RECLAIMING COPYRIGHT

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I. INTRODUCTION

As a result of special-interest capture, the Copyright Act confers overly broad rights to copyright owners at the expense of the public interest in having access to creative works. Until now, the primary vehicle for combating this special-interest influence over copyright has been constitutional challenge. This approach has proved entirely unsuccessful, however, as the Supreme Court's decision in *Eldred v. Ashcroft*[1] illustrates.

In *Eldred*, the Supreme Court upheld the constitutionality of the 1998 Copyright Term Extension Act (CTEA). Because the CTEA retroactively extended the already lengthy copyright terms of existing works, petitioners argued that the Act was rent-seeking legislation that could not promote copyright's purpose of encouraging creative works. The Court rejected their formidable constitutional challenges under both the Patent and Copyright Clause and the First Amendment without any mention of the influence that special-interest groups had over the CTEA's enactment.

The Court's decision, while disappointing to many, was hardly surprising. Because the CTEA's language extending the copyright term was clear and unambiguous,[2] there was no issue of statutory construction facing the Court. The issue was strictly constitutional, and the Court rarely strikes down economic laws like intellectual property statutes.[3] Indeed, courts often are reluctant to strike down legislation due to institutional constraints on their decision-

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[1] 537 U.S. 186 (2003).

[2] *See id.* at 192-93 (discussing the Copyright Term Extension Act, Pub. L. 105-298, §§ 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304) and noting no ambiguity in the statute).

[3] *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986) (stating that although "[m]uch has been written of the circumstances under which courts should strike down legislative enactments[,] . . . the Constitution is rarely used to invalidate a statute, especially an economic one."); *see also id.* at 224 n.9 (citing a study by Landes & Posner indicating that over the nearly 200-year period between 1789 and 1972, only ninety-seven Congressional statutes were held constitutionally invalid).

making ability as well as concerns over separation of powers.[4] Thus, even public choice scholars who advocate more exacting judicial review of special-interest legislation often argue that it goes too far to strike down such legislation on constitutional grounds.[5]

My goal is not to defend *Eldred* but to argue that, regardless of whether the *Eldred* Court was correct in ignoring special-interest influences in its *constitutional* analysis of the CTEA, courts should not ignore those influences when dealing with statutory construction of other provisions of the Copyright Act. Although modern copyright scholarship often laments the "excessively protectionist bias" of copyright law,[6] most courts have shown little inclination to curb the tide of copyright expansion. Many judges may agree that the pervasive influence of special interests in Congress has produced an imbalance in copyright policy. Nevertheless, these judges likely have viewed that influence as either irrelevant to interpreting the law, or as relevant but favorable to copyright owners, the apparent winners in the legislative process.

My thesis is that statutory construction is superior to constitutional adjudication for combating special-interest influence over the Copyright Act, and that courts committed to faithful interpretation of the law can and should take this influence into account in construing the Act. Although the Copyright Act has its roots in the public interest, which it serves by encouraging the creation and dissemination of expressive works, the general trend in copyright law has been an expansion of the rights of copyright owners at the expense of public access and improvements to copyrighted works. This tension between private and public interests in copyright law often presents itself in copyright infringement cases as a statutory ambiguity between private- and public-interest provisions in the Copyright Act. This paper argues that, where possible, such statutory ambiguities in the

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[4] *See, e.g.*, F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-315 (1993) (stating that "a legislative choice is not subject to courtroom fact-finding" and that rational basis scrutiny, with its presumption of constitutional validity, "is a paradigm of judicial restraint"); Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

[5] *See, e.g.*, Macey, *supra* note 3, at 242 (rejecting activist view that courts should invalidate special-interest legislation because it "usurps congressional authority and creates harmful friction between the branches.").

[6] *See* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2190-91 (2000) (recent Copyright Act amendments create "more specific, highly elaborated property rights," which "reveal[ ] an excessively protectionist bias").

interpretation of the Act should be resolved by a rule of interpretation that reclaims copyright for the public interest. Pursuant to this rule of interpretation, ambiguities between private- and public-interest provisions should be resolved by construing the private-interest provision narrowly and the public-interest provision broadly.

Of course, the Copyright Act, like most other statutes, serves a combination of private and public interests, and it will not always be obvious to courts which provisions serve which interests. Nevertheless, a number of ambiguities in copyright law may be resolved by the proposed rule of interpretation. Although the rule would apply to all private- and public-interest provisions in the Act, I focus on two examples of private-interest copyright provisions, the derivative works right[7] and the anti-circumvention and anti-trafficking provisions in the Digital Millennium Copyright Act (DMCA),[8] and two examples of public-interest copyright provisions, the fair use doctrine[9] and the idea/expression dichotomy.[10] I then identify troublesome ambiguities between these two categories of provisions, and I show how such ambiguities can and should be resolved pursuant to the proposed rule of interpretation.

The derivative works right and the prohibitions in the DMCA, and other private-interest copyright provisions, should be construed narrowly, particularly when they conflict with public-interest provisions such as fair use and the idea/expression dichotomy. This rule of interpretation enforces legislative meaning by implementing the "deal" that special-interest groups negotiated for themselves and by construing the Copyright Act in accordance with its stated public-interest purpose. It also serves substantive and process-oriented goals such as avoiding constitutional issues, encouraging more accurate statutory drafting, and avoiding statutory failure.

Part II surveys the literature on the implications of public choice theory for the process of statutory interpretation and explains how effective statutory interpretation can serve the public interest. Part III begins to apply this model of statutory interpretation to the Copyright Act by distinguishing between private-interest provisions of the Act, such as the derivative works right and the DMCA, and public-interest provisions, such as the

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7 *See* 17 U.S.C. § 106(2).
8 *See* 17 U.S.C. § 1201(a) and (b).
9 *See* 17 U.S.C. § 107.
10 *See* 17 U.S.C. § 102(b).

idea/expression dichotomy and fair use. Part IV develops this model of interpretation further by identifying areas in the Copyright Act in which there are conflicts or statutory ambiguities between the private- and public-interest provisions discussed in Part III. Finally, Part V analyzes how the theories of statutory interpretation outlined in Part II help to resolve the statutory ambiguities between public- and private-interest provisions of the Copyright Act identified in Part IV.

II. SPECIAL INTERESTS, CONSTITUTIONAL ADJUDICATION, AND STATUTORY CONSTRUCTION

Under traditional views of the legislative process and statutory construction, judges were entitled to assume that the legislators were "reasonable people acting reasonably," meaning that they legislated pursuant to the public interest.[11] As such, courts acted as faithful agents of the legislature. They attempted merely to "discover" legislative meaning in statutes[12] and construed ambiguous statutes in accordance with the public-interest legislative intent or purpose.

Public choice theory challenges this basic assumption about the legislative process and, therefore, calls into question traditional notions of statutory interpretation. Public choice "deromanticizes" politics[13] by arguing that the driving force behind legislation is not a benign attempt to serve the public interest but, rather, the self-interest of participants in the political process.[14] Under this view, legislators are interested in obtaining campaign contributions, the support of high-profile individuals and businesses, and anything else that helps maximize the odds of re-election.[15]

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11 *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434-35 (1989). This language is a paraphrase of Hart and Sacks' argument in *The Legal Process* that courts "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS 1415 (tent. ed. 1958).

12 *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 275 (1988) (calling this the "archaeological approach" to statutory interpretation because the "court's role is to unearth and enforce the original intent or expectations of the legislature that created the statute").

13 *See id.* at 276.

14 *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 334-35 (1962).

15 *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971). Stigler explains as follows:

> The industry which seeks political power must go to the appropriate seller, the political party. The political party has costs of operation, costs of maintaining an organization and competing elections . . . . The industry which seeks regulation must be prepared to pay with the two things a party needs: votes and resources. The resources may be provided by campaign contributions,

Furthermore, even when legislators are dedicated to serving the public interest, much of the information they receive comes from interest groups seeking to maximize their own welfare. Interest groups are an important aspect of public choice theory because of collective action problems affecting group activity. Because each member of a group will benefit from a legislative change regardless of whether the member contributed resources toward the change, members of a group often have little incentive to seek a legislative change,[16] and organization costs associated with informing members of the need for change and enforcing collective action agreements can be substantial.[17] These problems are more severe for larger groups than for smaller groups because members of smaller groups proportionally have more incentive to seek a legislative change[18] and typically have more homogeneous interests that reduce information and enforcement costs.[19]

As a result, large groups with diffuse interests—like the general public—will be underrepresented relative to smaller groups with more concentrated interests. Thus, the public choice theory of legislation posits that the legislative process will favor rent-seeking special-interest groups rather than the public interest.[20]

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contributed services (the businessman heads a fund-raising committee), and more indirect methods such as the employment of party workers. The votes in support of the measure are rallied, and the votes in opposition are dispersed, by expensive programs to educate (or uneducate) members of the industry and of other concerned industries.

16 *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 13-22 (1965).

17 *See id.* at 26-27 (stating that "[in larger groups], no collective good can be obtained without some collective agreement, coordination, or organization" and that "the larger a group is, the more agreement and organization it will need").

18 *See id.* at 28, 32-36. Olson explains that there is a greater tendency for a large group to obtain suboptimal amounts of a collective good (such as a favorable legislative change) because "the larger the number in the group, other things equal, the smaller the [largest benefit to an individual member] will be" and therefore the less likely it will be that any individual member will have sufficient incentive to obtain the benefit for himself and the rest of the group. *See id.* at 28. By contrast:

> [I]n some small groups each of the members, or at least in one of them, will find that his personal gain from having the collective good exceeds the total cost of providing some amount of that collective good; there are members who would be better off if the collective good were provided, even if they had to pay the entire cost of providing it themselves, than they would be if it were not provided . . . . Accordingly, the larger the group, the farther it will fall short of providing an optimal amount of a collective good.

See id. at 33-35.

19 For example, the most common type of organization representing economic interests is the trade association. *See id.* at 144. Trade associations not only create opportunities for members to meet each other, but also provide access to journals and other sources of information on matters of common interest to their members. Both of these functions are helpful in building consensus on the desirability of legislative change. *See id.* at 144-45.

20 *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L.

Because this flawed legislative process threatens the constitutional values of deliberative and representative democracy,[21] the courts have a legitimate role in acting as a check on the legislative process. Thus, some scholars have argued that courts should engage in strict constitutional review of Congressional statutes, which would mean invalidating some statutes that serve private rather than public interests.[22] The federal judiciary, however, rarely invalidates Congressional statutes for any reason, let alone on public choice grounds.[23] Institutional constraints such as a limited capacity to conduct independent fact-finding, as well as institutional concerns over separation of powers, make courts hesitant to strike down legislation except in the most egregious cases. As a result, constitutional adjudication is inadequate for enforcing constitutional norms or for checking special-interest power.

The inadequacies of constitutional adjudication are evident in copyright law. Indeed, the *Eldred* decision provides a good example of the institutional constraints that make courts unwilling to force Congressional enactments into full compliance with constitutional requirements. On the merits, the petitioners in *Eldred* had a strong argument that the CTEA violated the Patent and Copyright Clause's limitations on Congress's power. They argued for a sensible construction of the Clause that would interpret the "limited Times" requirement in light of the preambular language requiring that copyright law must "promote the Progress of Science and the useful Arts." Applying that requirement to the CTEA, they argued that Congress's continuous practice of retroactively extending the copyright term results de facto in an *unlimited* term, granted in installments, and that such

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REV. 873, 878 (1987) (describing "rent-seeking" as the attempt to obtain government regulation in the market that allows individuals or firms to charge excessive prices for use of an asset).

21 *See* Macey, *supra* note 3, at 230.

> The major implications of interest group theory are that legislation transfers wealth from a society as a whole to discrete, well-organized groups that enjoy superior access to the political process, and that government will enact laws that reduce societal wealth and economic efficiency in order to benefit these economic groups.

Id.

22 *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44 (1991) (summarizing proposals for heightened constitutional scrutiny for special-interest legislation).

23 *See* Macey, *supra* note 3, at 224 (noting that although many commentators have argued for circumstances under which statutes should be invalidated, statutes are rarely held unconstitutional, especially economic statutes) (citing William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 895-901 (app.) (1975)).

retroactive extensions for existing copyrighted works do nothing to promote progress in terms of future innovation.

The Court rejected these arguments and concluded that the CTEA satisfied rational basis scrutiny, identifying two objectives in the legislative record of the CTEA: (1) to conform the U.S. copyright term with the European copyright term;[24] and (2) to encourage the owners of copyrights in old works to restore and distribute the works.[25] There are numerous problems with the conclusion that these two objectives alone satisfy rational basis scrutiny. First, the CTEA does not create real uniformity between the American and European copyright terms,[26] and even if it did, it is highly questionable whether conformity with European law may provide a basis for satisfying U.S. constitutional requirements that do not exist in European law. Indeed, because European copyright law reflects more of a "natural rights" theory while U.S. copyright law reflects more of an "instrumental" theory,[27] one would expect differences between the two regimes with regard to the duration of term and retroactivity of term extensions.

Second, the objective of encouraging the restoration and distribution of old works is inadequate to support the CTEA because (1) the category of old works that can be distributed after they are restored comprise a small subset of copyrighted works, and, in any event, Congress could have extended the term for that category of works alone;[28] (2) there would be an incentive to restore many old works even without an extension of the existing copyright because the improvements could give rise to new copyrights; and (3) it is unclear why it is better to extend the existing copyright for an old work rather than let the copyright expire and allow others to compete for the restoration in the same way that book publishers compete in the market for classic books that have fallen into the public domain.[29]

Because the objectives identified by the Court provide little

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[24] *See Eldred*, 537 U.S. at 205-06 ("A key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years . . . . ").

[25] *See id.* at 206-07.

[26] *See id.* at 257-58 (Breyer, J., dissenting) (explaining that the CTEA does not establish uniformity between the American and European terms with regard to the most significant categories of works it affects, including works made for hire, existing works created prior to 1978, and anonymous or pseudonymous works).

[27] *See infra* notes 80-80 and accompanying text (discussing the European approach to copyright as more protective of artists' rights than U.S. law).

[28] *See Eldred*, 537 U.S. at 253 (Breyer, J., dissenting) (explaining that with regard to old films, very few old films remain to be restored or distributed because, even with existing copyrights, copyright owners have not deemed them profitable enough to preserve).

[29] *See, e.g., id.* at 260 (Breyer, J., dissenting) (arguing that the Patent and Copyright

support for the broad-sweeping term extension enacted in the CTEA, the decision is best understood in terms of institutional constraints that warrant judicial deference to the political branch. First, where legislation narrowly exceeds Congress's constitutional powers, courts nevertheless might uphold the legislation in order to reinforce the doctrine of separation of powers. Indeed, some scholars have urged this view in support of *Eldred* and the CTEA, arguing that "[e]ven if the Founders had believed that Congress's powers under the Copyright Clause were severely limited, they did not believe that courts should closely scrutinize legislation to determine whether Congress had stayed within those boundaries."[30]

Second, because courts are constrained by *stare decisis*, they might uphold narrowly unconstitutional legislation where doing so is consistent with precedent. This is particularly true in copyright, where steady and incremental expansion over time has made it difficult for courts to articulate how Congress has crossed a line with any particular enactment. Thus, the *Eldred* Court noted more than once the "unbroken congressional practice" of applying each previous term extension retroactively to existing copyrights.[31] Because no precedent had ever invalidated those previous term extensions, the Court said, "[c]ritically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not."[32]

Third, because courts are limited in their ability to conduct fact-finding, they are dependent upon the legislative record and therefore must be deferential to Congress's policymaking. The *Eldred* opinion repeatedly emphasizes that it is not within the Court's authority to question legislative policy like that of the CTEA, saying, "[w]e have . . . stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[33] The Court concluded the opinion with this final statement: "The wisdom of Congress's action . . . is not within our province to second guess. Satisfied that

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Clause "assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence").

