping

carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.”).

108. See 1 RESTATEMENT (SECOND) OF TORTS § 158 (1965) (discussing the elements of trespass); see also *id.* § 166 (“Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.”); 1 RESTATEMENT (FIRST) OF TORTS § 7 cmt. a (1934) (discussing the distinction between “injury” and “harm,” shedding light on the types of harm envisioned by tort law to be recompensable).

109. See *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 472–73 (Cal. Ct. App. 1996); see also *Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.*, 363 P.2d 175, 178 (Colo. 1961) (“[F]ault of the actor is an essential ingredient of liability [for trespass to chattels].”).

with a special solicitude for the home in the common law in keeping with other doctrines such as the special solicitude as seen in the Fourth Amendment.¹¹⁰ The rule does have long roots in the common law. Indeed, as noted above, the ancient cause of action in tort generally was trespass, in which the liability was strict (so long as the injurious action was direct and forcible). In this sense, the strict liability rule for real property trespassers can be viewed as a remnant of a past in which this was the general rule. Courts sometimes provoke the venerable notion that a person's home is her castle.¹¹¹ The norm intended to be captured in this phrase is that the home deserves special protection. Strict liability provides such protection as it favors owners over trespassers.

Other courts have cast land trespass as a sort of dignitary harm. A leading case is *Jacque v. Steenberg Homes, Inc.*, in which defendant moved a mobile home across the plaintiff's property.¹¹² Likely due to the fact that it was winter in Wisconsin and snow covered the ground, the jury found no compensatory harm to the plaintiff's property. The court nevertheless found harm, noting that,

The action for intentional trespass is directed at vindication of the legal right. . . . The law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded. Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

. . . .

. . . Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished.¹¹³

The court's opinion can be read as discerning what is, in effect, dignitary harm. The notion of dignitary harm is a promising parallel to copyright, inasmuch as a harm to intangible property is also not a physical harm, for the obvious reason that one cannot do physical harm to that which has no physical existence. There is a problem with drawing this

110. See U.S. CONST. amend. IV.

111. See, e.g., *Thomas v. State*, 53 So. 2d 340, 346 (Ala. 1951); see also *State v. Thomas*, 673 N.E.2d 1339, 1342 (Ohio 1997) ("However, there is no duty to retreat when one is assaulted in one's own home. . . . This exception to the duty to retreat derives from the doctrine that one's home is one's castle and one has a right to protect it and those within it from intrusion or attack.").

112. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997).

113. *Id.* at 160.

parallel, however. At least in the United States, copyright is widely viewed as grounded in economic reasoning, which by its nature denies granting *sui generis* normative status to non-instrumentalist notions such as dignity. Dignitary harm on an economic conception is dignitary harm in scare quotes. On an economic *cum* consequentialist approach, the legal recognition of such harms begins and ends with their analysis as constructed and justified solely in terms of their instrumental role in the promotion of utility, welfare, or wealth. Dignity has no independent normative weight in an economic or utilitarian model.

A variety of non-instrumentalist normative approaches may recognize dignitary harms as real and worthy of independent normative recognition and protection. In terms of an actual legal regime that might recognize such harms as deontological primitives, the obvious suggestion is a moral rights approach to copyright. Indeed, in an ordinary language sense of the word “dignity,” it seems transparent that moral rights are dignitary rights. This notwithstanding, from the perspective of the U.S. copyright system, there are no dignitary rights, *per se*.¹¹⁴ This has the important implication that if copyright is to justify a strict liability rule by analogy to trespass to land and its correlative dignitary harms, the justification must be in instrumental terms. In other words, one must provide a plausible account of how it optimizes the instrumental goals of copyright to have strict liability and conceive of the harm as dignitary harm.¹¹⁵

114. See *Gilliam v. Am. Broad. Cos, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”). *But see* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970) (“The [copyright] system provides a fairly useful way to protect an author’s dignitary rights . . .”). Many nations recognize moral rights as they are signatories to the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works art. 2(1), Sept. 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention], available at <http://www.law.cornell.edu/treaties/berne/overview.html>. Article Six protects attribution and integrity, stating:

Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Id.

However, moral rights regimes have had more success in other nations as the United States has really only embraced them with respect to visual art. See generally Berne Convention Implementation Act of 1988, § 3(b)(1), Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended at 17 U.S.C. § 101 (2006)); Visual Artists Rights Act of 1990, § 603(a), Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106A (2006)) (providing special attribution integrity rights only to creators of visual art). “Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner.” 17 U.S.C. § 106A(b) (2006). *But see Gilliam*, 538 F.2d at 26 (enjoining ABC television network from editing the *Monty Python* television program).

115. It is a staple of utilitarian theory, after all, that just because one is a utilitarian (or other

At the level of ordinary language, it is worth asking whether copyright infringement seems intuitively connected with dignitary harm. As a point of reference, note that when moral rights violations are discussed, the factual contexts are typically ones in which the infringing acts are quite intentional,¹¹⁶ and second, that when it comes to the world of amateur digital content, it is inapt in many situations to conceive of the infringing acts as an intentional affront to dignity. Importantly, there is a connection between being intentional and being an affront to dignity, by the lights of established deontological approaches.¹¹⁷ It is obvious to ordinary morality generally to view an intentional harm to another as morally worse than an accidental harm, all else equal. The obvious implication for copyright, then, is that whether a particular act of infringement is an affront to dignity or not will vary depending on the degree of intentionality in the infringing act.

As noted earlier, formal copyright doctrine does recognize the notion of “intentional infringement,” although the factor goes to the question of remedy, not liability itself. The question is raised, then, in what sense are non-intentional infringements properly seen as affronts to dignity? Indeed, even in the case of many amateur digital creations that may be said to involve intentional infringement, it is contrary to ordinary moral intuition, and seemingly purely formalistic, to conceive of the acts as affronts to dignity. Perhaps the best examples again are those of the sort lauded by Jenkins: Heather Lawver’s use of *Harry Potter*, for instance, is driven by love and admiration of the works of its creator J.K. Rowling; surely, there is no violation of the author’s dignity in any ordinary language sense of that term.¹¹⁸ Thus, this consideration offers no support for drawing a

consequentialist) one can still engage in talk of seemingly non-utilitarian, normative concepts so long as one does not forget the so-called “rule utilitarian” justification for doing so. After all, the fount of modern utilitarianism—John Stuart Mill’s *On Liberty*—does precisely this for the deontological primitive of liberty.

116. See 17 U.S.C. § 106A(a)(3) (2006). The rights of certain authors to attribution and integrity are subject to § 113(d) limitations. Visual artists have the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right

Id.; see also *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 41–42 (1st Cir. 2010) (finding in favor of an artist who successfully stipulated claim for violation of his moral right of integrity when museum displayed his unfinished work).

117. See 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8D.06[C][1] (rev. ed. 2010) (noting that “an intentional and prejudicial mutilation is an integrity violation, remediable through not only an injunction, but damages as well”).

118. JENKINS, *supra* note 3, at 171–74. Heather Lawver has created a medium where readers of *Harry Potter* can immerse themselves in the material “to escape from or reaffirm aspects of their real lives.” *Id.* at 174.

parallel with trespass to land even supposing that trespass to land is most accurately viewed as a strict liability rule based on dignitary harm.

In the above discussion, we first saw that in general there has been a historical shift from strict liability to fault liability and that there is no *prima facie* reason that this should not apply to copyright infringement as well. Next, we looked at the exceptions to the general fault rule in tort—ultrahazardous activities and land trespass. We saw that the rationale for those exceptions does not apply to copyright infringement.

As a final consideration, it is worth asking whether there is some *sui generis* reason for strict liability in copyright. Consider the general law and economic justification for strict liability: When one activity is so undesirable that society wants to create the strongest rule to deter it so that the injurer is less likely to engage in the activity, given that the injurer has become the insurer of all injuries, then strict liability may be justified.¹¹⁹

For most instances of amateur digital content, however, this description is the opposite of the truth for reasons discussed above. Amateur digital content is especially attractive as the activities that may result in injuries are not dangerous but instead are often highly educational and culturally enriching.¹²⁰ This fact is a strong argument against a strict liability standard.