30 *See* Paul M. Schwartz and William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2376-84 (2003) (arguing against originalist-intent claims that *Eldred* was wrongly decided).

31 *See Eldred*, 537 U.S. at 200, 208.

32 *See id.* at 209-10.

33 *See id.* at 212. The Court elaborated that "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be." *See id.* at 208.

the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals."[34] Indeed, Lawrence Lessig, who argued *Eldred* before the Court, has since written that he believes his failure to emphasize the harmful impact of the CTEA—to a Court that would have no other way to know the true effects of challenged legislation—is the primary reason that the challenge to the CTEA failed.[35]

Given these institutional constraints, statutory construction emerges as a superior tool for dealing with special-interest influence in copyright law. Statutory construction is more appropriate than constitutional scrutiny for dealing with public choice concerns because it limits judicial discretion to construing ambiguities and allows Congress ultimate authority to determine statutory meaning by simple amendment. Moreover, it ensures that the judicial function is commensurate with judicial competence and operates within institutional constraints.[36]

Public choice theories of statutory construction contend that while clear statutory provisions should be given their plain meaning even if they serve private interests, ambiguous provisions should be resolved against those interests. For instance, one economic theory holds that where a statute reflects a special-interest "deal" rather than public-interest social policy, the statute should be construed against special interests just as ambiguities in

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[34] *See id.* at 222.

[35] *See* LAWRENCE LESSIG, FREE CULTURE 229-30, 239-40, 244-45 (2004). Lessig recounts how he had been advised by key lawyers in the *Eldred* case that the case could be won only if they showed the Court that "dramatic harm were being done to free speech and free culture," but that he believed the Court understood the harm of the Copyright Term Extension Act (CTEA) and needed to be shown how it was unconstitutional. *See id.* at 230. In retrospect, Lessig laments the fact that when the Justices asked Lessig about the CTEA's impeding effect on the progress of science and useful arts, he responded that he was "not making an empirical claim at all" but rather was making a constitutional claim that the CTEA violated structural limits on Congress's enumerated powers. *See id.* at 238-39.

[36] As Cass Sunstein has argued:

> Federal courts underenforce many constitutional norms, and for good reasons. Institutional constraints—most notably, limited fact-finding capability and attenuated electoral accountability—make courts reluctant to vindicate constitutional principles with the vigor appropriate to governmental bodies with a better democratic and policymaking pedigree. As a result, there is a gap between what the Constitution actually requires and what constitutional courts are willing to require the political branches of government to do . . . . Relatively aggressive statutory construction—pushing statutes away from constitutionally troublesome ground—provides a way for courts to vindicate constitutionally based norms and does so in a way that is less intrusive than constitutional adjudication.

Sunstein, *supra* note 11, at 468.

ordinary contracts are construed against the drafter.[37] Efficiency of the regulation is the touchstone for determining whether it is public- or private-interest. Although some statutes are entitled to broad construction because they are designed to overcome market failures, some legal economists have long believed that, in general, the common law is inherently more efficient than legislation.[38] Because the common law historically has facilitated or simulated free-market principles of competition, a regulation that codifies the bargains struck by private interests may be viewed as anti-competitive in derogation of common law principles.[39] Thus, private-interest provisions should be construed narrowly because "the deference due toward a statute that corrects 'market failures' is not due toward a statute that creates them."[40]

Other views would identify and treat special-interest statutes differently. For instance, courts could apply the rule of narrow construction more generally to statutes enacted under conditions conducive to rent-seeking behavior, on the ground that it is too difficult to "distinguish between what is and what is not [rent-seeking legislation]."[41] Thus, a statute would be construed narrowly where the statutory benefits are concentrated in a few groups and the costs are borne diffusely by many.[42]

Another view would uphold special-interest deals only when they are explicit and otherwise would construe statutes according to their stated public-interest purpose.[43] In this way, courts effectuate legislative intent because, where there are clear constitutional or legislative statements regarding a public-interest purpose, it is likely that at least some legislators vote for the legislation under the belief that it does in fact serve that purpose.[44]

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37 *See* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

38 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 249 (6th ed. 2003) (discussing the economic efficiency of common law property, contract, and tort rules).

39 *See id.* at 250 ("[T]he common law establishes property rights, regulates their exchange, and protects them against unreasonable interference — all to the end of facilitating the operation of the free market, and where the free market is unworkable of simulating its results.").

40 *See* Easterbrook, *supra* note 37, at 18-19.

41 *See* Eskridge, *supra* note 12, at 311; *see also* Macey, *supra* note 3, at 239 (stating that "it is beyond the competence of the judiciary to conduct the kind of inquiry advocated by Judge Easterbrook").

42 *See* Eskridge, *supra* note 12, at 300, 325.

43 *See* Macey, *supra* note 3, at 232-33.

44 This approach—construing a statute according to a constitutional or legislative statement of purpose—is relevant to the ordinary task of statutory interpretation in two ways. First, it might effectuate the legislative purpose or intent of a statute. Any notion of legislative purpose or intent must take into account the numerous different reasons that individual legislators support any particular bill, and it is highly unlikely that all legislators who support a bill do so to curry favor with special interests. Indeed, it is likely that many

This default rule also increases transparency in the political process, reduces the amount of special-interest legislation as a whole, and reduces the amount of "hidden" special-interest legislation relative to all special-interest legislation.[45] Thus, whenever a statute purports to serve the public interest, courts should accept the legislature's stated purpose and construe the statute in accordance with the public interest.[46]

For some scholars, the rule construing private-interest statutory provisions narrowly is located within a broader framework of statutory construction. Cass Sunstein has argued that special-interest legislation should be construed narrowly according to interpretive "norms," which are derived from three categories of values including constitutional values, institutional concerns, and the need to counteract statutory failures.[47] Because rules of construction often conflict (as the Legal Realists demonstrated),[48] Sunstein develops a hierarchy of interpretive norms in which norms reflecting the three categories of values should be weighed

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legislators support it because they have been misled by special-interest groups into believing that the legislation does in fact serve the public interest. Second, it provides a default rule for construing statutory ambiguities that arise when some aspects of a statute favor special interests and therefore conflict with the stated public purpose of the statute.

45 *See* Macey, *supra* note 3, at 238 ("Where a special interest group has negotiated a low-cost, hidden-implicit deal with the legislature, there is no reason why it should receive the benefits of the more expensive open-explicit deal. Indeed, to award such benefits encourages a shift toward the vague sort of legislation that increases the information costs the public faces in evaluating legislation.")

46 It is interesting to note that Macey, like Easterbrook, would enforce an unambiguous statute even where it represented a statutory "deal," and would construe ambiguities in favor of the public interest. *See* Macey, *supra* note 3, at 239 ("[W]hen an interest group bargain is explicit, courts should uphold the bargain."). Thus, it is not clear how much the differences between Macey's and Easterbrook's approaches really matter. The greatest practical difference between the two theories probably would arise due to judicial error. For instance, an application of Easterbrook's criteria incorrectly would construe a private-interest statute broadly under the mistaken belief that it is a public-interest statute. Presumably, Macey's theory would avoid that mistake by assuming a public-interest purpose and construing the statute to effectuate that purpose.

47 *See* Sunstein, *supra* note 11, at 466-69 (providing an overview of the sources of interpretive principles). For instance, he argues that the principles of construing statutes so as to avoid constitutional invalidity and constitutional doubt serve a number of functions and are particularly justifiable in light of the fact that constitutional norms are judicially underenforced. This canon provides an example of how Sunstein's approach is relevant to the process of statutory construction. First, to the extent that Congress is institutionally bound (along with the executive and judicial branches) to uphold the Constitution, construing a statute to avoid constitutional issues might reflect what Congress would prefer once a constitutional issue becomes evident, even if such a construction does not reflect the original enacted or intended meaning. Second, even if adopting a statutory construction that avoids constitutional issues may not be justified as an effort to estimate statutory meaning, it certainly may be justified as a default rule that elicits appropriate clarification of meaning from Congress.

48 Probably the most famous example of this is Karl Llewellyn's attempt to show that for every traditional canon of statutory construction, there is an equal canon that points to an opposite construction. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

most heavily.[49] Interestingly, Sunstein assigns top priority to the norm of narrow construction for special-interest legislation because it is important to all three categories of values in the hierarchy.[50] When the judicial branch construes special-interest legislation narrowly, it promotes central constitutional values by acting as a check on the legislative branch of government and encouraging deliberative democracy. This interpretive norm also serves institutional values by encouraging Congress to draft clearer statutes and discouraging Congress from relying on misleading legislative history.[51] Finally, it reduces the risk of statutory failure because it decreases the extent to which a statutory purpose is corrupted by special-interest power as well as the extent to which the public might disregard a law it feels is unjust.[52]

Einer Elhauge rejects all of these theories because they require courts to make normative judgments about how much interest-group influence is desirable or tolerable in the legislative process.[53] He proffers his own reasons for advocating narrow construction of special-interest statutes. Like Sunstein, he treats special-interest statutes within a broader proposed framework of statutory interpretation. He argues that where judges are unable to estimate statutory meaning, they should not merely interpret statutes according to their own judgment of which interpretation is best.[54] Rather, they should apply statutory default rules that provoke the legislature to respond with more explicit instructions, either "ex ante through more precise legislative drafting to avoid the prospect of the default rule, or ex post through subsequent legislative override of the interpretation imposed by the default

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49 *See* Sunstein, *supra* note 11, at 498.

50 *See id.* (arguing that norms that favor political accountability and deliberation, such as a norm of narrow construction for interest-group transfers, occupy the "very highest place" in the hierarchy because they protect constitutional values, reflect institutional competence, and avoid statutory failures).

51 *See id.* at 466 ("One might, for example, conclude that legislative history, produced by private groups and never enacted, is entitled to little weight . . . . ").

52 *See id.* at 467-68 (discussing ways in which special-interest statutes fail).

53 For instance, he points out that economists identify special-interest legislation using efficiency as a baseline, while others prefer an egalitarian (or distributive justice) baseline. In some cases different baselines would lead to different results, and in any case, the baselines may be used independently of public choice theory to determine whether a statute should be construed broadly or narrowly. *See* Elhauge, *supra* note 22, at 49-59.

54 *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2032 (2002) (arguing that, where possible, statutory ambiguities should be resolved by "preference-estimating" default rules "that constrain judges to maximize political preference satisfaction") and *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) (arguing that where courts cannot resolve statutory ambiguities using "preference-estimating" default rules, courts should use "preference-eliciting" default rules that encourage more accurate drafting of legislative preferences).

rule."[55]

Thus, Elhauge argues that where a statute's meaning is uncertain and interest groups on one side of the issue have proved their "greater ability to command time on the legislative agenda, raise issues, and/or influence statutory drafting," the statute should be construed against those interest groups because such groups are more likely than others to get the legislature to correct mistaken interpretations.[56] He contends that so long as such a construction is plausible and the interim costs of any mistaken interpretations are acceptable, this preference-eliciting rule is preferable because it avoids the need for normative baselines: "[t]he point is not that the groups disfavored by these default rules normatively deserve to be disfavored, but that disfavoring them (where legislative meaning and preferences are uncertain) leads to a legislative response that more precisely identifies the extent of their political influence."[57]

The foregoing theories of statutory construction provide a framework for resolving ambiguities in the Copyright Act. We will return to these theories in Part V, after identifying some ambiguities between public- and private-interest provisions to which they should apply.

III. The Copyright Act as Public- and Private-Interest Legislation

A. *The Copyright Act Generally*

Historically, copyright law was designed to serve the public interest. Indeed, the United States Constitution explicitly states the public-interest purpose of American copyright law: "to promote the Progress of Science and the useful Arts." Copyright protection increases the creative works available to the public by creating property rights in the control of those works, thereby allowing authors to prevent others from copying without remuneration.

Without copyright, the free market might yield too few creative works. The creation of these works involves considerable risk and investment, yet once the works are produced, others could free-ride by copying successful works cheaply and easily. This free-rider problem is an instance of market failure in which the creator is unable to capture the entire social benefit of the work, leading

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55 *See* Elhauge, *Preference-Eliciting Statutory Default Rules*, *supra* note 54, at 2165.
56 *See id.* at 2170-71, 2177, 2179.
57 *See id.* at 2166.

the creator to invest less than the socially optimal amount in producing such works. By giving the creator of a work the exclusive right to copy and make other uses of the work, the Copyright Act corrects the market failure caused by free-riding, thereby encouraging innovation.

Early American copyright statutes provided copyright owners with very rudimentary rights. The first Copyright Act (of 1790) ensured protection of any "map, chart or book" for an initial term of 14 years plus a renewal term of 14 years. Moreover, the scope of the copyright given to an author was limited to the right to copy the work itself and did not include the right to make "derivative works" (such as translations of a novel into another language, for example).[58]

Over the next century, the Act was amended only five times. Each modest amendment added one or two new items to the list of copyrightable subject matter, mostly in an attempt to accommodate new forms of expression brought about by emerging technology, but expanded the scope of protection very little.[59] Although Congress granted a right to prepare derivative works in the 1870 Copyright Act, that right gave copyright owners only "the right to dramatize or to translate their own works."[60] During the same 100-year period, the copyright term was increased by only 14 years.[61] Moreover, the early copyright statutes, including the 1909 Act, had very simple structures that set forth general provisions and relied heavily on courts to develop a common law of copyright within the statutory framework.[62]

The contrast between the current Copyright Act[63] and its predecessors could not be more stark. In the last 30 years, both the size of the copyright statute and the amount of protection it provides have grown by leaps and bounds. Indeed, the Copyright

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58 *See* Act of May 31, 1790, c. 15 § 1, 1 Stat. 124, 1st Cong. 2d Sess.

59 *See* 2 Stat. 171 (1802) (prints); 4 Stat. 436 (1831) (musical compositions); 11 Stat. 138 (1856) (dramatic compositions); 13 Stat. 540 (1865) (photographs); Act of July 8, 1870, 16 Stat. 212, Rev. Stat. § 4948-71, 35 Cong., 2d Sess. (paintings, drawings, sculptures, and other works of the fine arts).

60 *See* Act of July 8, 1870, 16 Stat. 212 c. 230 § 86, 35 Cong., 2d Sess.

61 The initial term was increased from 14 years to 28 years in 1831. *See* 4 Stat. 436. *See also* LESSIG, *supra* note 35, at 34 (arguing that, in contrast to early term extensions, which occurred very infrequently, recent extensions of the term, coupled with abandonment of the requirement that copyright owners must seek renewal of copyrights, have dramatically increased the term of copyright protection).

62 *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 857-859; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT xiii, release 55 (August 2001).

63 Unless otherwise noted, most of this critique applies to the 1976 Act and its amendments.

Act reflects all of the hallmark characteristics of a special-interest statute. These characteristics include: (1) concentrated benefits and diffuse costs; (2) uncertainty in the optimal regulatory framework or level of regulation; (3) a statutory structure that is very specific or detailed (which indicates interest-group compromise) rather than general (which would allow more judicial discretion); (4) legislative history materials revealing extensive interest-group influence; and (5) statutory results that are indefensible on economic or other grounds.[64]

First, while the benefits of broad copyright protection are concentrated in relatively few individuals and industries, the costs of that protection are spread among all potential users of copyrighted works, which includes nearly the entire population. Because copyrights are an increasingly valuable asset for the copyright owners, interest groups representing the copyright owners have an incentive to organize and lobby effectively for expansive copyright protection. By contrast, the vast majority of users of copyrighted works have a very diffuse interest in blocking such protectionist legislation and therefore fail to organize responsive lobbying efforts, even where the aggregate costs to these users might outweigh the benefits of expansive protection to the interest groups.[65]

Second, because there is uncertainty in the optimal level of copyright protection, there is greater room for special-interest groups to persuade legislators of the correctness of their position.[66] Although it is likely that some copyright protection is needed to correct the free-riding problem in the creation of new works, the optimal level of copyright protection is uncertain because time, market forces, and other means of self-help can often mitigate the potential harm to copyright owners without the need for legislative or judicial intervention.[67] But the problem of uncertainty cannot

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64 *See supra* part II.

65 Although many statutes are afflicted with this imbalance in costs and benefits, the problem is more acute in the Copyright Act than in many other statutes, including the Patent Act, where there is greater equality in the bargaining power and incentives of owners and users.

66 *See, e.g.*, Herbert Hovenkamp, *Regulation History as Politics or Markets*, 12 YALE J. ON REG. 549, 559 (1995).

67 *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 125 S. Ct. 2764, (2005):

> The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent

be obviated simply by overcompensating copyright owners at the behest of special-interest groups. While too little protection might result in too few works due to an author's inability to internalize the total social value of the works, too much copyright protection could also result in too few works. Copyright owners could exploit their quasi-monopoly power by producing fewer works at a higher price, and others would forgo producing works that copy or build on existing copyrighted works because of increased production and transactions costs.[68] Thus, if the Copyright Act confers too much protection to copyright owners, it elevates private interests over the public interest and creates market failure rather than cures it.

Third, the complex structure of the 1976 Act and subsequent amendments is radically different from earlier copyright statutes.[69] As Jessica Litman has observed, "[u]nlike the porous 1909 Act, the 1976 Act is a detailed comprehensive code, chock-full of specific heavily negotiated compromises."[70] As a result, the Act is less

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> for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.

Id. at 1167.

Indeed, in 1970, then-Professor Stephen Breyer argued persuasively that, given market realities and self-help measures available to copyright owners, it was dubious whether *any* copyright protection was needed to mitigate the problem of free-riding. As a result, Breyer concluded that Congress should maintain the status quo of copyright protection but refrain from expanding the rights of copyright owners in the future. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). Nevertheless, since the time of Breyer's writing, the statutory protection enjoyed by copyright owners has grown to unprecedented levels at an unprecedented pace.

[68] Professor Landes and Judge Posner have explained as follows:

> The less extensive copyright protection is, the more an author, composer, painter, or other creator can borrow from previous works without a license yet without thereby infringing copyright, and the lower, therefore, the costs of creating a new work . . . . The effect [of overbroad copyright protection] would be to raise the quality-adjusted cost of creating new works—the cost of expression, broadly defined—and thus, paradoxically, perhaps lower the number of works created. This analysis implies that copyright holders might well find it in their self-interest, ex ante, to limit the scope and duration of copyright protection.

See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 68-69 (2003).

The problem is that, although authors have an *ex ante* interest in having meaningful limits on copyright protection for derivative works, once the copyright owners of those works know that they have a commercially successful work, they have an incentive to lobby for extensive copyright protection to obtain additional rents on that work.

[69] Register of Copyrights Barbara Ringer said that the 1976 Act "is as radical a departure as was our first copyright statute, in 1790," making "a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself." *See* Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCIL. L. REV. 477, 479 (1977).

[70] *See* Litman, *supra* note 62, at 857-859; 1 NIMMER & NIMMER, *supra* note 62, at xiii, release 55.

amenable to judicial discretion,[71] despite copyright's traditional need for common-law experimentation with rules for new technologies prior to statutory codification.[72] Professor Melville Nimmer also lamented this change in structure of the 1976 Act:

> Where previously the statute had too little to say in many vital copyright areas, it may now be argued that it says too much. I regret this departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles. This has now been replaced with a body of detailed rules reminiscent of the Internal Revenue Code. Once [sic] suspects that many of the more complicated provisions are not so much an expression of anyone's ideal as to how to draft legislation, but are rather the product of hard-fought compromises between conflicting interest groups.[73]

Fourth, it is well-documented that the 1976 Act has an "unusual legislative history" that reflects not merely commonplace lobbying of individual legislators but virtually complete delegation of drafting authority to representatives of large and well-organized industries that would benefit from the legislation.[74] Although notable authors (including Noah Webster and Mark Twain) influenced early copyright legislation to some extent,[75] the legislative history of the 1976 Act "reveals that most of [its] statutory language was not drafted by members of Congress or their staffs at all . . . [but instead] evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."[76] According to one of the leading scholars on the legislative history of the 1976 Copyright Act, the resulting statute:

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71 *See generally* Easterbrook, *supra* note 37, at 16-18 (stating, "[t]he more detailed the law, the more evidence of interest-group compromise and therefore the less liberty judges possess," and arguing that judges must take into account the interest-group influence in all kinds of litigation, especially in "'traditional' economic subjects" like intellectual property).

72 Professor Merges argues that over the past century, copyright law has adapted most effectively to new technologies when Congress has enacted "broad, enabling amendments," that "leave[ ] considerable room for maneuvering in the courts, and buy[ ] more time for the inevitable consolidation of quasi-common-law changes in major statutory revisions." *See* Merges, *supra* note 6, at 2190. He argues that, by contrast, "[d]etailed, technology-specific provisions reflecting the passing concerns of a moment . . . thwart, to some extent, the quasi-common-law process by which IP law is elaborated" and "have proven difficult to adapt to new technologies." *See id.*

73 *See* 1 NIMMER & NIMMER, *supra* note 62, at xiii, release 55.

74 *See* Litman, *supra* note 62, at 860-62; William F. Patry, *Copyright and the Legislative Process: A Personal Perspective,* 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996).

75 *See, e.g.,* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 35-47 (2001).

76 *See* Litman, *supra* note 62, at 860-61.

> represented precisely what one might have expected to evolve from negotiations among parties with economic interests in copyright. The bill granted authors expansive rights covering any conceivable present and future uses of copyrighted works, and defined those uses very broadly. It then provided specific, detailed exemptions for those interests whose representatives had the bargaining power to negotiate them.[77]

Moreover, this legislative capture has continued since passage of the 1976 Act. Professor William Patry, an insider to the legislative process that produced the 1995 Digital Performance Rights Act, described the pervasive influence of special-interest groups in this way:

> Copyright interest groups hold fundraisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report. In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report. With the 104th Congress we have, I believe, reached a point where legislative history must be ignored because not even the hands of congressional staff have touched committee reports.[78]

Fifth, the dramatic expansion of copyrights cannot be squared, either on economic or non-economic grounds, with the public interest purpose of copyright law. With regard to non-economic grounds for copyright expansion, one might argue that an expansive copyright law (like that of some European countries) embodies the natural-rights view that authors and artists should be given complete control over their creative works. It is fairly clear, however, that American copyright law does not embody such a view. The Supreme Court has consistently held that the purpose of American copyright law is instrumental; its purpose is to encourage creativity, not to reward artists for their labor or genius. For instance, in *Feist Publications, Inc. v. Rural Telephone Service*, the Court, rejecting the sweat of the brow doctrine, held that facts were not copyrightable, even where substantial time and energy had gone into their discovery and collection.[79] In addition, several

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[77] *See id.* at 883.

[78] *See* Patry, *supra* note 74, at 141.

[79] *See Feist*, 499 U.S. 340, 359-60 (1991) ("[T]he 1976 revisions to the Copyright Act

aspects of the most recent Copyright Act and its amendments—including broad employer rights under the work-for-hire doctrine,[80] narrow artists' rights under the moral rights provisions,[81] and a copyright term extension that vests in transferees rather than authors or their heirs[82]—belie the claim that American copyright law is premised on the need to protect the natural rights of authors and artists.

Moreover, some areas of copyright expansion over the past few decades are difficult to justify on economic grounds. The most problematic of these areas, those which are the product of special-interest influence, will be addressed in the following subsection.

B. *Specific Private-interest Provisions of the Copyright Act*

Some of the most troublesome aspects of copyright expansion over the past few decades include a longer copyright term, broad derivative works rights that prevent others from making transformative uses of copyrighted works, and digital rights in the DMCA that prevent uses previously thought to be noninfringing. It is important to note, however, that these provisions are highlighted as significant examples and are not the only special-interest provisions in the Copyright Act. As the previous subsection discussed, the Copyright Act is replete with such provisions, including many that might be viewed as "good" legislation. Some

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leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection . . . . Nor is there any doubt that the same was true under the 1909 Act.").

80 Section 201 states that "[i]n the case of a work made for hire," which is broadly defined in section 101, "the employer or other person for whom the work was prepared" is deemed to be the author of the work, despite the fact that the constitution specifies only that Congress may give rights to *authors*. *See* U.S. CONST. art. 1, § 8, cl. 8. According to one Copyright Office study, approximately 40% of works registered with the Copyright Office were works for hire as of 1955. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 n.4 (1989) (adding that the Copyright Office does not keep more recent statistics on the number of such registrations).

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82 William Patry has argued that the most troublesome aspect of the term extensions granted in the 1976 Act and the 1998 amendments is not their duration, but the fact that they vest in transferees of copyright owners rather than reverting to authors or their heirs. *See* Patry, *supra* note 74, at 150-52. In describing the 1998 Copyright Term Extension Act, which added twenty more years to a life-plus-50-years term, Patry said: "Who will the copyright in the extra twenty years go to then? It will go to the transferee, without any opportunity for the author or children to get it back. Does this tell you anything about who is the real principal beneficiary of the bill? The answer is not authors or their children." *See id.* at 151.

examples include exemptions to performance and display rights for the benefit of churches, small businesses, and handicapped persons,[83] and an exemption to the DMCA's prohibitions for reverse engineering of computer programs to benefit the computer industry.[84]

The proposed rule of construction would construe both "good" and "bad" special-interest provisions narrowly. If all private-interest provisions (such as the derivative works right and the DMCA) are construed narrowly and all public-interest provisions (such as the idea/expression dichotomy and fair use) are construed broadly, there would be little need for such "good" special-interest exemptions because most of the exempted activities would be deemed noninfringing even without the exemption. In fact, these groups would likely be better off under the proposed rule than with their current exemptions because the exemptions they were able to negotiate are so narrow that they afford very little protection against the broad rights negotiated by more powerful interests. Moreover, if copyrights were construed more narrowly, these groups might be able to devote their limited resources to things other than lobbying for exemptions from copyright law. Finally, if special-interest provisions are construed narrowly, there will likely be fewer of them, which will result in a less complex and more comprehensible statute.

The remainder of the paper will apply the proposed rule of construction to some of the more notorious examples of rent seeking. The most recent term extension has been heavily criticized because it was clearly the product of special-interest lobbying and, on balance, does not serve copyright's public interest in encouraging creative works. The term extension will not be addressed in detail here, however, because the proposed rule applies only to statutory ambiguities and there is no statutory ambiguity in the meaning or scope of the term extension provisions. There is, however, significant ambiguity in the scope of both the derivative works right and the DMCA, and the following analysis will focus on these provisions as examples of private-interest provisions.

1. Derivative Works Rights

The Copyright Act gives a copyright owner not only the right to copy, which has always been at the core of copyright protection,

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[83] *See* 17 U.S.C. § 110.
[84] *See* 17 U.S.C. § 1201(f).

but also the right to prepare derivative works, which is a right to prevent others from producing new works that build or improve upon the copyright owner's work. A derivative work is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[85] Special-interest influence is evident in the breadth and specificity of the derivative works definition, and it is clear that this right confers substantial benefits to relatively few copyright owners while it imposes significant costs on the public at large.

Moreover, it is unlikely that the right is justifiable on the ground that it provides an incentive to produce copyrighted works. Because the goal of copyright is to encourage the production of creative works, a copyright is justified only insofar as production of creative works will be greater with the right than without it. A copyright that protects only the right to make exact copies of a work is thought to be justified because the cost of creating the original work is high, the cost of copying the original work (or the cost of creating the new, allegedly infringing work) is low, and the new work substitutes for the original work in the market.

The same calculus might justify a narrow derivative works right, or a right that protects against substantially copying the original work in a new form or medium.[86] It would not be consistent with the goals of copyright to allow someone to copy much of another's work, make some minor changes, and then call it his or her own. But it is also not consistent with the goals of copyright to have a broad derivative works right that treats radical transformations of works the same as verbatim copying.[87] A broad

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85 17 U.S.C. § 101.

86 There is only a weak case for having any derivative works right at all. *Compare* LANDES & POSNER, *supra* note 68, at 109-112 (arguing that the case for the derivative works right is "a subtle one" but that giving the author of the original work control over some derivative works might help to (1) prevent authors from delaying distribution of the original work until derivative works also can be produced, and (2) reduce transaction costs associated with negotiating with multiple authors), *with* Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1216-17 (1996) (arguing that Landes and Posner's justifications of the derivative works right are flawed and suggesting that the derivative works right is justified only where it would be administratively difficult to determine whether a new work infringed on the original work or a derivative work). *See also* LESSIG, *supra* note 35, at 139 ("Some view transformation as no wrong at all—they believe that our law, as the framers penned it, should not protect derivative rights at all.").

87 *See* LESSIG, *supra* note 35, at 138-39:

> It is this derivative right that would seem most bizarre to our framers, though it has become second nature to us. [This right] created an astonishing power within a free culture . . . . I understand the wrong in duplicating and selling

derivative works right would give the owner of the copyright in the original work the right to prevent others from creating new works that build on the copyrighted work, even where the new content of the derivative work is equal to or greater than the creative content copied from the original work. In that case, the cost of creating the new work is higher relative to the cost of creating the original work, and the new work typically would not substitute for the original work in the market. As a result, the potential harm to copyright owners is significantly lower where a derivative work is a substantially new work rather than a close copy of the original work.[88]

Moreover, because a derivative work involves an expenditure to adapt the original work into a new form, and there is a low *ex ante* probability that any particular work will be successful enough to justify producing the derivative work, authors are not likely to count on derivative works as a source of income sufficient to justify producing the original work.[89] A broad derivative works right, however, substantially increases the production and transaction costs of new works because it requires authors who want to improve upon earlier works to negotiate and pay for licenses to produce the new work. The impact on creative improvements can be significant.[90] Broad derivative works rights prevent even significantly or radically different works from being produced if those works are "based upon one or more preexisting works" to some degree.[91] The breadth of this provision is particularly problematic because all works build on other works to a large

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someone else's work. But whatever *that* wrong is, transforming someone else's work is a different wrong . . . . Yet copyright law treats these two different wrongs in the same way.

88 *See, e.g.*, LANDES & POSNER, *supra* note 68, at 109-115 (arguing that courts should refuse to find infringement where the expressive element added in the derivative work dominates over the expressive element borrowed from the original work).

89 *See* Sterk, *supra* note 86, at 1216 ("For an author's first book, . . . because the chance that movie rights to the book will command a high price is infinitesimally small, any first author who makes movie royalties a critical factor in deciding whether to write is almost certainly misperceiving his own interests[,]" whereas "for the established author, revenues from the book alone generally will be enough to keep the author writing . . . .").