The preceding discussion is best evaluated in light of Lessig's argument for legalization of remix. The reason is that the preceding argument for a fault standard proceeded by comparison to the status quo. This leaves open the question as to whether this solution, even if preferable to the status quo, is nevertheless not preferable to a third alternative, which may be preferable to both the status quo and to the fault standard alternative. The obvious one to consider in this regard is the alternative offered by Lessig as initially set out in Part I. I will argue, however, that Lessig's solution is fundamentally flawed due to its failure to appreciate the potentially dispositive role played by the fair use doctrine in the new world of amateur remix. The next Part will examine fair use as applied to remix, a topic conspicuously absent from Lessig's book-length treatment of remix but is crucial to understanding the most appropriate means to regulate amateur-generated content.

III. THE FAIR USE OF AMATEUR REMIX

As I noted in the Introduction, the fair use analysis of remix will be crucial to unraveling the ultimate import of both Parts I and II and their interconnectivity as well. First, consider Part I: Lessig's argument to legalize remix in order to avoid the current deplorable situation in which youthful remixers are criminals. The following fair use analysis of remix will have a direct, dispositive impact on this argument.

119. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 192–97 (5th ed. 1998). See also Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 19 (1995) (discussing that strict liability has been supported in criminal law to deter socially undesirable risk-taking for the sake of social welfare).

120. See U.S. COPYRIGHT OFFICE, *supra* note 80, at 49–50; Jenkins, *supra* note 1, at 278–80; text accompanying notes 82, 103.

At the same time, the fair use analysis of remix is of significant consequence for the issue raised in Part II, namely, whether copyright doctrine should adopt a more normatively-nuanced approach to the setting of the liability standard in copyright infringement cases, leaving room for application of a fault standard when appropriate. As already noted above in passing, the connection is that if it is the case, as I argue, that much amateur digital remix is fair use, then the injury-related facts that undergird these situations will be ones in which an unauthorized amateur use of copyprotected material is far from “substantially certain” to produce a situation in which the owner’s rights are violated by her unauthorized use. In such circumstances, the user risks harm but otherwise engages in a socially worthwhile activity. Modern negligence law emerged to deal with this sort of situation generally, and there appears to be no reason the same logic should not apply to torts that occur in fact patterns in copyright contexts as well.

Before engaging in the specific fair use analysis of amateur remix, there are a few points worth making about fair use in general. First, fair use is expanding. It is common to claim the opposite, but this is done for what appear to be polemical purposes—perhaps admirable ones but polemical ones nevertheless.¹²¹ However, cases such as the search engine case *Kelly v. Arriba Soft Corp.* represent dramatic expansions in fair use of search engines, which are repeatedly used to access millions of copyright protected copies without owner authorization, and yet, the activity is deemed a fair use.¹²² This dramatic expansion in the scale of activity that may be deemed fair is apparently due to courts’ sensible adoption of the fair use factors to a changing environment in which such large-scale unauthorized uses do not harm the owners’ reasonable markets for their works; while at the same time, they provide an extraordinary benefit to society via the transformational and informational tool that is the search engine.

This example is instructive both for showing how copyright is capable of expanding dramatically and for showing how technological advances are serving as the impetus for a reconfiguration and expansion of fair use. In the case of remix, the relevant technological change is the emergence of the set of technologies from cameras and video on phones, to easy uploading capability to sites such as YouTube or Flickr, to easy editing software. Mix all of this up and we are seeing as a result a true cultural explosion.

It has become pro forma to add that most such work is dross.¹²³ I will refrain. Suppose it is. Should one have expected some other result? Isn’t

121. Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 579–80 (1998) (discussing the predictions that fair use of digital media will be reduced in the near future).

122. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819–20 (9th Cir. 2003).

123. Even Lessig cannot resist; he writes,

[T]he breadth of this market . . . can’t help but inspire a wider range of creators. For reasons at the core of this book, inspiring more creativity is more important

this simply an instance of the law of the bell-shaped curve? Most of everything is mediocre by definition, right? If most professionally created and produced content such as movies, books, TV, etc. are mediocre, should we really expect more of amateurs? Nevertheless, a true cultural explosion is not to be dismissed lightly, and as I will argue below, fair use doctrine does not make this mistake. In fact, it is prepared to do just the opposite—namely, to embrace and provide succor for much amateur-generated content.

Indeed, I will argue that the unique history of fair use provides additional reason to suppose that courts will be especially comfortable in taking the initiative in facilitating the explicit expansion of fair use to cover amateur remix. As courts often note, the fair use doctrine developed in the case law and while the doctrine was codified into the 1976 Copyright Act,¹²⁴ Congress was explicit that its goal was precisely not to freeze the doctrine but instead to encourage courts to allow it to change in order to adapt to changing circumstances.¹²⁵ The explosion in amateur-generated content is plausibly viewed as just such a circumstance.

Ironically, despite Congress's explicit invitation to judicial flexibility and innovation, courts without exception apply the four-factor test as set out in the Copyright Act, although the test was itself a distillation of the vast run of case law involving fair use going all the way back to *Folsom v. Marsh*.¹²⁶ Happily, as will now be seen, these four factors do not serve as the four corners of a box to contain the expansion of fair use when it is appropriate that it should do so. Thus, it is a virtual certainty—no pun intended—that courts encountering fair use defenses in infringement cases involving amateur remix will engage in the following sort of four-factor analysis.

A. Factor One: Purpose and Character of the Use

Factor One of the fair use test looks to the purpose and character of the use.¹²⁷ The two sub-factors to Factor One look to whether the use is commercial and whether the use is for nonprofit educational purposes.¹²⁸

than whether you or I like the creativity we've inspired.

....

... I mean to romanticize the yeoman creator. In each case, the skeptic could argue that the product is better produced elsewhere The Long Tail enables a wider range of people to speak. Whatever they say, that's a very good thing. Speaking teaches the speaker even if it just makes noise.

LESSIG, *supra* note 5, at 130, 132.

124. Copyright Act of 1976, § 107, Pub. L. No. 94-553, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107 (2006)).

125. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–78 (1994).

126. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

127. 17 U.S.C. § 107(1) (2006).

128. See *id.*

The variety and creativity of remix culture is truly astounding.¹²⁹ Tushnet notes, “[F]anworks have expanded from mostly text-based, with occasional graphic art, to include music and video. These works add new characters, stories, or twists to the existing versions.”¹³⁰

As noted earlier, much amateur creative work is thought to be of low quality.¹³¹ There can be low-quality transformations as well as high-quality ones, however. The *Bleistein* non-discrimination principle counsels against paying attention to the perceived quality of a work.¹³² Accordingly, quality judgments are often thought to have no place in the transformative analysis, as was indicated by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*¹³³ In finding the work to be a parody, the *Campbell* court refused to take the further step of evaluating the quality of the parody (explicitly at least, seemingly in order to establish the point of doctrine—as the court went out of its way to make a somewhat snarky remark on the point in passing)¹³⁴ and indeed can be seen to damn the work by faint praise.¹³⁵

Campbell proffers two distinct conceptions of transformativeness. The first test looks to whether a new work sufficiently alters the first, and the second looks to whether the new work promotes social welfare.¹³⁶ In the case of remix, works will often possess each of these features. Whether a fanwork is sufficiently creative will, of course, turn on the standard a work must pass to be a new work. If the test is merely the test for new works as applied in the context of originality, the test will be easy to pass.¹³⁷

In the context of defining a new work for the purposes of originality,

129. Jenkins breaks down fan-based remix into ten categories, including: (1) Recontextualization, (2) Expanding the Series Timeline, (3) Refocalization, (4) Moral Realignment, (5) Genre Shifting, (6) Cross Overs, (7) Character Dislocation, (8) Personalization, (9) Emotional Intensification, and (10) Eroticization. JENKINS, *supra* note 1, at 162–77.

130. Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 503 (2008).

131. See, e.g., ANDREW KEEN, *THE CULT OF THE AMATEUR: HOW TODAY’S INTERNET IS KILLING OUR CULTURE* 56 (2007) (“Do we really need to wade through the tidal wave of amateurish work of authors who have never been professionally selected for publication?”).

132. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (discussing the equal copyright protection for humble advertisements as for works of high art, regardless of their quality).

133. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (“The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.”).

134. *Id.* at 582–83.

135. *Id.*

136. *Id.* at 579.

137. Judge Posner in *Gracen v. Bradford Exchange* has argued that the standard for derivative works is a higher one. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304–05 (7th Cir. 1983) (“The requirement of originality is significant chiefly in connection with derivative works, where if interpreted too liberally it would paradoxically inhibit rather than promote the creation of such works by giving the first creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.”).

the test is binary; either the work is sufficiently original or it is not. By contrast, the fair use test is not binary. A work that possesses a bare minimum of originality so as to just pass the test to avoid being labeled a derivative work would be unlikely to count as transformative in the context of Factor One analysis as courts are interested in the degree of transformation. The more transformative the work, the more weight that will be given to the consideration of transformative use vis-à-vis the other factors of the fair use test.¹³⁸

On *Campbell's* second conception of transformative use, courts are instructed to perform a rough welfare calculation in order to measure transformative use by considering the social value of the use. I would contend that most remix works would easily pass this test as they both create social welfare and do not create offsetting harms. As noted in the introductory comments to this Part, in the search engine cases, for example, courts have found the role that the works in question play in the functioning of search engines to be a transformative use that is extremely socially valuable.¹³⁹

When one thinks of the welfare created by new works, it is natural to think in terms of the welfare that would come through consumption of the works. By this standard, it would appear that a low quality work would have a marginal impact on social welfare. And given that much remix is thought to be of low quality, the conclusion would seem to be that much remix adds little to social welfare. But the issue is more complicated as the utility impact may pertain not only to the work itself but to the impact on the people involved. Following Professor Tony Reese, Tushnet, for example, points to the transformation involved in remix as pertaining to the creator and not the work per se.¹⁴⁰ Lessig argues that participating in remix culture promotes personal integrity.¹⁴¹ To the extent that this is true, there is no reason a court could not factor this into Reese's conception of works that transform their creators. Lessig also argues that mere diversity of remix will better inspire creators.¹⁴² Tushnet argues that the fact that fan works are motivated for non-commercial reasons and that creators write for niche audiences means that a broader array of content will emerge than in a

138. See, e.g., *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 333–37 (S.D.N.Y. 1998) (holding that a *Star Trek* commentary book contained enough original expression to be considered a derivative work, but not enough to be transformative for the purposes of the fair use test). See *infra* notes 116–18 for a discussion on derivative works.

139. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819–20 (9th Cir. 2003).

140. Tushnet, *supra* note 130, at 504 (“Transformation can also occur when someone remakes a work to make it more meaningful to herself and uses it as a lens to interpret the world”); see also R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 494 (2008) (“[A]ppellate courts also clearly do not view the preparation of a derivative work—or any transformation or alteration of a work’s content—as necessary to a finding that a defendant’s use is transformative. Instead, courts focus on whether the purpose of the defendant’s use is transformative.”).

141. LESSIG, *supra* note 5, at 92 (“And with a practice of writing [blogs] comes a certain important integrity.”).

142. *Id.* at 42.

context in which creators are motivated by monetary rewards.¹⁴³ There is no reason courts cannot pay attention to these diversity benefits in their determinations regarding the existence of transformative use.

Note, however, that when one applies a welfarist approach, one must be open to uses that may be socially deleterious as well. An important albeit controversial example is pornography. J.K. Rowling and George Lucas, the owners of the *Harry Potter* and the *Star Wars* characters, respectively, have each noted that they are opposed to pornographic uses of their works by fans.¹⁴⁴ In the rapidly evolving world of digital remixing technology, these authors could expect to see remixed pornographic content drawing from feature-length *Harry Potter* and *Star Wars* films. Thus, while it is fair to conclude that much fan fiction and remix is transformative—both because these works contain new forms of expression, meaning, and message and because they are generally productive of social welfare—the logic of a welfarist approach to transformative use forces the conclusion that some works may be transformative yet arguably productive of *disutility*.

Next, consider the sub-factor of commercial use.¹⁴⁵ Some forms of remix are non-commercial by design, and indeed, the definition of fan fiction sometimes includes that it is non-commercial.¹⁴⁶ Writers of fan fiction have frequently heralded the non-commercial nature of fan fiction as one of its core virtues.¹⁴⁷ Jenkins has discussed some of the ways in which creators of remix sometimes seek commercial gain. In the past,

143. Tushnet, *supra* note 130, at 507 (“[N]oncommercial creative uses, precisely because they are not motivated by copyright’s profit-based incentives, are more likely to contain content that the market would not produce or sustain. . .”).

144. See JENKINS, *supra* note 3, at 150 (describing warnings by Lucasfilm to fans in the early 1980s not to publish erotic *Star Wars* stories); E-mail from Theodore Goddard, Attorneys for Christopher Little Literary Agency and Warner Brothers, to unnamed *Harry Potter* fan (Jan. 22, 2003), available at http://www.chillingeffects.org/fanfic/notice.cgi?action=image_337 (reprinting a cease-and-desist letter sent to the owner of a website dedicated to *Harry Potter* fan fiction on behalf of J.K. Rowling’s literary agency, which expressed concern that children might come across the sexually explicit content).

145. See Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 31 (2008) (“The first factor involves examining ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.’” (quoting 17 U.S.C. § 107(1) (2000))).

146. See Tushnet, *supra* note 1, at 655 (stating that part of the definition of fan fiction as “not produced as ‘professional’ writing”); Fiesler, *supra* note 91, at 731–32 (“[F]an fiction is understood to be ‘unauthorized’ and ‘not-for-profit.’”). Tushnet also defines “fanworks” as “noncommercial” for the purposes of protection under the Organization for Transformative Works. Tushnet, *supra* note 130, at 501.

147. See JENKINS, *supra* note 1, at 158 (noting that even as fan fiction becomes more prevalent, “fanzines continue to be a mode of amateur, non-profit publication”); Tushnet, *supra* note 1, at 657–58 (“Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit. They believe that their emotional and financial investment in the characters gives them moral rights to create with these characters.”); Fiesler, *supra* note 91, at 747–48 (describing the “thou shalt not profit” rule as a self-enforced constraint on the fan fiction community).

however, these efforts have been relatively insignificant.¹⁴⁸ This has been true for a few reasons: first, due to quality differentials with the commercial works upon which they are built; second, because of the norm against commercializing fanworks discussed above; and third, out of fear that commercial use might occasion unwanted attention from the owners of the underlying works.¹⁴⁹

There have been relatively few litigated cases involving non-commercial uses. As a result, past discussion of fair use of fan fiction and remix has relied almost exclusively on comparisons with cases such as *Bridgeport Music, Inc. v. Justin Combs Publishing* or the *Rocky* case.¹⁵⁰ Each of these cases involved a commercial defendant. In each case, the use was found to be unfair. In *Bridgeport*, a commercially successful musician, Sean “P. Diddy” Combs, incorporated music samples without authorization (or attribution) and was found to be an infringer.¹⁵¹ By contrast, in a fact pattern similar to *Bridgeport* but involving a one-second sample used by a child creating an amateur remix, I would confidently predict that a court would almost surely find fair use. Moreover, I would speculate that a court would find such a use to be fair even if the use was only marginally transformative. The consideration of non-commercial use is a potentially powerful fair use factor and would be a dominant consideration in cases such as these.

Finally, in addition to being overwhelmingly transformational and non-commercial in nature, fanworks and remix are plausibly characterized as promoting important educational values, which is a goal explicitly mentioned in § 107 of the Copyright Act.¹⁵²

As the above examination of Factor One considerations shows, typical remix is likely to be both transformative and non-commercial. Given that Factor One is the most important of the four factors, the above Factor One considerations count strongly toward the fair use of most amateur remix.

B. *Factor Two: Nature of the Copied Work*

Factor Two of the fair use test considers the nature of the work that is copied without owner authorization. The factor has two sub-factors: first, whether the work is published, and second, whether the work is creative as compared to factual in nature.¹⁵³ Much fan fiction and remix culture draw from unauthorized works that are published, which counts in favor of the

148. JENKINS, *supra* note 3, at 139–44.

149. Fiesler, *supra* note 91, at 749 (noting that most fan fiction writers are worried that if anyone begins to profit from the unauthorized works, it will attract the negative attention of copyright owners).

150. *Bridgeport Music, Inc. v. Justin Combs Publ’g*, 507 F.3d 470 (6th Cir. 2007); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989).

151. *Bridgeport*, 507 F.3d at 476–77.

152. 17 U.S.C. § 107(1) (2006).