90 *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y USA 209 (1983) ("[E]very infringer of a derivative right is, by definition, itself the potential copyright owner of a derivative work, with an equal claim on copyright's system of investment incentives. The fact that the Copyright Act aims to encourage investment in original and derivative works alike seriously complicates the determination whether a particular derivative work infringes an original work.").

91 *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1020-1023 (1997) (arguing that while the derivative works right in copyright law means that even significant or radical improvements infringe the works on which they are based, patent law doctrines such as blocking patents and the reverse doctrine of equivalents protect such improvements in some circumstances).

extent.[92] For example, even works as "original" as Michelangelo's *David*[93] and Mark Twain's stories[94] were based upon previously existing works. Because a broad derivative works right prevents second-comers from creating new works based on existing works while providing little incentive to create the original works, it seems likely that the costs of the right outweigh the benefits.

2. Digital Rights in the DMCA

The DMCA, enacted in 1998, provided a number of new rights intended to bring copyright law "into the digital age."[95] The most significant and controversial provisions of the DMCA are in the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, which was enacted, in part, to conform United States copyright law to two WIPO treaties drafted in 1996.

The stated goal of the DMCA is to balance the rights of copyright owners and users of copyrighted works when those works are in digital form. Because works in digital form can be copied cheaply and easily with virtually no diminution in quality and can be transmitted to thousands of people via the internet, WIPO and Congress felt that new legislation was needed to prevent piracy of copyrighted works and encourage making works available in digital form. On the other hand, increased protection of digitized works, which are usually of better quality and more easily available (over the internet) than their analog or hard-copy forms, raised concerns over the rights of consumers to make lawful uses of such works.

The DMCA was enacted with the support of special-interest groups, including numerous groups from the publishing, recording, computer, and communications industries. Thus, it is

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92 The Ninth Circuit has described the statutory definition of "derivative work" as "hopelessly overbroad," because "'every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before.'" *See* Micro Star v. Formgen, Inc., 154 F.3d 1107, 1110 (9th Cir. 1998) (noting that the 9th Circuit has added criteria to narrow the definition of what constitutes an infringing derivative work) (quoting Emerson v. Davies, 8 F. Cas 615, 619 (C.C.D. Mass. 1845)).

93 *See* ROSS KING, MICHELANGELO AND THE POPE'S CEILING 158 (2003) (noting that Michelangelo's *David*, which he sculpted in 1504, was inspired by a nude figure on an ancient Roman sarcophagus that Michelangelo saw and sketched sometime after his arrival in Rome for the first time in 1496).

94 *See* VAIDHYANATHAN, *supra* note 75, at 62-69 (stating that "Twain was a rampant plagiarist, as we commonly understand the term," and quoting a letter from Twain to Helen Keller in which Twain says there was not "much of anything in any human utterance, oral or written except plagiarism").

95 *See* REPORT OF THE SENATE COMM. ON THE JUDICIARY, S. REP. NO. 105-190, at 2 (1998) [hereinafter S. REP. (DMCA)].

no surprise that the DMCA is complex legislation that provides strong protection against piracy of digitized copyrighted works. It does so by reinforcing technological controls that copyright owners place on their copyrighted works to prevent access and certain other uses.[96] Such controls provide a physical barrier that limits access and use to those users with a "key," or users who are making authorized uses of the copyrighted works. The DMCA affords legal protection against the circumvention of those technological controls as well as against trafficking in technology that facilitates such circumvention.

Assuming that the threat of piracy is greater for works in digital form, the DMCA is laudable insofar as it increases deterrence for digital piracy. As interpreted by some courts, however, the DMCA goes too far in protecting copyright owners at the expense of the public because it fails to preserve access to works for personal and socially beneficial uses that cause little or no harm to a copyright owner. Following the DMCA's prohibitions on circumvention and trafficking in subsections 1201(a) and (b), respectively, section 1201(c) provides that: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." Despite this "savings clause," courts have found liability where a defendant circumvented an access control for the sole purpose of accessing uncopyrighted materials (including uncopyrightable ideas or other public domain materials) or making fair use of copyrighted materials.[97] In other words, rather than merely providing additional penalties for piracy of digitized works (penalties that would piggyback on the protection afforded by traditional copyright law), the DMCA penalizes uses that have never been prohibited—that have in fact been encouraged—by traditional copyright law.[98] As such, the DMCA fails to achieve the balance that copyright law historically has sought to achieve,[99] and it is

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96 *See* LESSIG, *supra* note 35, at 157 (2004) ("The DMCA was enacted as a response to copyright owners' first fear about cyberspace. The fear was that copyright control was effectively dead; the response was to find technologies that might compensate . . . . The DMCA was a bit of law intended to back up the [technological] protection . . . designed to protect copyrighted material.").

97 *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001); 321 Studios v. Metro Goldwyn Studios, Inc., 307 F. Supp. 2d 1085, 1101-04 (N.D. Cal. 2004); United States v. Elcom, 203 F. Supp. 2d 1111, 1124 (N.D. Cal. 2002).

98 *See* LESSIG, *supra* note 35, at 160 ("The controls built into the technology of copy and access protection become rules the violation of which is also a violation of the law. In this way, the [DMCA] extends the law—increasing its regulation, even if the subject it regulates (activities that would otherwise plainly constitute fair use) is beyond the reach of the law.").

99 *See id.* at 157-60 (arguing that because the DMCA does not provide a defense for fair

private-interest legislation.

C. *Specific Public-interest Provisions of the Copyright Act*

In contrast to the private-interest aspects of the Copyright Act discussed in the previous sections, however, there are at least two specific provisions of the Copyright Act that serve the public interest in an obvious way: the idea/expression dichotomy in section 102(b) and the fair use doctrine in section 107.

1. Idea/Expression Dichotomy

The idea/expression dichotomy relates to copyrightability. It provides that the copyright protection available "for an original work of authorship [does not] extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[100] Thus, the idea/expression dichotomy distinguishes between original expression, which is ordinarily copyrightable, and the underlying ideas, concepts, etc., which are not copyrightable.

To some extent, the idea/expression dichotomy is based on the formal notion that facts, concepts, and other discoveries (which exist apart from the individual who discovers them) do not originate with or owe their existence to an author and, therefore, do not qualify as "original works of authorship," as is required for both constitutional and statutory copyrightability. However, the doctrine has a more important functional aspect as well. It keeps "building-block" facts and ideas in the public domain, which serves the public-interest purpose of copyright law to promote creative expression.[101]

This public-interest purpose of the idea/expression dichotomy is evident in two ways. As an initial matter, the doctrine holds that procedures, processes, systems, and methods of operation are always in the public domain, even when they do in fact owe their origin to an individual. For example, in *Lotus Development Corp. v. Borland Int'l, Inc.*, the court held that Lotus's menu command hierarchy was an uncopyrightable method of operation because it provided the interface with the user, even

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use, it changes copyright's traditional balance between copyright owners and potential users).

100 *See* 17 U.S.C. § 102(b).

101 *See Eldred*, 537 U.S. at 219 ("Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.").

though it was clear that Lotus created it.[102] In addition, under the idea/expression dichotomy's merger doctrine, copyright protection is denied to otherwise copyrightable expression where that expression "merges" with an uncopyrightable idea, or where there are only a few ways to express the underlying idea. Indeed, the merger doctrine itself may be viewed as a default rule of statutory construction in which ambiguities between ideas and expression are resolved against copyright protection in order to serve the public interest in maintaining a robust public domain.

2. Fair Use

The fair use doctrine provides a defense to copyright infringement for uses of copyrighted materials that further the purposes of copyright law. Historically, fair use was a common-law doctrine, but Congress codified it in section 107 of the 1976 Copyright Act. Section 107 directs courts to consider four factors in assessing a claim of fair use: (1) the purpose or character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality taken from the copyrighted work; and (4) the effect of the use on the market for the copyrighted work.[103] Although there is no clear definition of fair use, these factors tend to favor uses that are not commercial but are instead more personal in nature, as well as uses in which the defendant does not merely copy but, instead, adds value to the copyrighted work by contributing original expression to the work or by using it for a new, socially beneficial purpose.[104]

As was previously discussed, the negotiations leading up to the 1976 Act culminated in expansive rights for copyright owners and "specific, detailed exemptions for those interests whose representatives had the bargaining power to negotiate them."[105] Jessica Litman describes the role of the fair use doctrine in those negotiations this way:

> In the midst of . . . expansively defined rights and rigid exemptions, the fair use doctrine became the statute's central source of flexibility. In the earliest versions of the bill, the beleaguered fair use provision offered the sole means of tempering the expansive scope of the copyright owner's exclusive rights. Fair use was also the sole safe harbor for

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102 *See Lotus*, 49 F.3d 807, 815-19 (1st Cir. 1995).

103 *See* 17 U.S.C. § 107.

104 *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-85 (1994); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448-56 (1984).

105 *See* Litman, *supra* note 62, at 883.

interests that lacked the bargaining power to negotiate a specific exemption.[106]

The Supreme Court acknowledged the public-interest purpose of both the idea/expression dichotomy and fair use doctrine in *Eldred*. First, the Court observed that copyright law as a whole shares the First Amendment's public-interest purpose of protecting speech because "copyright's purpose is to *promote* the creation and publication of free expression."[107] Second, the Court described the idea/expression dichotomy and the fair use doctrine as "built-in free speech safeguards" that make "further First Amendment scrutiny [ ] unnecessary" for copyright legislation that "has not altered [these] traditional contours of copyright protection."[108]

IV. Statutory Ambiguities Between Public- and Private-interest Provisions of the Copyright Act

A. *Derivative Works and Fair Use*

The tension between the private-interest nature of the derivative works right and the public-interest origins of copyright law presents itself as a statutory ambiguity at the intersection of the derivative works right and the fair use doctrine. The definition of "derivative work" conflicts with both the first and fourth factors of the fair use analysis, the purpose and character of the defendant's use and the harm to the market for the copyrighted work, respectively, as they have been consistently applied by courts. Moreover, because there is no obvious way to resolve this conflict, it presents a true statutory ambiguity between the two provisions. However, this ambiguity may be resolved with rules of statutory construction that take into account the private- and public-interest nature of the two provisions.

First, there is tension between the statutory description of the exclusive right to prepare derivative works and the first factor of the fair use analysis. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that the first factor, which considers the

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106 *See id.* at 886. It should be noted that not everyone believes fair use was intended to increase public access to copyrighted works. Modern fair use doctrine derives from Justice Story's opinion in *Folsom v. Marsh*, and it has been argued that *Folsom* reduced, rather than expanded, the scope of noninfringing uses of copyrighted works. *See, e.g.*, John Tehranian, *Et tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. Davis L. Rev. 465 (2005). Arguably, Congress further reduced the scope of fair use by codifying the common law doctrine as an affirmative defense in the 1976 Act. Nevertheless, it is clear that fair use as it exists today is one of the few major exceptions to the broad copyrights negotiated by interest groups.

107 *See Eldred*, 537 U.S. at 219 (emphasis in original).

108 *See id.* at 221.

purpose and character of the defendant's use, generally favored a finding of fair use where the defendant's use is "transformative," meaning that it does not merely "supersede the objects" of the original work but instead adds "new expression, meaning, or message."[109] The *Campbell* Court reasoned that because the purpose of copyright law is to encourage creative works, the more transformative the new work is, the less weight will be accorded to other factors tending to weigh against a finding of fair use, such as the commercial nature of the defendant's work. Thus, under *Campbell*, transformative works are entitled to greater protection under the fair use doctrine than works in "which the alleged infringer merely uses [the copyrighted work] to get attention or to avoid the drudgery in working up something fresh . . . ."[110]

Paradoxically, while the "transformative" quality of a defendant's use of a copyrighted work bolsters the defendant's claim of fair use, the derivative works right reserves to the copyright owner the right to make any work "in which the copyrighted work may be recast, *transformed*, or adapted."[111] There is an obvious conflict between Congress's use of the word "transformed" in the definition of "derivative work" and the Court's use of the word "transformative" in the elaboration of the fair use defense.[112]

In addition to the ambiguity involving the derivative works right and the first fair use factor, there is also an ambiguity involving the fourth fair use factor. Under § 107, the fourth fair use factor requires courts to consider "the effect of the [defendant's] use upon the potential market for or value of the copyrighted work." Unfortunately, although many courts have said that market harm is the most important factor in the fair use analysis, neither § 107 nor any other provision in the Copyright Act define which markets should be considered in determining market harm. The term "potential market" seems to require courts to consider more than just the markets actually being exploited by

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109 *See Campbell*, 510 U.S. at 579 (quoting Justice Story's opinion in *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841)) (internal citations omitted).

110 *See id.* at 580.

111 *See* 17 U.S.C. § 101 (emphasis added).

112 *See* Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 124-28 (2001) ("A literal application of the derivative right results in the evisceration of fair use as conceived in common law. It transforms infringement analysis by requiring courts to examine the original work and then discern which other works the first author might potentially create, rather than examining the nature of the use made by the alleged infringer."); 4 NIMMER & NIMMER, *supra* note 62, at § 13.05[A][1][b] & n.82 (noting "potential ambiguity of [the term 'transformative'] in light of the definition of 'derivative work' in 17 U.S.C. § 101").

the copyright owner at the time of the allegedly infringing acts, but, in focusing on the market for "the copyrighted work," the statute does not specify whether or to what extent courts must consider harm to other markets, such as markets for derivative works.

Clearly, if an alleged infringer has made and sold verbatim copies of a copyrighted novel, the court's analysis of the fourth factor should find market harm based on sales of the infringing copies because the defendant's sales supplanted sales of the copyrighted novel in its ordinary market. Likewise, the fourth factor can easily be read to include harm to other commonly exploited markets; for example, a court likely would find market harm where the alleged infringer recreated and sold the copyrighted novel in another medium, such as a motion picture version.

It is less clear whether a copyright owner suffers market harm under the statute when the alleged infringer produces a new work in which some elements are borrowed from the copyrighted work but the original, expressive contributions of the alleged infringer are equal to the borrowed elements. For example, the novel *The Hours* borrows from *Mrs. Dalloway*,[113] the novel *Wide Sargasso Sea* is based on *Jane Eyre*,[114] and the memoir *Reading Lolita in Tehran* builds on extensive excerpts from *Lolita*.[115] In such cases, the newer work does not make minor changes to the earlier work or simply convert it into a new medium; instead, the newer work radically transforms the earlier work.[116] Given the amount of creativity involved in producing the newer works, it is nearly impossible for the owners of the copyrights in the earlier works to have produced the newer works or works similar to them. Furthermore, newer works of this kind typically do not supplant sales of the original novels on which they are based; on the contrary, oftentimes they actually enhance sales. Indeed, in each of these three examples, the Amazon.com website, which makes all of these works available for purchase, advertises that customers who purchased the more recent work also purchased the original

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113 *Compare* MICHAEL CUNNINGHAM, THE HOURS (1998) *with* VIRGINIA WOOLF, MRS. DALLOWAY (1925).

114 *Compare* JEAN RHYS, WIDE SARGASSO SEA (1967), *with* CHARLOTTE BRONTË, JANE EYRE (1846).

115 *Compare* AZAR NAFISI, READING LOLITA IN TEHRAN: A MEMOIR IN BOOKS (2003), *with* VLADIMIR NABOKOV, LOLITA (1958).