153. *See Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp. 1231, 1245 (N.D. Cal. 1995) (“The second factor focuses on two different aspects of the copyrighted work: whether it is published or unpublished and whether it is informational or creative.”).

putative fair user. Here, the term “published” is used in its standard sense as a legal term of art in which commercial film, video, book, etc. can all be said to be published. It is worth noting, however, that the concept is likely to become increasingly problematic. For instance, if an amateur digital creator grabs some content from a friend’s Facebook page, has she copied a published work? Other things equal, the more inclined courts are to see such works as unpublished, the more their unauthorized use will be frowned upon by fair use.

Consider the second sub-factor, namely, where the work resides on the creative versus informational side of the content spectrum. Once again, the sorts of uses that have garnered the greatest attention thus far are unauthorized uses of popular commercial content, which is by-and-large creative in nature. But again, the sorts of uses that are likely to increase in prevalence are likely to test this distinction. For example, if friend *A* grabs a photo from friend *B*’s Facebook page, what set of criteria is appropriate to determining whether the borrowed work is informational or creative? To the extent that such works are deemed creative, other things equal, the fair use doctrine will frown upon the use.

Suppose the current situation is one in which the predominant number of borrowed works is both published and creative. In other words, each of the Factor Two sub-factors points in the opposite direction. In such instances, courts typically find that the second factor disfavors fair use. Thus, Factor Two will typically work against a finding of fair use, at least in the present one and ones similar to it. It is noteworthy, then, that courts have typically characterized Factor Two as the least important of the fair use factors.¹⁵⁴ Thus, the damage to the fair use bona fides of amateur digital remix and fan fiction from the application of Factor Two will be minimal.

C. *Factor Three: Amount and Substantiality of the Portion Used*

Factor Three takes account of the amount of the underlying work that is copied as well as the value of the portion taken. Many courts have referred to the qualitative component as the “heart of the work.”¹⁵⁵ There appears to be no typical case for purposes of Factor Three analysis when it comes to amateur digital works. Some remix draws heavily from the underlying works, either quantitatively, qualitatively, or both, while other works draw relatively little from the underlying works and add much that is creative

154. See Loren, *supra* note 145, at 31 (“While the Supreme Court has indicated that all four factors must be considered and no presumptions should be employed, it has become clear in the case law that often the first and fourth factors dominate the analysis, with the third and second factors trailing in significance, in that order.”).

155. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985) (“Next, the Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In absolute terms, the words actually quoted were an insubstantial portion of ‘A Time to Heal.’ The District Court, however, found that ‘[T]he Nation took what was essentially the heart of the book.’” (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983))).

and original. All else equal, the former category of works will count in favor of the owner while the latter will count in favor of the user.

Even in those instances in which the third factor might have in the past counted against second users, courts are increasingly inclined to note that Factor Three must be judged in light of Factor One.¹⁵⁶ In other words, the more transformative the use, the less that Factor Three is likely to matter. Following *Sony Corp. of America v. Universal City Studios, Inc.* and *Campbell*, courts and commentators now go so far as to note that when a work is sufficiently transformative, a use may be fair despite the fact that a complete copy of the work is used without permission.¹⁵⁷ It is noteworthy that this balancing act typically does not seek to factor in the other sub-factor of Factor One besides transformativeness, namely, commercial versus non-commercial nature of the borrowed work. This is a consequence of the fact that the issue has nearly always arisen in cases involving commercial uses. In the context of amateur remix, however, the underlying factual situation is likely to be different in a relevant manner. The Factor One sub-factor of non-commercial use would work in tandem with the transformative element of the use to be set off against the amount and substantiality of the portion used. In an amateur remix context, then, it presumably will require less transformativeness than would otherwise be necessary to offset the Factor Three consideration of the amount and substantiality of the portion used due to the non-commercial nature of the fanwork.¹⁵⁸ This consideration again highlights the importance of the amateurishness of amateur-generated content.

In general, however, as we move from a world of fan fiction to a world of remix, Factor Three will likely play a more important role in influencing fair use outcomes in a direction unfavorable to fair use. It is reasonable to predict that the amount taken will be a function of technology, such that as it becomes less costly to make digital copies of large files such as feature-length films, people will be inclined to make more full-length copies of

156. See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 615–16 (2008) (discussing the various outcomes by courts using the multifactor fair use test and the importance of one factor over another).

157. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).

158. See, e.g., *Sony Corp.*, 464 U.S. at 449–50 (“[T]he fact that the entire work is reproduced . . . does not [in certain circumstances] have its ordinary effect of militating against a finding of fair use.”); see also *Campbell*, 510 U.S. at 587 (“[R]eproduction of entire work ‘does not have its ordinary effect of militating against a finding of fair use’ as to home videotaping of television programs” (quoting *Sony*, 464 U.S. at 449–50)). Factor One considerations will not always trump Factor Three considerations, however. In *Walt Disney Productions v. Air Pirates*, for instance, the court found that the defendants had taken too much to be justified by the other factors, including the transformative nature of the work. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978) (“[I]t is our view that defendants took more than is allowed even under the *Berlin* test as applied to both the conceptual and physical aspects of the characters.”). Professor Pamela Samuelson has recently questioned whether *Air Pirates* would be decided in the same manner today. Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2550 n.70 (2009).

unauthorized works as their starting point. Compare this situation to that which pertains to fan fiction in which the creator takes the ideas of the characters and then does all the writing of the new work on her own using these characters as grist. The former sorts of uses are more likely to lead to market harm and thus are less likely to be fair uses. For instance, if one reads a random sampling of the many thousands of fan fiction works written using *Twilight* characters, one will see that they are typically of such low quality from a market perspective that they pose absolutely no threat to the market for the original.¹⁵⁹ The opposite is true if one starts from a complete digital copy and removes very little, as the resulting work will be more likely to have commercial value because the work remains largely the original work. Other things equal, the more that is taken from the original and the more substantial the part taken, the more likely there is to be market harm as a result of market substitution.¹⁶⁰ This effect is much more likely when the creator begins from a full copy of the work as compared to taking a snippet to use as a small part of a larger whole. Thus, better technology is in tension with fair use in this respect. Nevertheless, on the whole, Factor Three will not preclude fair use when works are transformative and non-commercial, as appears to be the case for the preponderance of remix works.

D. Factor Four: Harm to Actual and Potential Market

Factor Four takes account of whether the unauthorized use will harm the market for the original. Because a significant number of remixes are transformative and non-commercial, they will not harm the market for the owner's original work.¹⁶¹ In the case law, there is an inverse relationship between transformative uses and the Factor Four consideration of harm to the market of the unauthorized work. In other words, the more transformative a work, the less likely for there to be market harm because the works are increasingly dissimilar and thus less likely to compete in the same market. *Campbell* notes that,

[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects" of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original

159. See Lipton, *supra* note 13 (manuscript at 20).

160. *Campbell*, 510 U.S. at 587–88 (“[W]hether ‘a substantial portion of the infringing work was copied verbatim’ from the copyrighted work is a relevant question, . . . for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.” (quoting *Harper & Row*, 471 U.S. at 565)).

161. *Id.* at 591 (noting that there is only a presumption of market harm in the case of commercial works, “[i]f the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.” (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992))).

will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.¹⁶²

A parallel case can be made that the more non-commercial a work, the less likely it is to hurt the market for the underlying work that it uses without authorization. Indeed, the opposite is increasingly true in increasingly interesting ways. As Tushnet notes, “[F]anworks encourage and sustain a vibrant fan community that helps authorized versions thrive”¹⁶³ The connection to fair use is of course that the lower risk of market harm, the more likely the use is to be fair. Note as well that the alleged inadequacies in quality of amateur works bemoaned by author Andrew Keen and others¹⁶⁴ would work to make it more likely that the uses are fair, given that low quality works are less likely to steal a defendant’s market.

A more difficult question is whether amateur digital works hurt the market for derivative works. Not all possible derivative works markets are protected—only those that are reasonably likely to be exploited by owners.¹⁶⁵ Remixes are often idiosyncratic to a particular creator and are thus not geared toward a reasonable, commercial market. Hence, they are unlikely to come into disfavor for fair use purposes due to harm to potential markets.

There is a second point to note that may also work in favor of amateur creators and perhaps especially creators of digital remix as compared to traditional fan fiction. Contrary to the implicit suggestion of some commentary, not all fan fiction and remix are likely to count as derivative works. Derivative works are “recast, transformed, or adapted” from the original.¹⁶⁶ This characterization will be true for many works built on top of the original works such that the original works, or elements of them, such as key characters, remain recognizable and often continue to remain a large presence in the new work. These sorts of works are plausibly characterized as transforming, recasting, or adapting the original and thus may put the creator in the position of being alleged to be an infringer of the owner’s derivative works right. In other instances, however, it is not apt to characterize the new work as a “derivative” of the original. For example, music mash-ups are an important category of remix. Mash-up artists often use large numbers of unauthorized works in the process of creating their music.¹⁶⁷ For instance, the remixer behind *Girl Talk* uses tens of

162. *Id.* (internal citations omitted).