116 *See, e.g.*, Note, *Originality*, 115 HARV. L. REV. 1988, 1989 & n.5 (2002) (discussing *The Hours*' reworking of *Mrs. Dalloway* and *Wide Sargasso Sea*'s reworking of *Jane Eyre* as examples of the concept of originality in copyright law).

work. Moreover, in two of these three examples, Amazon.com encourages purchase of the original work as well as the more recent work by offering a discount to purchasers who buy both books at the same time.[117]

Nevertheless, because the copyright owner's right to prepare derivative works is defined so broadly under the statute, courts often find that the fourth factor weighs against a finding of fair use even where the newer work radically transforms the earlier work or the newer work increases sales of the earlier work. In part, this is because courts have found that market harm includes not only lost sales, in which the defendant's activities supplanted sales that the copyright owner otherwise could have made, but also lost licensing revenues, fees the copyright owner could have charged the defendant for use of the copyrighted work. Such a broad view of the copyright owner's rights—the right to control virtually any market in which some portion of the work has been used, whether or not the use supplants sales of the copyrighted work—produces confusion, even circularity, in the fair use analysis. The copyright owner could always argue that she has suffered some market harm because the defendant could have paid a fee for the very use at issue in the case. This argument is circular, however, because if the defendant's use is a fair use, then the copyright owner had no right to compensation from the defendant in the first place and there would be no harm to a legally recognized market.

A number of courts have noted this potential for circularity[118] and have attempted to define which markets are within the copyright owner's control. Unfortunately, there is little consensus or concreteness in the courts' market definitions. For instance, courts speak of protecting the "normal" market for the copyrighted work,[119] markets that the copyright owner "would in general develop or license others to develop,"[120] or "traditional,

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117 *See* http://www.amazon.com/exec/obidos/ASIN/0312305060/qid=1109970323/sr=2-1/ref=pd_bbs_b_2_1/002-6940996-1762401 (last visited Oct. 6, 2005) (noting that customers who bought *The Hours* also bought *Mrs. Dalloway* and offering a discount for the purchase of both); and http://www.amazon.com/exec/obidos/tg/sim-explorer/explore-items/-/081297106X/0/101/1/none/purchase/ref=PD_sexpl/002-6940996-1762401 (last visited Oct. 6, 2005) (noting that customers who bought *Reading Lolita in Tehran* also bought *Lolita*).

118 *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1387 (6th Cir. 1996) (addressing defendant's argument that it is circular to count lost licensing revenue for purposes of determining market harm for fair use analysis because the plaintiff has no right to demand a licensing fee if the challenged use is a fair use); Am. Geophysical Union v. Texaco, 60 F.3d 913, 929 (2d Cir. 1994) (same).

119 *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 568 & n.9 (1985).

120 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

reasonable, or likely to be developed markets."[121] The difficulties that attend the ambiguity in market definition under the fourth fair use factor are exacerbated by the fact that, because fair use is an affirmative defense, the defendant often bears the difficult burden of showing the non-existence of market harm.[122]

1. Arguments that the Conflict is Illusory

Before attempting to resolve the apparent conflict between the derivative works right and the fair use doctrine, it is necessary to consider the extent to which a real conflict exists. Two arguments suggest that the conflict is illusory. First, the derivative works right may have only marginal independent significance because it overlaps with the right of reproduction and therefore produces very little additional tension with the fair use doctrine. Second, the derivative works right may be so broad that it preempts fair use claims based on the transformativeness of the defendant's use. As an initial matter, it should be clear that these two arguments represent nearly opposite views of the meaning and scope of the derivative works right; therefore, their very existence belies the claim that there is no ambiguity. Moreover, as we shall see in the following sections, neither of these views is correct because they both oversimplify the complex relationship between the derivative works right and the fair use doctrine.

a. *Argument 1*: The Derivative Works Right is of Marginal Significance

The right of reproduction, or the right to copy, is the core right owned by copyright owners. Because the creation of most derivative works requires copying the original works on which the derivative works are based, it might be argued that virtually all of the works that would infringe the derivative works right would also infringe the reproduction right.

If this argument is correct, the derivative works right applies independently of the reproduction right in only a few narrow types of cases: for example, where the defendant's allegedly infringing use is not the copying of the copyrighted work but rather either the physical alteration of a particular, lawfully obtained copy of the copyrighted work[123] or an improvised performance of the

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121 *See Am. Geophysical Union*, 60 F.3d at 929-30.

122 For instance, in *Campbell*, the Supreme Court remanded the case to the district court with instructions that 2 Live Crew prove the absence of harm to the market for non-parody rap versions of the song *Pretty Woman*. *See Campbell*, 510 U.S. at 593-94.

123 *Compare* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1343 (9th

copyrighted work, meaning a performance that is not fixed in a tangible copy.[124] Under this view, the derivative works right creates only marginal additional rights for copyright owners and therefore produces only marginal additional tension between the exclusive rights granted to copyright owners and the fair use defense available to users of copyrighted works. Thus, it might seem that the conflict between the derivative works right and the fair use doctrine is largely illusory.

The problem with this view is that it measures the significance of the derivative works right solely in terms of the number of works that would infringe the derivative works right without simultaneously infringing the reproduction right. Thus, it fails to consider that the derivative works right also has significance (perhaps its primary significance) in the enlarging effect it has on the scope of the reproduction right itself.[125] The interaction between the reproduction right and the derivative works right is apparent from the standard that is used in determining infringement of the reproduction right. A common articulation of that standard is that the defendant has infringed where "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as

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Cir. 1988) (cutting copyrighted artwork out of an authorized copy of a book and gluing it to decorative tiles created a derivative work), *with* Lee v. A.R.T. Co., 125 F.3d 580, 582-83 (7th Cir. 1997) (mounting authorized copies of plaintiff's copyrighted notecards and lithographs to ceramic tiles with epoxy resin did not create derivative a work).

[124] The House Report states that although the derivative works right "overlaps the exclusive right of reproduction to some extent," the derivative works right "is broader than that right . . . in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form." *See* H.R. REP. No. 94-1476, at 62 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675. Finding this definition of the derivative works right to be too broad, some courts, explicitly rejecting that distinction, have held that there is no violation of the right to prepare derivative works unless the allegedly infringing act incorporated the plaintiff's work into a concrete form. *See, e.g.*, Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992).

[125] Thus, the derivative works right blurs the outside limit of the reproduction right because it allows courts to avoid answering the difficult question of whether works that contain both copied material and a great deal of new material violate the reproduction right. For example, before the 1870 Copyright Act added any derivative works rights, courts viewed the translation of a novel into another language as a substantially new work that did not violate the reproduction right. *See, e.g.*, Stowe v. Thomas, 23 Fed. Cas. 201 (C.C.E.D. Pa. 1853) (translation of plaintiff's book *Uncle Tom's Cabin* into German is not infringement). Since the derivative right to translate a work into another language was added in 1870, however, the unauthorized translation of a work probably violates not only the derivative works right but the reproduction right as well (because courts would be precluded from taking into account the new material). Nevertheless, the derivative works right saves courts the difficulty of making this determination. *See* Sterk, *supra* note 86, at 1217.

the same."[126] The derivative works right causes more uses to be deemed infringing under this standard, because it precludes courts from taking into account any changes made by the defendant, such as changes incidental to conversion of the original work from one medium to another, that are reserved to the copyright owner by the derivative works right.

An example of this interplay is the Second Circuit's decision in *Horgan v. Macmillan, Inc.*[127] The district court had held that publication of around sixty still photographs of various scenes from the New York City Ballet Company's performance of the Nutcracker ballet did not infringe George Balanchine's copyright in the choreography of the ballet.[128]

The judge reasoned that because the essence of choreography is flow or movement, the still photographs, which "catch dancers in various attitudes at specific instants of time," did not "take or use the underlying choreography."[129] Thus, the district court essentially held that, because the defendant had used a very different medium, the essence of the defendant's work was too different from that of the plaintiff's work to permit a finding of infringement under the ordinary infringement standard. The Second Circuit reversed, concluding that the district court erred in holding that the defendant's use of copyrighted material in a different medium precluded a finding of infringement.[130] It remanded the case for a determination of whether there was substantial similarity between the two works regardless of whether the differences in the medium of the two works made it impossible to recreate the choreography of the ballet from the still photographs.[131]

b. *Argument 2*: The Derivative Works Right is So Broad that it Preempts Fair Use

In sharp contrast to those who have argued that the derivative works right has only marginal independent significance, others believe that the copyright owner's nearly consummate right to create derivative works under the current Copyright Act preempts claims of fair use that are based on the defendant's original contributions. For example, Paul Goldstein has argued that

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126 *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
127 789 F.2d 157 (2d Cir. 1986).
128 *See* Horgan v. Macmillan, 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985) (district court denying plaintiff's request for preliminary injunction).
129 *See id.*
130 *See Horgan*, 789 F.2d at 162-63.
131 *See id.*

"[w]hen Congress in the 1976 Act brought every form of transformative use within section 106(2)'s derivative right, it consequently left no room for the fair use doctrine to weigh the transformative nature of a use in the statutory balance."[132] This argument also reflects the view that there really is no conflict between the derivative works right and the fair use doctrine. The premise is that, by granting such a broad derivative works right, Congress contemplated the entire category of transformative works and decided to give control over all of those works to the owner of the copyright in the original work.

This ostensibly neat resolution of the conflict between the derivative works right and the fair use defense underestimates the complexity of the relationship between the two provisions. Although the copyright owner has on her side Congress's broad statutory definition of a derivative works right, the alleged infringer has on her side Congress's codification of a robust fair use doctrine. By incorporating the judicially-created doctrine of fair use into the 1976 Act along with the expanded derivative works right, Congress apparently intended to put fair use on at least equal footing with the derivative works right.

Even where it is undisputed that the defendant's use of a copyrighted work infringes the right to prepare derivative works, Congress clearly intended that fair use, where it applies, constitutes an exception to infringement. Section 106 lists the copyright owner's exclusive rights, including the right to prepare derivative works, but sections 107-112 (labeled "Limitations on Exclusive Rights") set forth a series of exceptions to those rights. The first of these exceptions is the fair use doctrine, codified in § 107, under which fair use of a copyrighted work "is not an infringement of copyright . . . [n]otwithstanding the provisions of section 106 . . . . " Thus, the fair use doctrine is entitled to the same deference owed to the other statutory exceptions to copyright infringement. One other such exception is the first-sale doctrine of § 109, under which the owner of a lawful copy of a copyrighted work may sell or display his or her copy of that work notwithstanding the exclusive rights of distribution and public display. Just as expansion of the rights of distribution and public display would not jettison the venerable first-sale doctrine, expansion of the right to prepare derivative works does not necessarily eviscerate the well-established fair use doctrine.[133]

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[132] *See* GOLDSTEIN, *supra* note 90, at § 10.2.2 (2d ed. Supp. 2002).

[133] *See* H.R. REP. NO. 94-1476, *supra* note 124, at 65 (1976) (describing the fair use

More specifically, the history and language of the 1976 Act make clear that Congress intended to retain the fair use doctrine in its historical form, which would require courts to weigh the defendant's transformative contributions in favor of fair use. The legislative history of the Act explicitly states that statutory codification of the fair use doctrine was not intended to modify the common-law formulation of the doctrine or to preclude future judicial shaping of the doctrine in any way.[134] The four fair use factors listed in § 107 date back over 150 years, closely tracking the fair use factors articulated by Justice Story in *Folsom v. Marsh*.[135] According to Justice Story's historical account, the purpose of the fair use doctrine is to determine whether the new work merely "supersede[s] the objects" of the original work or instead adds something new, such as comment or criticism.[136] The Supreme Court quoted Justice Story recently in the *Campbell* case, rephrasing the inquiry in the current vernacular as whether the defendant's use is "transformative."[137] Given the historical roots of the transformativeness inquiry, it is highly unlikely that Congress, in adding to the derivative works right, intended to preclude courts from considering the transformative quality of a defendant's use in determining whether the use is fair.

Moreover, although the general language of the derivative works definition—which provides that a derivative work is any "work based upon one or more preexisting works," including any "form in which a work may be recast, transformed, or adapted"—is broad enough to cover virtually any transformative use, that language is susceptible to a narrower interpretation in light of the

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doctrine as "one of the most important and well established limitations on the exclusive right[s] of copyright owners").

134 *See id.* at 66. The House Report accompanying the 1976 Act states as follows:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

135 *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (in deciding whether an abridgement of Washington's writings constituted a fair use, the court explained that in such cases "we must often . . . look to the nature and objects of the selections made, the quantity and value or the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work").

136 *See id.* at 344-48.

137 *See Campbell*, 510 U.S. at 579 ("The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" (citations omitted)).

numerous specific illustrations listed in the statute.[138] All of these illustrations, "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, [or] condensation," suggest that the derivative works right was intended merely to secure the copyright owner's right to adapt (and prevent others from adapting) the copyrighted work into other forms or media. Under this view, courts evaluating the transformativeness of a defendant's contributions in a fair use analysis would be precluded from taking into account only those changes which were incidental to converting the original work into another form or medium, but not from taking into account other original contributions. Under this narrower interpretation, for example, the author Vladimir Nabokov, or his heirs or assignees, could probably prevent someone else from making a straight movie version of the book *Lolita* but could not prevent anyone from making a work with a very new message like the book *Reading Lolita in Tehran.* Although this interpretation of the derivative works right still leaves ambiguities at the intersection of the derivative works and fair use, it would allow some consideration of transformativeness in the fair use analysis.

In sum, the conflict between the derivative works right and the fair use doctrine presents a real statutory ambiguity. This ambiguity should be resolved through rules of statutory construction that take into account the private- and public-interest nature of these provisions. As we shall see, the applicable interpretive rules suggest that ambiguities between these two provisions should be resolved by adopting the narrower interpretation of the derivative works right.

B. *The DMCA, the Idea/Expression Dichotomy, and Fair Use*

In order to understand the ambiguities that exist between the DMCA, on the one hand, and public-interest provisions of the Copyright Act, such as the idea/expression dichotomy and fair use, on the other, it is important to have a detailed understanding of the language and structure of the DMCA's anti-circumvention and

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138 This is merely an application of the common law rule of construction known as *ejusdem generis*, which provides that "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." *See* BLACK'S LAW DICTIONARY 517 (6th ed. 1990) (citing U.S. v. LaBrecque, 419 F. Supp. 430, 432 (D.C.N.J. 1976)).

anti-trafficking provisions contained in section 1201. Subparagraph 1201(a)(1)(A) states that, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[139] Subparagraph 1201(a)(2) supports the prohibition on circumvention of control technologies by prohibiting trafficking in technology and devices that facilitate such circumvention.[140]

There are a few exceptions to these prohibitions. With regard to the prohibition on circumvention, subparagraph 1201(a)(1)(B) provides that this prohibition "shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are . . . adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works . . . . " Subparagraph (C) directs "the Librarian of Congress, upon the recommendation of the Register of Copyrights," to "make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work, are . . . adversely affected by

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139 Subparagraph 1201(a)(3) provides definitions for the terms in these prohibitions:

> (3) As used in this subsection—
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> (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and
>
> (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

17 U.S.C. § 1201(a)(3).

140 It provides as follows:

> (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—
>
> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
>
> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
>
> (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively controls access to a work protected under this title.

17 U.S.C. § 1201(a)(2).

Subsection 1201(b) contains an anti-trafficking provision that is virtually identical to the anti-trafficking provision in 1201(a)(2), except that the provision in 1201(b) targets trafficking in a somewhat different type of circumvention technology. Because some copyright owners may prefer not to control access to the work, but rather to allow access and control only certain uses of the work, section 1201(b) is different from the previous anti-trafficking provision in that it prohibits trafficking in technology that aids in "circumventing protection afforded by a technological measure that effectively *protects a right of a copyright owner* . . . . " (emphasis added).

the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works."[141] Other exceptions to these prohibitions include an exception for nonprofit libraries, archives, and educational institutions to access a work in order to determine whether to acquire a copy of the work for their collection and an exception for reverse engineering of computer programs.[142]

In addition—and of greater importance for present purposes—subsection 1201(c)(1) provides a more general exception to the prohibitions on circumvention and trafficking:

> (c) OTHER RIGHTS, ETC., NOT AFFECTED. (1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

Arguably the most important and difficult issue in interpretation of the DMCA is whether circumvention that is performed in order to gain access to a work solely for noninfringing purposes can provide a basis for liability for circumventing a technological measure or for trafficking in technology that facilitates such circumvention. For example, suppose I use decryption software to decrypt a DVD solely for the purpose of playing 30 seconds of the DVD's footage for educational purposes in the classroom. This non-commercial, educational use of a small portion of the copyrighted work would certainly be deemed a noninfringing fair use under copyright law. But despite the fact that the DMCA is intended to deter digital piracy, my decryption would violate the anti-circumvention provision in subsection 1201(a)(1) unless some exception applies, and anyone who provides me the technology that enables such circumvention would be liable for trafficking under subsection 1201(a)(2).

The same is true if I circumvent a technological measure solely for the purpose of gaining access to uncopyrighted portions of a copyrighted work (such as the uncopyrightable ideas underlying the copyrightable expression of a work). For example, suppose that in my free time I use circumvention technology to gain access to an electronic version of a new Civil War novel, but rather than copying any of the novel's copyrightable expression, I decide to write my own Civil War romance novel about completely different characters in a different region of the South. The idea/expression

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141 *See* 17 U.S.C. § 1201(a)(1)(C).

142 *See* 17 U.S.C. § 1201(d) and (f).

dichotomy prevents copyrighting the abstract idea of a Civil War novel, and therefore my use would certainly be deemed a noninfringing use under copyright law. Nevertheless, unless some exception applies, my circumvention would violate the anti-circumvention provision of subsection 1201(a)(1), and anyone who provides me the technology that enables such circumvention would be liable for trafficking under subsection 1201(a)(2).

Defendants in recent DMCA cases have argued that the savings clause in subsection 1201(c)(1) can be read as providing an exemption from liability for both circumvention and trafficking where the challenged act of circumvention or trafficking "enable[s] only legitimate uses" of copyrighted works.[143] In *Universal City Studios, Inc. v. Corley*, defendants had posted on an internet web site the decryption software DeCSS with an explanation of how DeCSS could be used to decrypt DVDs such as those produced by the plaintiff movie studios. The district court held that the defendants had violated the anti-trafficking provision of 1201(a)(2) and entered an injunction prohibiting the defendants from engaging in various activities involving the decryption software.[144]

On appeal, the defendants argued that the DMCA's prohibitions against circumvention and trafficking should be construed narrowly in order to avoid constitutional issues under the Patent and Copyright Clause and the First Amendment.[145] Specifically, they argued that the savings clause in 1201(c)(1), which provides that "[n]othing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use of copyrighted material," could be interpreted "to allow the circumvention of encryption technology protecting copyrighted material when the material will be put to 'fair uses' exempt from copyright liability."[146] The court disagreed, holding that 1201(c)(1):

> simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred. Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the "fair use" of information just because that information was

143 *See* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1198 (Fed. Cir. 2004).

144 *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000).

145 *See* Universal Studios v. Corley 273 F.3d 429, 443 (2d Cir. 2001).

146 *See id.*

> obtained in a manner made illegal by the DMCA. The Appellants' much more expansive interpretation of subsection 1201(c)(1) is not only outside the range of plausible readings of the provision, but is also clearly refuted by the statute's legislative history.[147]

The court's conclusion that the proposed interpretation is implausible and "clearly refuted" by its legislative history rests primarily on two points: (1) that "[t]he legislative history of the enacted bill makes quite clear that Congress intended to adopt a 'balanced' approach to accommodating both piracy and fair use concerns, eschewing the quick fix of simply exempting from the statute all circumventions for fair use;" and (2) that Congress sought to strike this balance by not allowing a generally applicable defense of fair use but instead including a few specific, narrow exceptions.[148] The court determined that Congress "sought to achieve this goal [of balance] principally through the use of what it called a 'fail-safe' provision in the statute, authorizing the Librarian of Congress to exempt certain users from the anti-circumvention provision" when "'necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.'"[149] In addition, the court stated that "Congress also sought to implement a balanced approach through statutory provisions that leave limited areas of breathing space for fair use," such as the exceptions for libraries, educational institutions, and reverse engineering. Thus, employing some version of the *expressio unius* canon, the court concluded that "[i]t would be strange for Congress to open small, carefully limited windows for circumvention to permit fair use in subsection 1201(d) if it then meant to exempt in subsection 1201(c)(1) *any* circumvention necessary for fair use."[150]

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147 *See id.*

148 *See id.* at 444.

149 *See id.* (quoting H.R. REP. No. 105-551, pt. 2, at 36 (1998)).

150 *See id.* David Nimmer, the current author of the leading copyright treatise, also has stated, with little explanation, that the fair use savings clause in subsection 1201(c)(1) does not provide a defense to the anti-circumvention and anti-trafficking provisions of section 1201. He offers, however, scant evidence from the legislative history for this narrow interpretation of 1201(c)(1)—only an isolated comment that was made by the President of a special-interest trade association approximately a year before enactment of the DMCA, which suggests that there is no fair use defense to the anti-circumvention or anti-trafficking provisions because the focus of those provisions is on evasion of technological controls, not on infringement of copyrighted materials. *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 731 n.315 (2000).

Nimmer argues, however, that without a more general exception, the specific exceptions from liability for circumvention and trafficking that do exist in the statute are insufficient to achieve the balance between copyright owners and users that Congress sought. For instance, he says that the provisions in 1201(a)(1)(B) and (C), which grant to

In fact, however, the DMCA is easily interpreted to include a fair use defense to its prohibitions. First, the specific exemptions from liability included in the DMCA for libraries, educational institutions, and others do not necessarily preclude interpreting the savings clause as providing a more general exception that would allow circumvention for traditional fair use purposes. Fair use is a notoriously malleable doctrine,[151] and what constitutes fair use in a traditional context like print media might not constitute fair use in the context of digital uses. As a result, even if a general fair use defense did apply to DMCA liability, groups with substantial lobbying power still would bargain for a specific exception to insulate their constituencies from the vagaries of fair use litigation.[152] Given the well-documented presence of interest groups representing libraries, educational institutions, and the computer industry in the DMCA negotiations, it is unsurprising that the DMCA contains specific exemptions for circumvention by libraries and educational institutions for some purposes as well as for reverse engineering of computer programs.[153]

Indeed, the pre-DMCA Copyright Act also contained specific exceptions for uses that would also likely be protected by the fair use doctrine. For example, section 110 lists a number of

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the Librarian of Congress rulemaking authority to create exemptions to the prohibition on circumvention where persons "are . . . adversely affected by virtue of such prohibition in their ability to make noninfringing uses of [a] particular class of works under" the Copyright Act, do not live up to their billing as "fail-safe" protection for fair use. *Id.* at 694; *see also id.* at 693 n.97, 739-40. He describes this provision, which the *Corley* court said supplants any potential fair use defense to liability for circumvention or trafficking, as "enigmatic" because it does not define what a "particular class of works" refers to, and because it provides no logical reason for protecting fair use of classes of works but not fair use of the individual works that would comprise such classes:

> The statute itself does not give direct content to its enigmatic reference to "a particular class of works . . . . " The legislative history notes the obvious point that a "particular class of copyrighted works" is narrower and more focused than all copyrightable works. It would seem, therefore, that the language should be applied to discrete subgroups. If users of physics textbooks or listeners to Baroque concerti, for example, find themselves constricted in the new Internet environment, then some relief will lie. If, on the other hand, the only problem shared by numerous disgruntled users is that each is having trouble accessing copyrighted works, albeit of different genres, no relief is warranted.

Id. at 694-95.

151 *See* 4 NIMMER & NIMMER, *supra* note 62, at § 13.05. Nimmer describes the fair use doctrine as "the most troublesome in the whole law of copyright," and says that it "is so flexible as virtually to defy definition." To illustrate, Nimmer explains that the Supreme Court has addressed the doctrine three times in the past few years, and "[t]he malleability of fair use emerges starkly from the fact that all three cases were overturned at each level of review, two of them by split opinions at the Supreme Court level." *Id.*

152 *See supra* notes 105-106 and accompanying text (the 1976 Act included specific exceptions for those groups with enough bargaining power to get them, and the fair use provision protected the interests of everyone else without such power).

153 *See, e.g.*, S. REP. NO. 105-190, at 3-4 (1998).

exceptions to the rights of public performance and public display that would almost certainly qualify for protection under the more general fair use doctrine in section 107. Thus, section 110(1) exempts "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution . . . ," and section 110(3) exempts "performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly."[154]

Nor is a generally applicable fair use defense precluded by subparagraph 1201(a)(1)(c), which directs the Librarian of Congress to determine in a rulemaking proceeding those users who are exempt from the prohibition on circumvention because they are "adversely affected by the prohibition . . . in their ability to make noninfringing uses under this title of a particular class of copyrighted works." Because Congress often provides for both rulemaking and adjudication on statutory issues, it is likely that Congress intended to leave room for courts to adjudicate individual fair use cases under the DMCA while awaiting forthcoming administrative rules from the Librarian of Congress for particular classes of works (such as those most harmed by the DMCA's prohibitions).

The DMCA was enacted at an early stage in development of the technology dealing with the digitization of copyrighted works, before the courts had much opportunity to experiment with fair use in the context of digitized copyrighted works.[155] Nevertheless, it is clear from the legislative history that Congress realized strong digital rights could have seriously detrimental effects on legitimate uses of copyrighted materials and that achieving a healthy balance between the rights of copyright owners and the rights of users was of paramount importance. Thus, it makes perfect sense for Congress to supplement the statute with ongoing administrative oversight of the effects of the statute on fair uses in the same way that Congress provides administrative oversight for environmental statutes dealing with technology that is new or yet to be developed.

Viewed from this administrative law perspective, the fact that Congress did not define "a particular class of works" is not

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154 *See* 17 U.S.C. § 110(1) & (3) (2005).

155 *See* Merges, *supra* note 6, at 2202-03 (arguing that the DMCA was enacted before courts had an opportunity to formulate fair use doctrine for digitized works, and that ideally Congress would have waited to codify common law rules or principles once they emerged).

mysterious,[156] as Congress may not care which classes of works are subject to the rulemaking. It only cares that there be *some class* of works to invoke the rulemaking provision because, by definition, rulemaking applies to a group of cases, whereas adjudication applies to one case at a time. This also explains the apparent arbitrariness of Congress's decision to protect classes of works but not individual works. Likewise, because this provision contemplates the creation of broader, more categorical rules regarding fair use, it makes sense that Congress would require the rulemaking to conform to the Administrative Procedures Act, which requires a notice and comment period for the benefit of affected parties.

In this light, the exception allowing rulemaking for fair use is best understood not as a policy determination that only these specific categories of fair uses should be protected but, rather, as an effort to provide additional protection for fair uses through an administrative model.

Second, although the *Corley* court held that the defendants' proposed interpretation of the savings clause, which would allow for a fair use defense to circumvention and trafficking, was "outside the range of plausible readings of the provision," it is *Corley*'s interpretation of the savings clause that denies the clause its most natural meaning. The savings clause provides as follows: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." *Corley* interpreted the clause to mean that anyone who accesses a work *without violating any prohibition of the DMCA* may assert fair use as a defense if sued for copyright infringement under non-DMCA portions of the Copyright Act. But if the clause means that the fair use defense is available only where there is alleged copyright infringement but no violation of the DMCA, then it is completely superfluous because it merely states what is already clear in the pre-DMCA Copyright Act. Moreover, because the purpose of including a savings clause in a statute is to provide a rule of construction that instructs courts on how to resolve conflicts between laws, the fact that Congress included a fair use savings clause in the DMCA suggests that Congress saw a potential conflict between the DMCA and other provisions of the Copyright Act, particularly fair use. *Corley*'s interpretation of the savings clause denies that any such conflict exists by reducing the savings

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156 *See* Nimmer, *supra* note 150, at 694 (describing as "enigmatic" Congress's failure to define these classes of works and to protect classes of works but not individual works).

clause to a mere tautology: if the DMCA does not make your acts illegal through its own prohibitions, then it does not make your acts illegal through a different law either.

A more plausible interpretation of the savings clause is that a person who is sued for circumvention or trafficking under the DMCA may assert as a defense that the sole purpose and effect of the circumvention or trafficking was to make or facilitate making a noninfringing use of the content. This interpretation acknowledges that there is a potential conflict between the DMCA and fair use because the DMCA's prohibitions on access and use could be read to prevent even completely innocent uses of a work. Moreover, it gives meaning to the clause by interpreting it as a rule of construction that instructs courts to preserve, as much as possible, the scope of fair use as it existed prior to enactment of the DMCA. This interpretation is at least as plausible as interpreting a clause that says "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use . . . " in a way that allows the section to virtually wipe out the possibility of asserting such rights, remedies, limitations, or defenses in the universe of cases to which the section applies.

The Federal Circuit's recent decision in *Chamberlain Group v. Skylink Technologies*[157] supports the argument that a fair use defense applies to the anti-circumvention and anti-trafficking provisions of the DMCA. Both Chamberlain Group and Skylink Technologies are manufacturers of garage door openers (GDOs).[158] Chamberlain developed a GDO that was embedded with "rolling code" technology, which consists of a computer program designed to prevent burglars from recording the signal of a homeowner operating his or her garage door by continually changing the code that is required to open the garage door.[159] Thus, the rolling code performs two tasks: (1) it protects itself from unauthorized intrusion by verifying the rolling code; and (2) once the code is verified, it activates the GDO motor.[160]

Skylink developed a universal GDO transmitter that was capable of operating many different types of GDOs, including those with rolling code technology.[161] Skylink's transmitter operated Chamberlain's GDO by either transmitting a code that

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157 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 1669 (2005).
158 *See id.* at 1183.
159 *See id.*
160 *See id.* at 1185.
161 *See id.* at 1184.

would be accepted by the GDO or by resetting Chamberlain's GDO to a new code and then transmitting that code.[162] Chamberlain did not (and could not) sue Skylink for copyright infringement because it was clear that Skylink had not copied any of Chamberlain's copyrighted computer code. Rather, Chamberlain alleged that Skylink violated the DMCA by trafficking in technology that circumvents the technological measure (the rolling code) that controls access to its copyrighted program.[163]

The district court granted summary judgment to Skylink, and the appeals court, resting primarily on the DMCA's definition of circumvention "as an activity undertaken 'without the authority of the copyright owner,'" affirmed.[164] The court held that Chamberlain did not meet its burden of showing that the circumvention underlying the trafficking claim was unauthorized. First, the court explained that owners of GDOs traditionally have had the right to use universal GDO transmitters to access the software embedded in the GDOs they purchased because the copyright laws allow access while prohibiting copying. Second, the court rejected Chamberlain's argument that "the DMCA overrode all pre-existing consumer expectations about the legitimate uses of products containing copyrighted embedded software" and made "all such uses of products . . . illegal under the DMCA unless the manufacturer provided consumers with *explicit* authorization."[165] In rejecting this argument, the court was emphatic:

> The anticircumvention provisions convey no additional property rights in and of themselves; they simply provide property owners with new ways to secure their property . . . . Contrary to Chamberlain's assertion, the DMCA emphatically *did not* "fundamentally alter" the legal landscape governing the reasonable expectations of consumers or competitors; *did not* "fundamentally alter" the ways that courts analyze industry practices; and *did not* render the pre-DMCA history of the GDO industry irrelevant.[166]

Thus, the court held that Skylink had not violated the anti-trafficking provisions of the DMCA because their universal GDO did not facilitate circumvention of an access control on a copyrighted work without authority of the copyright owner.