163. Tushnet, *supra* note 130, at 503.

164. KEEN, *supra* note 131, at 56.

165. *See Campbell*, 510 U.S. at 592 (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”).

166. 17 U.S.C. § 101 (2006).

167. *See* Rob Walker, *Mash-up Model—Girl Talk*, N.Y. TIMES (Magazine), July 20, 2008, at 15 (noting that *Girl Talk*’s newest collection of songs “is composed almost entirely of more than 200 samples of other artists’ music, ranging from Lil Wayne to Kenny Loggins—none of which [*Girl Talk*] has obtained permission to use”).

unauthorized snippets.¹⁶⁸ It cannot plausibly be claimed that the new work is a recasting, adaptation, or transformation of all or of any one of these works in particular. This feature should work to the benefit of remix when it comes to fair use, as fewer of these works can colorably be alleged to violate the derivative works right because fewer of these works are derivative.

E. *Balancing the Factors*

Having considered each of the four factors of the fair use test, the next step is to balance them. The Copyright Act provides no guidance as to how to do so. Nevertheless, as noted in passing above, courts have developed doctrines with regard to the relative weighing of these factors. We saw that much remix will win on 3.5 out of 4 of the fair use factors, including the two that courts consider most important, the first and fourth factors.¹⁶⁹ Generally speaking, then, remixes are fair uses. To be clear, my claim is that these uses are fair presently and not just in some counterfactual world in which a court actually performs a fair use test. I state this in the Holmesian sense that law is the best prediction of what judges will do.¹⁷⁰ My claim is that because judges presented with most examples of fan fiction and remix as they have existed thus far would find such uses to be fair, these uses are fair now.

As was seen above, however, not all remix works are fair uses. For instance, as noted in the discussion of Factor Three above, some amateur remixes may pose significant threats to the market for the original if they use too much of the work in proportion to the amount of transformative change. Additionally, we cannot rely on static analysis because the sorts of works we are likely to see in the future will in part be determined by the form of regulation of remix that is adopted. In particular, if amateur remix is made legal—at least in the manner proposed by Lessig—we could expect to see an increase in near copies of complete works with only minor changes. It is quite foreseeable that works such as this could displace the owner's market for the original, especially given that Lessig appears to promote the legalization of commercial as well as non-commercial remix.¹⁷¹ We see, then, that while there may be a vast number of fair uses, there are significant unfair uses as well. This fact will come into play in the next Part. For present purposes, what matters is the overall finding that much remix is fair use.

Lessig argues that fair use is too complex for ordinary people to apply, the implication being that legalization will provide a bright-line rule now lacking under fair use analysis.¹⁷² This problem is not solved by making amateur remixes legal, however, as creators will still need to engage with fair use law to the extent that their use may—and will typically—implicate

168. *Id.*

169. *See supra* Parts III.A–D.

170. Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. REV. 699, 702 (1998).

171. *See supra* note 79 and accompanying text.

172. LESSIG, *supra* note 5, at 269–71.

other copyrights. In other words, Lessig's proposal will not achieve the bright line to which he aspires. To see this, imagine a type of use that is likely to be common were amateur remix to be made legal: the *Clean Flicks* model of digitizing a movie and then deleting violent and sexually explicit scenes.¹⁷³ An example of such a use would be the movie *Titanic* without the steamy scene of Kate Winslet topless. Were the owner unable to sue for violations of its right to derivative works because amateur remix was legal, the owner could still sue under the theory that this was an unauthorized copy. The defendant would then proffer a fair use defense, claiming this use as a transformative remix. There is no reason, however, that a transformative work cannot also constitute an infringing "copy" as this term is understood in its technical, legal sense.¹⁷⁴ Consider a paradigm case in copyright law, *Steinberg v. Columbia Pictures Industries, Inc.*, as an example.¹⁷⁵ In this case, the defendant produced a poster to promote the film *Moscow on the Hudson* that the court held was an unauthorized use of plaintiff's well-known *The New Yorker* cover.¹⁷⁶ While the poster was clearly a transformative-derivative work, it was also successfully alleged to involve elements of exact copying.¹⁷⁷ Thus, ordinary users will still need to be able to distinguish remixes that involve making illicit copies of the originals from those that do not. The determining factor will typically involve the fair use test. Thus, fair use doctrine cannot be avoided after all. In other words, Lessig must acknowledge that producers of remix culture will not be able to avoid the issue of fair use because any putative user has to be in a position to determine if making the transformative remix or derivative work also involves the making of a fair use copy with regard to the "remix," *qua* copy. Thus, again, we see that legalization of remix in the manner proposed by Lessig fails as a panacea.

F. *Lenz v. Universal*

In general, one of the problems in discussing amateur remix is that the topic is so new that directly relevant case law has yet to develop. There is, however, an exception to this regrettable state of affairs: the recent seminal case, *Lenz v. Universal Music Corp.*¹⁷⁸ It will be instructive to close out this Part with a discussion of this case because it indicates the potential for an expanded role for fair use in the context of amateur remix.

Lenz gained a good deal of media attention because it was yet another

173. *See Clean Flicks of Colo., L.L.C. v. Soderbergh*, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006) (noting the process by which Clean Flicks deletes "sex, nudity, profanity and gory violence" from movies and redistributes them).

174. *See* 17 U.S.C. § 106(1) (2006) (providing that a copyright owner maintains the exclusive right "to reproduce the copyrighted work in copies").

175. 663 F. Supp. 706 (S.D.N.Y. 1987).

176. *Id.* at 708–09.

177. *See id.* at 713–14 (finding "copyright infringement" even where "not all of the details are identical" because all that is needed is a "substantial similarity that involves only a small portion of each work").

178. 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

instance in which the commercial copyright industry sued a particularly sympathetic plaintiff for an act that while technically a colorable instance of infringement, nevertheless appears to the common person to be acceptable. The facts of the case, in short, are that an eighteen-month-old child spontaneously began dancing to a Prince song, and the mother recorded it on a video and posted it on YouTube.¹⁷⁹ Universal filed a takedown notice pursuant to the Digital Millennium Copyright Act (DMCA), the mother objected, and the Electric Frontier Foundation took the case *pro bono* after the situation gained attention.¹⁸⁰

Interestingly, Lessig begins the introduction to his book with the facts of this case,¹⁸¹ contrasting it with what he would call a “fair and justified” use of the law, one in which Universal might, for example, demand the takedown of a “new television series with high-priced ads.”¹⁸² Lessig argues that in the *Lenz* case the use of the law is neither fair nor justified because:

The Prince song on Lenz’s video, however, was something completely different. First, the quality of the recording was terrible. No one would download Lenz’s video to avoid paying Prince for his music. Likewise, neither Prince nor Universal was in the business of selling the right to video-cam your baby dancing to their music. There is no market in licensing music to amateur video. Thus, there was no plausible way in which Prince or Universal was being harmed by Stephanie Lenz’s sharing this video of her kid dancing with her family, friends, and whoever else saw it.¹⁸³

Lessig brushes aside discussion of any further details of the case, noting that there will be “plenty of time to consider the particulars of a copyright claim like this in the pages that follow.”¹⁸⁴ However, in the rest of the book there is no discussion of a case of remix in which Lessig discusses either fair use or allegations of criminal conduct. Lessig then turns to the larger point:

What is it that allows these lawyers and executives to take a case like this seriously, to believe there’s some important social or corporate reason to deploy the federal scheme of regulation called copyright to stop the spread of these images and music? “Let’s Go Crazy”? Indeed! What has brought the American legal system to the point that such behavior by a leading corporation is considered anything but “crazy”? Or to

179. *Id.* at 1151–52; *see also* LESSIG, *supra* note 5, at 1 (stating that Ms. Lenz’s son started dancing upon hearing Prince’s song).

180. *Lenz*, 572 F. Supp. 2d at 1152–53; LESSIG, *supra* note 5, at 3.

181. LESSIG, *supra* note 5, at 1–4.

182. *Id.* at 2.

183. *Id.* at 2–3.

184. *Id.* at 4.

put it the other way around, who have we become that such behavior seems sane to anyone?¹⁸⁵

What Lessig does not discuss, however, is that this case is a counterexample to his basic thesis about the criminality of amateur remix. The real meaning of the case is precisely the opposite of that which is implied by the manner in which the case is represented by Lessig. Lenz disputed the infringement claim, asserting fair use, and then she sued Universal for submitting a takedown request to YouTube without first making a good faith effort to determine whether the use was fair—and hence authorized under the law.¹⁸⁶

Lenz won the case, establishing a potential precedent that could strongly promote the ability of amateur remixers to show their works. If courts in other jurisdictions follow *Lenz*, it will no longer be enough for the owner of an underlying work to file a takedown demand based simply on the fact that some amount of her work was used in a remix. In addition, an owner filing a takedown notice must represent that it has a good faith belief that the use is not a fair use.¹⁸⁷ Given the fair use analysis provided above showing that much remix is fair use, the obvious but important implication is that there will be much remix for which commercial owners of underlying works will not be able to make good faith representations of infringement. This means in turn that there should be a drop in the DMCA takedown notices filed by owners such as Universal, particularly for those cases in which the use is very likely fair and the owner would otherwise have been able to prevail simply due to the asymmetry in power and resources between corporate owners and amateur remixers. After *Lenz*, taking such actions, if not well supported in terms of fair use analysis, may subject an owner to a finding of misrepresentation under the DMCA.¹⁸⁸ The end result is that this case is strongly supportive of the fair use rights of amateur remixers.

IV. AMATEUR DIGITAL REMIX: FREE AS IN PERMISSIBLE

Recall why we engaged in the preceding fair use analysis in the first place. The fact that amateur remix is predominantly fair use goes directly toward refuting Lessig's claim that "[r]emixing is criminal."¹⁸⁹ A use that

185. *Id.* at 4–5.

186. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152–53 (N.D. Cal. 2008) (“On July 24, 2007, Lenz filed suit against Universal alleging misrepresentation pursuant to 17 U.S.C. § 512(f) and tortious interference with her contract with YouTube.”).

187. *See id.* at 1156 (“A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute.”).

188. *See id.* at 1154–55 (“An allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.”). On the need for fair use safe harbors generally, see Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1502–03 (2007) (suggesting that because of overdeterrence and uncertainty, fair use should be reformed to recognize certain types of copying as per se fair).

189. *See* Hetcher, *supra* note 17, at 1896. Lessig writes that:

is fair is not an infringement.¹⁹⁰ A use that is not an infringement is a fortiori not a criminal infringement. Accordingly, the fundamental legal claim undergirding Lessig's set of arguments is false.

A. *No Presumption of Illegality*

As noted above, Lessig says almost nothing in *Remix* about fair use. The few remarks that he does provide, however, are of great interest because they tie the doctrine of fair use directly to his criminality argument. Lessig writes, "Once triggered, the law requires either a license or a valid claim of 'fair use.' Licenses are scarce; defending a claim of 'fair use' is expensive. By default, RW [Read/Write] use violates copyright law. RW culture is thus presumptively illegal."¹⁹¹ Lessig's claim here is essentially that because amateurs cannot afford to establish fair use, they are infringers—or rather, presumptive infringers—as their actions are "presumptively illegal."

This argument is fallacious. Users are only fairly characterized as infringers if their use, when evaluated by a court, would fail to pass the fair use test. It is true that if one is a fair user and is sued, one may, for all practical purposes, be equivalent to an infringer in the sense that one will typically not be able to establish one's fair use status for monetary reasons and thus will lose by default. Crucially, however, this does not make one an infringer—or even a presumptive infringer—but rather a fair user who is not in a position, practically speaking, to vindicate her legal rights. It is well and good to point to a situation of corporate actors using the legal system to achieve favorable outcomes despite the actual law on the issue. But, if anything, this provides all the more reason to insist upon the fact, and highlight the fact, that most of the amateur uses at issue are indeed fair and therefore legal. Indeed, it is this very fact that makes the actions of corporate owners so detestable.

Conceptualizing this point in terms of possible world semantics may help to clarify what it means to talk about fair use in a context in which there is almost no established case law to provide a better indication of the legal status of various uses. Considered as alternative possible scenarios, there is a meaningful difference between talking about case results as precedent and considering the status of fair use as a matter of prediction in a world without precedent. Two different sets of possible worlds are relevant in the present context.¹⁹² In one set, litigants actually go to court

In a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?

LESSIG, *supra* note 5, at xviii.

190. 17 U.S.C. § 107 (2006).

191. LESSIG, *supra* note 5, at 100.

192. See generally SAUL A. KRIPKE, NAMING AND NECESSITY 15–20 (1980) (explaining and defending the use of "possible world" semantics).

and a fair use determination is produced. Based on the fair use analysis provided above, my claim is that in these worlds, most amateur remixers are found to be fair users. In the second set of possible worlds of interest, overbearing commercial owners harass fair users such that for practical reasons they stop their use voluntarily or default in a lawsuit. In such worlds, many potential users would never attempt to undertake fair uses in the first place, due to the chilling effects of previous actions taken by owners against fair users. In this second set of possible worlds, courts do not produce fair use case law. In these worlds, the uses are not held to be unfair as there is simply no legal determination on the merits. Losing a lawsuit by default does not turn a fair use into an unfair use.

Moreover, while Lessig claims that remix is “presumptively illegal,”¹⁹³ he fails to explain what this claim entails. The passive tense of the statement begs the question as to whom is presuming the illegality. If he is referring to those worlds where owners intimidate fair users, it is not the case that there is any presumption of illegality. While the users themselves would feel that owners have treated them unfairly, this feeling—quite the opposite of a presumption of illegality—is a reflection of the fact that the users will have a belief, implicit or explicit, that their use is fair.

Nor is there reason to think that the owners would make such a presumption. If commercial owners have good lawyers, these lawyers should be able to dispassionately predict what a court would be inclined to find with regard to fair use. If I am right that most remix is fair use, then one would expect owners’ lawyers to reach this conclusion as well.¹⁹⁴ It should be noted as well that courts are not presuming illegality for the very reason that fair users are practically prevented from seeking to legally vindicate their fair use claims. Consequently, courts are not even made aware of the dispute. Thus, they are certainly not in a position to develop a specific legal opinion regarding fair use—namely, that it is presumptively illegal.

Summing up the preceding discussion, it is simply a mistake to think that because some party is not in a position to vindicate a legal right that therefore the party no longer has this right. So too, if an unauthorized use is fair, it remains so even if the user is not able to benefit from this otherwise favorable legal fact, either because the party is intimidated or otherwise practically disabled from exercising the right. Thus, it is incorrect to think that remix is presumptively illegal. In other words, Lessig’s crucial conception of kid remix is incorrect.

B. *Fair Use and Criminality*

As discussed in Part I, Lessig claims that because remix is criminal, this will lead to disrespect for the law and more criminal activity. This claim implicitly relies on an assumption of perfect information. This assumption is a frequent move in arguments in a traditional law and economic vein,

193. *See supra* text accompanying note 191.

194. Needless to say, this fact need not deter them from harassing amateur creators, should they deem it most strategic to do so.

particularly of a Chicago School variety. While Lessig is intimately versed in this approach, having taught at Chicago and clerked for Judge Richard Posner on the Seventh Circuit, he is not a self-identified advocate of the school, and thus, it is more incumbent upon him to explain why he is implicitly drawing on the assumption of perfect information here, especially in light of the fact that the on-the-ground facts suggest the opposite. “It is not well known that such activities would [potentially] be criminal. Unless one was specifically knowledgeable regarding intellectual property law, one would not know whether an unauthorized remix, when not a fair use and willful, is criminal.”¹⁹⁵ Indeed, this claim is so counterintuitive to common sense that one who believed the law generally made sense would be inclined to doubt that the rule could be such. The fact that

[S]uch a rule is so equitably counterintuitive that one would not expect it to exist, [is a fact that] cuts against the grain of Lessig’s larger argument. . . . [I]f people are not told that a certain behavior is criminal, . . . [and are not charged with crimes by prosecutors for engaging in such behavior], then the claim that [kids] are suffering the negative effects of being labeled as criminals [appears without foundation].¹⁹⁶

Not only are remix kids *not* labeled as criminals, except by Lessig,¹⁹⁷ but they receive information that would lead them to reasonably conclude the opposite, were they actually to think about the issue.