Although this conclusion was sufficient to support the court's

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162 *See id.*
163 *See id.* at 1185.
164 *Id.* at 1193 (quoting 17 U.S.C. § 1201(a)(3)(A)).
165 *Id.* at 1193.
166 *Id.* at 1193-94 (emphasis in original).

decision, the court went on to say that the DMCA's statutory structure and legislative history show that the prohibitions in the DMCA apply only to activities "reasonably related" to copyright infringement.[167] The court rejected Chamberlain's proposed construction of the DMCA, which the court described as meaning that "the owners of a work protected by *both* copyright *and* a technological measure that effectively controls access to that work . . . would possess *unlimited* rights to hold circumventors liable . . . *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public."[168] The court explained that such a construction presumed that Congress intended to "allow[ ] copyright owners to deny all access to the public," and implied that such a construction might be unconstitutional, saying that "[e]ven under the substantial deference due Congress, such a redefinition borders on the irrational."[169]

In addition, the court found an unavoidable conflict between a broad construction of the DMCA's prohibitions and the fair use savings clause in § 1201(c)(1). Indeed, the court found that such a broad construction of the DMCA's anti-circumvention and anti-trafficking provisions "would flatly contradict § 1201(c)(1)—a simultaneously enacted provision of the same statute,"[170] and that the usual approaches to statutory construction require avoiding that result if it is possible to construe the statute in a way that gives "some uncontradicted meaning for each provision."[171]

Thus, there is ambiguity in the scope of the DMCA's prohibitions, and, as the next section will discuss further, there are good reasons to adopt the proposed narrower interpretation.

V. Construing the Copyright Act

This section argues that the rules of statutory construction discussed in earlier sections may be used to resolve statutory ambiguities between public- and private-interest provisions of the Copyright Act. The Copyright Act presents a particularly strong

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167 *Id.* at 1194-95 ("The statute's plain language requires plaintiffs to prove that those circumventing their technological measures controlling access did so 'without the authority of the copyright owner.' 17 U.S.C. § 1201(3)(A). Our inquiry ends with that clear language. We note, however, that the statute's structure, legislative history, and context within the Copyright Act all support our construction.").

168 *Id.* at 1200 (emphasis in original).

169 *Id.*

170 *Id.*

171 *Id.* (quoting Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 509 (1999) (Souter, J., dissenting)).

case for construing rights narrowly (*i.e.*, against infringement), particularly in the areas of ambiguity discussed in the previous section, because the Act meets all the criteria for construing legislation against special-interest groups.

A. *Copyrights should be construed narrowly to implement legislative intent*

1. Copyrights should be construed narrowly to enforce the special-interest "deal"

As was previously discussed, much of the Copyright Act exhibits the characteristics of a legislative deal negotiated by special interests. The Act confers concentrated benefits on small groups while imposing diffuse costs on large groups, making it susceptible to interest-group influence. It also has a detailed and complex structure, legislative history showing extensive special-interest influence, and inefficient results. Indeed, the legislative history shows that "[t]he negotiated bargains in the 1976 Act were struck not between legislators and lobbyists but among representatives of opposing interests . . . ."[172] As such, ambiguities in this legislative deal should be construed against interest groups, just as ambiguities in ordinary contracts are construed against the drafter.[173]

The common law can provide a baseline for determining the efficient legal rule. Ironically, although early copyright law was premised on the need to depart from common-law principles in order to remedy the market failure caused by free-riding on the creative works of others, more recent copyright law creates market failure by rewarding rent-seeking and restricting competition. As a result, less than the optimal amount of copyrightable innovation may occur. Thus, the Copyright Act has overshot its equilibrium position, and ambiguities should be resolved in a way that tends to restore the balance. This is not just because courts may think it is good copyright policy, but because courts ordinarily assume that Congress wanted neither to abrogate common-law principles more than a statute does by its explicit terms nor to give parties to a legislative contract more than they bargained for.

This approach is particularly relevant to ambiguities dealing with fair use, because in recent years it has been argued that fair

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172 Litman, *supra* note 62, at 881.

173 This reflects the *contra proferentem* canon of construction, which states that in contracts and other written documents, "an ambiguous provision is construed most strongly against the person who selected the language." *See* BLACK'S LAW DICTIONARY 327 (6th ed. 1990) (citing Supreme Court precedent).

use itself should be limited to instances of market failure.[174] Under this view, copyright owners would be entitled to share in the benefits of all uses of copyrighted works unless some instance of market failure, such as high transaction costs or externalities, prevented payment for those uses.[175] It should be obvious that the fair use-as-market failure approach is extremely deferential to copyright owners. Given the low threshold of copying necessary for a finding of infringement, it would result in liability for virtually all uses of copyrighted material, including many uses that are either trivial or transformative.

However, if copyrights themselves are the product of anti-competitive bargains, then courts should not defer to those rights in a futile, or even counterproductive, attempt to preserve the integrity of the market. Indeed, from a statutory construction perspective, limiting fair use to cases of market failure (and finding liability in all other cases) creates a presumption in exactly the wrong direction. If special interests have negotiated for themselves more statutory rights than are needed to correct the market failure that justified the statute in the first place, and the common law provides a baseline for determining the efficient rule, then courts should construe ambiguities in favor of the common-law doctrine of fair use, not against it.

Indeed, the common law provides a ready analogy for resolving the ambiguity between the DMCA's prohibitions and the fair use doctrine. Courts have said that where a copyright infringement defendant makes a copy of a copyrighted work for the sole purpose of facilitating a fair use of copyrighted or uncopyrighted materials, the defendant is entitled to a fair use defense as to the copying as well. For instance, in *Sega Enterprises Ltd. v. Accolade, Inc.*, the Ninth Circuit held that a defendant may copy a computer program for the purpose of reverse-engineering in order to facilitate the writing of a complementary computer program, so long as the defendant's resulting program is not deemed to infringe the plaintiff's program.[176] Building on *Sega*,

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174 *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (articulating the theory of fair use as a response to market failure).

175 *See id.* at 1614-15. The Supreme Court cited this theory in *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 568 & n.9 (1985) ("Economists who have addressed the issue believe the fair use exception should come into play only in those situations in which the market fails or the price the copyright holder would ask is near zero.").

176 *See* Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1520-28 (9th Cir. 1992) (video game manufacturer is privileged to make copy of game console's operating system for sole purpose of writing manufacturer's own programs that would be compatible with game console); *see also* Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 602-

the Seventh Circuit held in *Assessment Technologies v. WIREdata, Inc.* that a copyright infringement defendant would be privileged to copy a copyrighted database for the purpose of extracting public-domain data, at least where the defendant copies the database "only because the data and the format in which they were organized could not be disentangled," and "the only purpose of the copying would be to extract noncopyrighted material, and not to go into competition with [the plaintiff] by selling copies of [the database software.]"[177]

In these cases, the courts recognized a privilege for "intermediate" copying, or copying which (1) is technically a violation of the Copyright Act but (2) causes no harm to the copyright owner and (3) is incidental to making a fair use of either copyrighted or uncopyrighted material. This is precisely the situation that occurs when someone circumvents access control technology under the DMCA for the sole purpose of making a fair use of a copyrighted work protected by the technology. Although the circumvention technically violates the prohibition in section 1201(a)(1), the circumvention itself causes no harm to the copyright owner where it is followed not by an infringing use of the protected work but, rather, by a completely innocent use of the work. The same argument applies if someone trafficks in technology that technically violates the prohibitions in section 1201(a)(2) or (b) but that facilitates circumvention solely for the purpose of making fair uses of the protected work.

Thus, the common law baseline for cases involving "intermediate" violations provides that courts should err on the side of allowing a fair use defense. According to this baseline, courts should construe the DMCA's prohibitions narrowly and allow a fair use defense for harmless violations of those prohibitions. Courts should also adhere to this rule in interpreting other provisions of the Copyright Act and the DMCA where Congress has not made clear its intent to deviate from the common law rule.

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08 (9th Cir. 2000); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1539-40 n.18 (11th Cir. 1996); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 842-44 (Fed. Cir. 1992).

177 *See* Assessment Techs. of Wis, LLC. v.WIREdata, Inc., 350 F.3d 640, 645 (7th Cir. 2003) ("if the only way WIREdata could obtain public-domain data about [real estate] properties in southeastern Wisconsin would be by copying the data in the databases as embedded in [the copyrighted] Marketdrive, so that it would be copying the compilation and not just the compiled data only because the data and the format in which they were organized could not be disentangled, it would be privileged to make such a copy . . . ").

2. Copyrights should be construed narrowly to enforce the public-interest purpose

The Article I clause giving Congress lawmaking authority to enact a federal copyright law explicitly provides that copyright law must serve the public interest in "promot[ing] the Progress of Science and the useful Arts."[178] Thus, the Copyright Act should be construed consistently with this stated public purpose (and against overly broad copyright protection passed at the behest of special-interest groups) in order to force special-interest groups who demand self-serving copyright protection to make their demands explicit, thereby requiring them to internalize the true costs of obtaining such legislation.[179]

Although some may view this approach as encouraging judicial activism and encroaching on the legislative prerogative, constitutional statements of purpose are clearly relevant to routine statutory construction. Construing the Copyright Act to further the constitutional statement of purpose reflects an attempt to discern and implement legislative meaning. This approach effectuates legislative intent because it is likely that at least some legislators vote for legislation under the belief that it serves the constitutional purpose. Moreover, a clear constitutional statement of purpose is arguably more representative of legislative meaning than legislative history, which, as Justice Scalia and others have argued, is often written by one side or the other during the legislative process and therefore can be a poor indicator of the ultimate meaning of a statute.[180] Indeed, where ambiguity persists despite a court's best efforts to discern statutory meaning, it is only natural that courts would resolve that ambiguity by resorting to an explicit statement of purpose, particularly where that statement of purpose appears in the very constitutional provision that provides Congress's power to enact the statute.

The preamble "[t]o promote the Progress of Science and the useful Arts" in the Patent and Copyright Clause provides the purpose for which Congress must enact copyright legislation; the remainder of the clause suggests that Congress can achieve this purpose by granting limited rights to authors in exchange for the public benefit derived from the work. The *quid pro quo* embodied by the Patent and Copyright Clause reinforces the preambular

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178 U.S. CONST. art.1, §8, cl.8.

179 *See* Macey, *supra* note 3, at 237-38.

180 *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (arguing in favor of textualism, and in favor of deference to agency interpretations of law).

statement of purpose by acknowledging that progress depends on balancing the need to give incentives to some authors today with the need to retain a robust public domain for others to build on tomorrow.

The Act's broad derivative works right upsets this balance between owners and users. There are at least two reasons why this right is unnecessary for ensuring adequate incentives to authors: (1) the right against copying will ordinarily protect the copyright owner from free-riding and allow the owner to profit from her work; and (2) the probability is extremely low that an author will profit not only from the original work but from a derivative work based on the original work as well.[181] Because the derivative works right provides little incentive to create the original work while preventing others from creating substantially new works based on an existing work, it could impede the creative activity that copyright was intended to promote.

And with regard to the DMCA, the legislative history of the WIPO Treaties Act (the sections of the DMCA dealing with prohibitions on circumvention and trafficking) suggests that maintaining balance between the rights of owners and users was Congress's paramount concern. Register of Copyrights Marybeth Peters stated that "[t]he challenge is how to [give] . . . protection to copyright owners, while avoiding chilling . . . lawful uses of copyrighted works and public domain materials."[182] Moreover, numerous legislators emphasized that the DMCA legislation does not create a "pay-per-use" society and protects consumers' "traditional" and "historical" rights to make fair uses of both copyrighted and public domain materials.[183] Indeed, Professor Nimmer has argued that "[b]y the time the WIPO Treaties Act was enacted, solicitude for fair use in the digital environment exceeded

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181 *See* Sterk, *supra* note 86, at 1216.

182 *WIPO Copyright Treaties Implementation Act and On-Line Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Marybeth Peters, Register of Copyrights, Library of Congress).

183 *See* 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (remarks of Rep. Bliley) (emphasizing that the bill included an important fair use provision "to ensure that consumers as well as libraries and institutions of higher learning will be able to continue to exercise their historical fair use rights"); 144 CONG. REC. E2144 (daily ed. Oct. 13, 1998) (remarks of Rep. Tauzin) (arguing in favor of the bill and against a pay-per-use system as "profoundly antithetical to our long tradition of the exchange of free ideas and information"); 144 CONG. REC. H7099 (daily ed. Aug. 4, 1998) (remarks of Rep. Dingell) (arguing that affording copyrighted works so much protection that they become "impenetrable to anyone other than those who are willing to pay the going rate" is not "the American way," and that "United States copyright law historically has carved out important exceptions to the rights of copyright owners").

support for mother's apple pie, and 'the specter of moving our Nation towards a "pay-per-use" society' had become as popular in Congress as the Mafia drug trade."[184]

Thus, the legislative history of the DMCA itself is replete with references to its public-interest purpose of balancing the need to protect copyright owners in the digital era and users' traditional rights of fair use. Courts should construe the Copyright Act consistent with these statements of purpose, because such a construction implements the intent of at least some legislators by "interpret[ing] the statute in the way the legislature said that it wanted" and prevents legislators from relying on such statements in the committee reports and debates in order to disguise private-interest legislation as public-interest legislation.[185]

It is difficult to see how the DMCA achieves balance or promotes progress if it is interpreted not to include a fair use defense.[186] The DMCA serves a legitimate, public-interest purpose insofar as it deters digital piracy. The legislative history of the DMCA emphasizes that because copyright owners are likely to suffer greater harm from digital piracy than from traditional piracy, the DMCA provides additional protection to digital works in order to encourage people to distribute works in digital form. It does not follow, however, that doing away with a fair use defense

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184 *See* Nimmer, *supra* note 150, at 725 (adding that "[n]ot a single speaker in either the House or the Senate rose to express any other point of view").

185 Macey explains the importance of such statements in the legislative history in this way:

> Where statutes are accompanied by extensive committee hearings and debates that extol the advantages of the statute from the public perspective, reliance on such public statements is likely to lead judges to take the legislature at its word, and to interpret the statute in the way the legislature said that it wanted. Thus, the traditional reliance on legislative history raises the political cost of special interest legislation by increasing the probability of nullification. This in turn forces the legislature to be explicit about the deals it is making, if it wants to be sure those deals will ultimately be enforced.

Macey, *supra* note 3, at 233.