Consider the impact of social-networking sites like YouTube or MySpace. When kids go to these sites, they find large numbers of amateur videos, many of which remix from commercial sources to some extent. From this fact, it would be natural to conclude, if only implicitly, that such videos are not criminal. These sites are not on the fringes of mainstream culture—quite the opposite—yet no one is shutting down YouTube or telling [kids] not to upload videos to it.

Indeed, . . . there are strong social norms supporting remix. Lessig’s second argument implicitly depends on a general social understanding that remix activity is criminal activity and likely to serve as a gateway crime.¹⁹⁸

195. Hetcher, *supra* note 17, at 1920.

196. *Id.*

197. Lessig’s book is published by a non-academic press. This means that Lessig’s arguments stand to have a greater real-world impact by enriching public debate and hopefully public policy. This can be a double-edged sword, however, because if I am right that Lessig’s main argument is wrong, then enhanced public exposure may result in enhanced public harm, namely, a world in which kids are wrongly characterized as criminals.

198. Hetcher, *supra* note 17, at 1920–21.

One essential element of a gateway crime is the presence of a social dimension, such that by taking part in the gateway crime, one begins to associate with a new group of people who themselves are already engaged in a wider array of criminal activities.¹⁹⁹ By associating with such a group, one is naturally exposed to more criminal associations and consequently this leads to criminal opportunities. Fan fiction and remix do not involve this social dimension, however. Acts of amateur creation have no tendency to bring kids into greater contact with criminals. Thus, Lessig's argument based on the threat of a burgeoning criminal culture blossoming in the wake of a failure of legislators to legalize remix is also without foundation.

The fair use of significant amounts of remix works also affects Lessig's claim that institutions of literacy will be deterred from teaching the sorts of skills that would promote the flowering of remix culture.²⁰⁰ He offers almost no direct support for this claim. Rather, it is presented in a conclusory fashion, apparently drawn from the implicit premises that remix is criminal and that schools, by their nature, do not teach criminal activities.²⁰¹ This argument is faulty. Consider the most compelling conceptual reason first. The skills that one needs to be a criminal remixer are exactly the same as those one needs to be a professional remixer working at places like Pixar or Disney. One cannot teach students one set of skills without teaching them the other. Art and design schools would by their nature consider it part of their core mission to teach students the skills they need to qualify for employment at companies such as these. Given that for commercial content companies, the shift to digital is a *fait accompli* at this point, it would therefore be highly surprising if students were not learning to create and manipulate digital content. Indeed, if their training is not in digital design—which, I would suggest, is but a form of remix—what else would these students be learning? Lessig's failure to address fair use leads him astray here; because much remix is fair use and thus legal, schools have every reason to teach these skills and no reason not to. Finally, it is worth noting that it is in educational settings in particular that unauthorized uses are more likely to be fair (and moreover, that to the extent that Lessig wishes to be committed to a traditional Chicago-style view of full information, he commits himself to the view that these potential users should be charged with knowledge of the fairness of their uses).²⁰²

199. Stephen Pudney, *The Road to Ruin? Sequences of Initiation to Drugs and Crime in Britain*, 113 *ECON. J.* C182, C183 (2003) (noting that one of the causes of the “gateway effect” is social interaction, i.e., meeting people one would not otherwise have met).

200. LESSIG, *supra* note 5, at 108 (“[T]he law as it stands now will stanch the development of the institutions of literacy that are required if this literacy is to spread. Schools will shy away, since this remix is presumptively illegal.”).

201. *Id.*

202. See 17 U.S.C. § 107(1) (2006) (providing that “the purpose and character of [a] use, including whether such use is of a commercial nature or is for nonprofit educational purposes”

Lessig's overall argument for legalization had four premises. The only one I have contested is the first premise, that "[r]emixes cause no harm."²⁰³ The second premise appears unproblematic. Lessig claims that "[c]reative practices that cause no harm should not be impeded by the law."²⁰⁴ This premise is unobjectionable for a whole range of normative views that assume that one is free to do as one wishes as long as there is no issue of countervailing harms to others. This is the famous "harm principle" that is at the core of Millian consequentialist jurisprudence.²⁰⁵ Nor is the third premise objectionable. It reads: "Creative practices that produce social benefits should be promoted by copyright law."²⁰⁶ This follows from a basic consequentialist approach, which at its core values welfare-enhancing outcomes. The fourth premise of Lessig's argument is also unobjectionable. He contends that, "Remix culture creates social benefits."²⁰⁷ The truth of this claim is seen in passing throughout the previous discussion. Lessig wishes to draw the conclusion that, "Therefore, remix cultural practices should not be impeded but instead supported by legal rules."²⁰⁸

With regard to the premise that I do dispute, the earlier discussion of harm in the context of fair use supports this view. Amateur remix culture is not an unalloyed good such that policy issues never arise or that tradeoffs never need to be made regarding its regulation. While much remix is a fair use, not all is. As noted above, the clearest type of harm for which I predict there would be a significant degree of consensus is the harm to the exclusive right of copyright that would be possible in a world in which it would be legal to, for example, make full-length remixes of newly released feature-length films.²⁰⁹ In stark contrast to traditional fan fiction, these remixes very plausibly could hurt the market for the originals.

Unfair uses are not frequently talked about but they deserve more attention because they constitute the other side of the coin in fair use doctrine. The fair use test is routinely discussed in positive terms; it has been referred to by such terms as a "safety valve" for copyright law.²¹⁰ And while this positive characterization is merited, it is useful to keep in mind that once one accepts that copyright protection is valid, and that its

should be considered among other factors in determining whether a use is fair and therefore not a copyright infringement).

203. See *supra* text accompanying notes 19–20; see also Hetcher, *supra* note 17, at 1898.

204. See Hetcher, *supra* note 17, at 1898.

205. JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND UTILITARIANISM 3, 14 (Bantam Dell 1993) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

206. See Hetcher, *supra* note 17, at 1898.

207. See *supra* text accompanying note 23; see also Hetcher, *supra* note 17, at 1898.

208. Hetcher, *supra* note 17, at 1898 (emphasis omitted).

209. See *supra* Part III.B.

210. See *Tenn. Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 283 (5th Cir. 1970) (quoting John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968) as describing the fair use doctrine as a "balance wheel and safety valve for the copyright system").

justification is to promote creativity, then one is by logic committed to the idea that not all uses are fair and that unfair uses do not promote the goals of copyright. Accordingly, we must pay attention to the possibility of significant unfair uses of fan fiction and remix culture going forward.

The above discussion has examined Lessig's complex set of arguments all leading to the conclusion that amateur remix should be legalized. In sum, the arguments for moving away from the present regulatory regime were unconvincing because amateur remix is not criminal, and thus, there will be no stigmatizing of a whole generation of kids as criminals. Nor will institutions of learning suffer. Nor will a more generalized crime wave be unleashed upon society by rising generations that no longer show a general fidelity to the rule of law. Thus, Lessig has not provided reasons for moving away from the present regime. This conclusion is worth dwelling upon in the teeth of Lessig's powerful rhetorical strategy of arguing for legalization in the negative, that is, as a better option than the present regime, simply because it does not suffer from the defects of the present regime. Structuring the argument in this manner allows the consideration as to whether legalization will create other problems to be left unaddressed. As the preceding examination has demonstrated, however, there are problems with legalization. In particular, significant uses, now deemed as strongly unfair by law and informal norms, would go unchecked, as we saw in the hypothetical example of full-length minor remixes of newly released films.

V. CONCLUSION

In light of the preceding discussion, we are now in a better position to appreciate the merits of the first policy proposal discussed above, namely, that a fault standard should be applied to amateur remix. As we saw, fair use allows us to draw the connection between copyright infringement and the desirability of a shift from strict liability to fault liability. Fair use has shifted from being the exception to being the rule in the context of fact patterns involving amateur digital remix. This means that more often than not when an amateur makes an unauthorized use, it is not an infringing act. This implies that typically there will not be a "substantial certainty" of causing harm when an actor engages in an activity that ends up harming another. Tort law generally takes very seriously the distinction between harms caused intentionally as compared to harms caused negligently. The former are intentional torts and the latter are negligence torts.

As every first-year tort student knows, there are two sorts of intentions that can satisfy the "intentionally" requirement.²¹¹ The obvious sense of intentional harm is when the injurer has as her overt goal causing harm to the victim. The second sense is when an injurer takes an action in circumstances in which causing harm to the victim is "substantially certain," although causing this harm is not a goal of the injurer.²¹² Much unauthorized copying of the sort we find in the copyright case law was

211. 1 RESTATEMENT (SECOND) OF TORTS § 8A (1965).

212. *Id.*

intentional infringement inasmuch as the facts of the cases involve acts of copying by defendants who were substantially certain to cause harm. This is because many of these unauthorized uses were commercial and in these circumstances fair use is unlikely. Indeed, there used to be a *per se* rule that commercial uses were treated as presumptively causing harm. Thus, in engaging in such copying, the copier was substantially certain to cause an unauthorized use. This is not true for instances in which amateur remixers use copyprotected material of others. Clearly, these uses are not authorized by the owner, but that is not the key question. The key question is whether the use is unauthorized, *tout court*. As we saw in the last Part, this is not the case because most amateur uses will be fair use and a fair use is a use authorized by the law.²¹³

Yet, not all uses by amateurs are fair uses. Some will be unfair because, for instance, they are little transformed and harmful to the owners' markets. Thus, when an amateur makes a use unauthorized by the owner, she risks causing harm but the risk does not rise to the level of substantial certainty. This shifts those activities by amateurs into the category of generally socially valuable activities that unfortunately but unavoidably create risk for others. If one causes harm under these conditions, it will be by accident rather than intentionally. These are accidental infringements that are aptly adjudicated under a fault standard. Accordingly, most remix will be legal in the way that driving down the street is legal. One may engage in the activity with the freedom with which one engages in other legal activity, namely, one may do so as long as one does not negligently harm others in the process. By recognizing the harms as accidental, the law is *de facto* recognizing the behavior that caused the harm—apart from the misfortune that the risk of harm was realized—as legal and acceptable. It is recognized as having a social value. As a normative matter, it is at the least permitted. This represents a significant change from the past, in which copyright infringement has been routinely treated like an intentional tort—like a punch in the nose. In ordinary parlance, we would say that punching someone in the nose is illegal. By contrast, accidentally hitting someone in the nose is only a civil wrong if one fails to exercise due care, in which case one committed a negligence tort.

Compare the analysis to that provided by Lessig. As we saw above, he argues that remix uses are “presumptively illegal.” If Lessig were right, this would mean that a well-informed amateur contemplating an unauthorized use should presume that the behavior that she was about to engage in was illegal. But she would be wrong to make a presumption as her expectation in this regard should properly depend on whether a harm is substantially certain to result, and if not, whether there is nevertheless a risk of harm, and if so, whether she is exhibiting due care under the circumstances. If she reasonably believes that an unauthorized use is not substantially certain, and that she is being duly careful, then just the opposite of thinking herself to be acting presumptively illegally, she will reasonably believe herself to be acting quite legally.

213. 17 U.S.C. § 107 (2006).

This, then, is the third way in which amateur digital remixers may be acting legally. This third way depends on a counterfactual policy shift in which a fault standard is to be implemented. As we saw above, the first way in which amateur remix may be legal—Lessig’s way—also depends on a counterfactual policy regime; one in which remix has been made legal by statute. It is only the second of the three ways—fair use—by which amateur-generated remix may be legal now in this world rather than counterfactually. Of the two counterfactual means in which amateur digital content might achieve legal status, for all the reasons provided above, clearly it is my contention that the better choice of the two is the one in which copyright law adopts a fault standard and proceeds to apply it when appropriate in disputes involving amateur-generated content.

One response to this argument might be that even granting that it is persuasive, it nevertheless involves postulating a policy shift that, however, desirable in principle, is unlikely in practice if for no better reason than that the current regime of strict liability favors the more powerful, concentrated, and interested actors, the content industry. There is a large commentary on why such groups will tend to get their way legislatively.²¹⁴ This is a serious point which must be addressed. Fortunately for the fault liability proposal, there is a compelling response and, moreover, one that favors this policy proposal over Lessig’s. The public choice point is standardly made in regard to legislative change, but the policy change I advocate could be furthered by courts. It was courts that originally shifted the standard from strict liability to negligence in tort generally, and there is no reason they could not do the same in copyright. There appears to be no provision in the Copyright Act that mandates strict liability. No less of public choice theorists than Richard Posner and William Landes have argued that courts are able to exercise more autonomy to do the right thing and follow their judicial consciences than are legislatures.²¹⁵ They should be encouraged to do so in the context of amateur-generated content.

Indeed, courts may find it necessary to adopt a set of changes in order to fully incorporate a fault standard. This Article has set out the basic argument for incorporation of the fault standard in copyright but much work is left to be done in order to more fully develop a free-standing tort theory of copyright, that is, copytort. Most striking, fault liability has implications for the issue of appropriate damages. In particular, in

214. See Derek J. Schaffner, Note, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL’Y 145, 146 (2004).

215. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 416–17 (2003). Regarding the discussion of whether policy change is more feasible from a public choice perspective via legislation or through the courts, *Lenz* is a dramatic example of the power of courts. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008). The DMCA left it unaddressed, and so it is up to the courts as to whether a lack of fair use must be alleged by plaintiffs. By choosing to make this a requirement, the court was in effect adopting a fault standard, albeit one that looks to fair use rather than due care as the test for faulty behavior. This example illustrates that it is perfectly within a court’s ambit to charge plaintiffs with alleging a lack of due care on the part of defendant in cases involving amateur remix.

negligence law, punitive damages are not seen as appropriate.²¹⁶ The obvious implication for the present context is to question the extent to which statutory damages as allowed under the Copyright Act are the moral equivalent of punitive damages. It is of interest to note in this connection that the Copyright Office, in its *Report on Orphan Works*, advocates for the creation of a safe harbor that would prominently feature the elimination of statutory damages.²¹⁷ The qualification for inclusion in the safe harbor incorporates what is in effect a fault standard, as the proffered test is whether the user of the orphan work made a “reasonably diligent search” for the work’s owner.²¹⁸ The arguable application to the present discussion is to conclude that statutory damages should not be allowed for amateur digital remix when it is to be judged under a fault standard because statutory damages function to more strongly penalize injuries just as do punitive damages in tort generally.

A second apparent implication of taking fault seriously in copyright is that the issue is raised as to the proper burden of proof regarding fault. In tort generally, the plaintiff has the burden of proof to establish the defendant’s fault. Other things equal, one would expect a parallel structure to hold in copyright as well, such that the owner must allege the user’s negligence as part of plaintiff’s prima facie negligence suit. Note the difference here as compared to the current situation in copyright, in which the defendant has the burden to establish fair use. This sort of additional burden on defendant as compared to the situation in tort generally may or may not be justified for fair use, but regarding the fault standard, again, other things equal, one would expect the plaintiff to have the burden of establishing fault in copytort, just as is the case in tort generally.

As these apparent implications of developing more fully a fault liability theory of copyright reveal, there is much work yet to be done in order to provide a comprehensive, top-down theoretical account of the connection between tort and copyright. This more thorough account shall be of interest in future scholarship as it potentially provides a response to the most salient rejoinder that can be made to the main claims that have been advanced in this Article. Specifically, a critic may charge that weighing factors such as the “transformative” nature of a work or the remix’s “informational” quality would provide little to no guidance to remixers on what is legal and will likely result in very fact-based lawsuits that may clog the courts. As the above discussion indicates, however, further implications of the fault standard as applied to copyright, such as a safe harbor for statutory damages and the burden of proof to show fault being on plaintiff, will have the effect that the cost to a potential plaintiff goes up and the benefit goes down, so by implication, there will be less incentive to

216. GOLDBERG, SEBOK & ZIPURSKY, *supra* note 39, at 493.

217. U.S. COPYRIGHT OFFICE, *supra* note 80, at 8 (“[W]here the user cannot identify and locate the copyright owner after a reasonably diligent search, then the system should permit that specific user to make use of the work, subject to provisions that would resolve issues that might arise if the owner surfaces after the use has commenced.”).

218. *Id.*

sue, that is, less chilling effect on potential remixers. In particular, if statutory damages are disallowed, then the incentive to sue will, in the vast preponderance of instances, be diminished greatly as real damages caused to owners from instances of amateur digital remix will likely be de minimis. And the law wisely chooses not to concern itself with trifles.