186 David Nimmer has argued that without exempting more fair uses from liability, the DMCA fails to achieve the balance between copyright owners and users that was of paramount importance in its enactment:

> The user safeguards so proudly heralded as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals . . . . This defect is not a small one. Many legislators characterized the Digital Millennium Copyright Act as "probably one of the most important bills that we have passed this Congress." The fair use issue constitutes "one of the most important provisions of this legislation." Accordingly, it is a source of disappointment to be forced to disagree with the conclusion that Congress "mastered the intricate details of this complex subject and has produced a balanced result."

Nimmer, *supra* note 150, at 739-740.

for circumvention or trafficking enhances the efficacy of the DMCA.

Laws may increase deterrence by increasing the detection of violations (the probability of getting caught), or by increasing the penalties for known violations, or both. Even with a fair use defense, the DMCA accomplishes its purpose of increasing deterrence for digital piracy in a number of ways. First, it enforces an access control—an electronic barrier—on copyrighted material, which deters piracy by preventing access to those who lack circumvention technology.

Second, while a great deal of copyright infringement is difficult to detect (because it takes place on a small scale and in homes or other private locations), circumvention and trafficking in circumvention technology are easier to detect. Trafficking technology is advertised and sold on the internet, and search engines can search the entire internet for circumvention and trafficking activity.[187] For instance, in *Corley*, the plaintiff movie companies could have discovered the defendant's website simply by searching for "DeCSS" on Google. By prohibiting circumvention and trafficking in circumvention technology, then, the DMCA focuses on acts that are (1) likely to lead to copyright infringement and (2) easier to detect than infringement itself.

Third, the DMCA increases deterrence for digital piracy by increasing the penalties for digital piracy relative to penalties for traditional piracy. Where a defendant has committed digital piracy by circumventing an access control or has contributed to digital piracy by trafficking in circumvention technology, the penalties provided for circumvention or trafficking in the DMCA are added on top of the penalties provided for infringement or contributory infringement under traditional copyright law.

Thus, assuming that the threat of piracy is greater for works in digital form,[188] it seems that the DMCA is laudable insofar as it targets digital piracy. But denying a fair use defense to circumvention and trafficking under the DMCA does not deter digital *piracy* at all. Rather, withholding the defense results in a new prohibition on acts that cause little or no cognizable harm to the copyright owner and that have been permitted, even

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187 *Cf.* LESSIG, *supra* note 35, at 161 (discussing the ease with which violations of copyright law can be detected on the internet).

188 *But cf.* CNN.com Survey: Net file-sharing doesn't hurt most musicians, http://cnn.technology.printthis.clickability.com/pt/cpt (December 7, 2004) (reporting the results of a survey indicating that "two-thirds of those surveyed said file sharing posed little threat to them," and that "[o]nly 3 percent said the Internet hurt their ability to protect their creative works").

encouraged, under traditional copyright law.[189]

Because acts of circumvention or trafficking could be committed for completely innocent purposes, the DMCA's prohibitions are fundamentally different from other situations in which the law punishes acts preliminary to commission of a crime whether or not the crime succeeds, such as in attempt or conspiracy. The purpose of the law of attempt and conspiracy is to provide additional deterrence against an intended crime, not to deter otherwise innocent acts. By punishing an attempt to commit a crime, the law increases the expected cost of the crime by increasing the probability but not the severity of the punishment. There will be punishment either for the crime if it occurs or for the attempt if it is interrupted prior to completion, but not for both. By punishing a conspiracy to commit a crime, the law increases the expected cost of the crime by increasing both the probability and the severity of the punishment, because there will be punishment for the conspiracy as well as for the crime if it is completed. In both attempt and conspiracy, the probability the crime will occur and the social costs of waiting to intervene until after the crime is completed are both high; therefore, the law creates an opportunity for law enforcement to intervene before the crime actually occurs.

By contrast, because there are many non-infringing uses of copyrighted works, there is a reasonable probability that when circumvention occurs, it is for completely legitimate purposes. Moreover, although access controls will sometimes be circumvented for infringing purposes, there will often be no lag between the circumvention of the control and the use of the content; therefore, by the time the circumvention has been detected, the nature of the use will also be known. As a result, it seems that there would be little opportunity for intervention between the acts of circumvention and infringement. Finally, although the harm associated with copyright infringement can sometimes be substantial, it is not comparable to the harm associated with violent crimes. Therefore, there is relatively little justification for penalizing acts of circumvention that do not culminate in infringing activity.

Thus, a fair use defense to the DMCA's prohibitions on circumvention and trafficking is necessary to ensure that the prohibitions deter actual infringement, not innocent acts. Indeed, denying a fair use defense to the prohibitions of the DMCA could

189 *See* LESSIG, *supra* note 35, at 160. Circumventing a control technology typically does not cause even the *de minimis* physical harm associated with breaking a padlock on a door.

have the marginal effect of *increasing* the amount of circumvention for infringing purposes relative to the amount of circumvention for innocent purposes. Where the probability of detecting infringement is low and the punishment for circumvention or trafficking is the same regardless of whether the purpose is innocent or infringing, a person who gains access to a work with the intent of making an infringing use will have no incentive to change his mind with regard to committing infringement. Conversely, it is possible (though less likely), that a person who gains access with the intent to make a fair use might choose to make an infringing use instead.[190] Because fair uses (by definition) typically cause little harm to the copyright owner, while infringing uses can cause substantial harm, the DMCA would provide better marginal deterrence against harm to copyright owners by retaining a fair use defense to circumvention and trafficking.

B. *When legislative intent is unclear, copyrights should be construed narrowly under a default rule that serves substantive and process-oriented goals*

1. Copyrights should be construed narrowly to protect constitutional values

Copyright's purpose appears not only in the legislative history of the 1976 Copyright Act and its amendments but in the Constitution itself. Indeed, the Patent and Copyright Clause is one of the few constitutional provisions that sets out not only Congress's power to legislate but also the purpose for which Congress must legislate.

Thus, the Clause's statement of purpose embodies a constitutional value that should be protected under both Cass Sunstein's theory and the traditional interpretive principle that statutes should be construed to avoid constitutional doubts. Although this traditional principle of interpretation does not depend on public choice theory for its validity, the pervasive influence of special interests over the Copyright Act invokes the principle because special-interest influence increases the risk that one or more copyright provisions will be held unconstitutional. The history of the Copyright Act clearly demonstrates that as interest-group influence has increased, so has the frequency of

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190 This could happen, for instance, where the person who circumvents an access control was not familiar with the material protected by the control prior to circumvention and changes his or her mind as to which material he or she wants to use.

constitutional challenges to the Copyright Act. Prior to the effective date of the 1976 Act, there are very few reported decisions challenging the constitutionality of the Copyright Act. Since the effective date of the 1976 Act, there have been numerous constitutional challenges, including challenges to the 1976 Act, the Copyright Term Extension Act, and the DMCA.

This point is best illustrated by considering constitutional issues that arise when courts construe copyrights broadly. Although the *Eldred* Court held that the Copyright Term Extension Act (CTEA) did not exceed Congress's power under the Patent and Copyright Clause, it is still possible for provisions of the Copyright Act to contravene that Clause. The Court has, in earlier cases, struck down legislation that violated more concrete limitations on Congress's power under the Patent and Copyright Clause. For example, in *Feist*, the Court held that facts are not copyrightable because they are discovered rather than created and therefore that an attempt to confer copyright protection over facts exceeds Congress's power under the Patent and Copyright Clause to grant exclusive rights to "authors" over their "writings."[191]

Moreover, the *Eldred* Court made clear, contrary to the D.C. Circuit's decision below, that copyright law is not "categorically immune" from First Amendment challenges.[192] The Court merely held, for two reasons, that the Copyright Term Extension Act did not raise significant First Amendment concerns. First, the Court noted that, in general, "copyright's limited monopolies are compatible with free speech principles . . . [because] copyright's purpose is to *promote* the creation and publication of free expression."[193] In addition, the Court emphasized that "copyright law contains built-in First Amendment accommodations,"[194] including the idea/expression dichotomy, which provides that copyright protection exists in an author's expression but not in the ideas embodied by that expression,[195] and the fair use defense, which allows for limited use of the author's expression for purposes such as teaching, research, comment, or criticism.[196] Historically, these doctrines have ensured that copyright law strikes a balance between protecting copyright owners from free-riding

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191 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 347-48 (1991).

192 *See* Eldred v. Ashcroft, 537 U.S. 186, 221 ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'").

193 *Id.* at 219 (emphasis in original).

194 *Id.*

195 *See id.*

196 *See id.* at 219-20.

and ensuring a robust public domain for subsequent users.[197] The Court found that although the CTEA lengthened the duration of copyrights, it did not enlarge the scope of copyrights in any way that affected these "traditional contours" of copyright law.[198] Given that the CTEA expanded only the term of copyrights and not their scope, and that similar copyright term extensions had never been invalidated in the past, it would have been difficult to articulate how this particular term extension was unconstitutional.[199]

Second, the Court observed that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[200] Accordingly, the First Amendment applies with less force to a provision like the CTEA, which does not "compel[ ] or burden[ ]" one's own expression but merely extends existing protection against the use of authors' original expression by others.[201]

Thus, the Court's analysis suggests that First Amendment values are threatened more by any copyright provision that either (1) burdens one's ability to make one's own speech, or (2) diminishes traditional safeguards such as the idea/expression dichotomy or the fair use defense. The first concern protects an individual's right to speak by ensuring her ability to convey her own message, whereas the second concern protects society's collective right to speak not only by advancing each individual's right to speak, but also by recognizing that a robust public domain is necessary for the creation of new expression. The *Eldred* Court observed that both the idea/expression dichotomy and the fair use defense promote a robust public domain in different ways—the former by protecting an author's expression but not the facts or ideas that underlie that expression,[202] and the latter by "allow[ing] the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain

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197 *See id.* (the "'idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression,'" and that "[t]he fair use defense affords considerable 'latitude for scholarship and comment.'") (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556, 560 (1985)).

198 *See id.* at 221.

199 *See id.* at 194-208.

200 *Id.* at 220-21 (distinguishing copyright term extension from the "must-carry" provisions imposed on cable operators in Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)).

201 *Id.* at 221.

202 *See id.* at 219.

circumstances," such as for criticism, comment, or teaching.[203]

A broad derivative works right threatens both individual and collective rights to speak. It burdens an individual's ability to speak by restricting not only the copying of another's speech but also the individual's ability to select, adopt, and transform another's speech into her own.[204] Indeed, unless some other doctrine such as the idea/expression dichotomy or fair use intervenes, the derivative works right would prevent individuals from making even substantially or radically different works in which, qualitatively and quantitatively, the new material predominates over the incorporated material.[205] This right also burdens society's collective right to speak because it shrinks the public domain by removing not only all copyrighted works, but also all real or hypothetical works in which the copyrighted works may be "recast, transformed, or adapted."[206]

Moreover, as was previously discussed, the DMCA's prohibitions also could seriously restrict application of both the idea/expression dichotomy and fair use, if the DMCA is interpreted not to include a defense for non-infringing uses. Although *Corley* and other cases have said that the DMCA does not remove the ability to assert such a defense to infringement claims where there has been no violation of the DMCA, it is clear that a broad reading of the DMCA's prohibitions does preclude such a defense where the DMCA applies. The DMCA's prohibitions on circumvention and trafficking restrict application of the idea/expression dichotomy and the fair use defense to a smaller universe of cases than they would apply to in the absence of the DMCA. Thus, notwithstanding the attempt to characterize these prohibitions as a limit on digital access rather than as an expansion of traditional infringement, the DMCA fails to heed *Eldred*'s warning against enactments that affect the "traditional contours" of copyright law.[207]

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[203] *Id.* at 219-20.

[204] *See, e.g.*, Randall P. Bezanson, *Speaking Through Other's Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 985-86 (2003) (arguing that the First Amendment protects "speech selection judgments," which he defines as "appropriation of speech originally created elsewhere (by another) and the secondary deployment of that material in another context by a person or entity different than the creator").

[205] *See* Lemley, *supra* note 91, at 1074-79 (arguing that patent law's favorable treatment of improvements to existing works is preferable to copyright's unfavorable treatment of such improvements, and arguing that although the doctrine of fair use could potentially mitigate the disparity, current formulations of fair use do not necessarily do so).

[206] *See* 17 U.S.C. § 101 (definition of "derivative work").

[207] In this way, the DMCA is very different from the CTEA. The *Eldred* Court found that the CTEA not only retains the traditional scope of the idea/expression dichotomy and the fair use doctrine during the added term of protection, but actually "supplements these

Indeed, my thesis that courts should adopt a rule of construction that resolves ambiguities between private- and public-interest provisions in favor of the public-interest provision is an extension of something copyright law already provides. Copyright law already has at least two such default rules of construction for resolving ambiguities in favor of public-interest provisions of the Copyright Act. First, in *Campbell*, the Supreme Court created a safe harbor for parody in the fair use analysis by saying that, where there is ambiguity as to whether the defendant's use of a copyrighted work is parody or satire, it will be treated as parody so long as it "reasonably could be perceived as commenting on the original or criticizing it, to some degree."[208] Second, with regard to the idea/expression dichotomy (which, according to *Eldred*, is the other public-interest aspect of copyright law), there is the merger doctrine. The merger doctrine provides that copyright protection over given material will be denied where the material "merges" with, or reflects one of only a few ways to express, an uncopyrightable idea. Thus, it may be said that, where there is ambiguity as to whether certain material constitutes uncopyrightable ideas or copyrightable expression, the merger doctrine provides a default rule that requires courts to construe the ambiguity in a way that serves the public interest in ensuring a healthy public domain. Given that the *Eldred* Court treated the idea/expression dichotomy and fair use as the two primary safeguards of First Amendment values in copyright law, courts should adopt a similar default rule that favors these public-interest provisions where they conflict with a private-interest provision like the derivative works right or the DMCA.

Finally, there is yet another way that narrow construction of copyrights either vindicates constitutional norms or avoids constitutional doubts. Because copyrights are "property" for purposes of the Takings Clause, broad judicial construction of copyrights may sometimes create property rights that cannot easily be taken away, even if the construction that created them is mistaken.[209] That is, if a court construing an ambiguity in the

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traditional First Amendment safeguards" by (1) allowing for limited use of copyrighted materials by libraries and similar institutions during the last twenty years of the copyright term, *see* 17 U.S.C. § 108(h), and (2) exempting small businesses and like entities from having to pay performance royalties for playing music in their establishments in some circumstances, *see* 17 U.S.C. § 110(5)(B). *See* Eldred v. Ashcroft, 537 U.S. 186, 219-20.

208 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583 (1994).

209 *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992) (meaning of "property" for purposes of Takings Clause should be determined with reference to state's "background" property rules).

Copyright Act mistakenly errs on the side of the copyright owner and that interpretation establishes (over time) a reasonable investment-backed expectation in ownership of a copyright, Takings Clause concerns could prevent Congress from correcting that mistake for fear of either effecting an unlawful taking or disturbing property rights more generally. The result could be a ratchet effect, in which copyrights may be expanded but not retracted.[210]

The *Eldred* decision highlights this issue, saying that the retroactive application of the copyright term extension to existing works is valid as a means of promoting creativity under the Patent and Copyright Clause because the "unbroken practice" of legislative expansion of copyrights over the past two hundred years makes it reasonable for authors writing under one copyright regime to expect the benefits of future expansions of copyrights in deciding what works to produce.[211] If the "unbroken practice" of copyright's expansion provides a background for assessing a copyright owner's entitlements, then Congress might not be completely free to consider narrowing copyrights in the future. I do not mean to suggest that such a change in copyright policy would actually constitute an unconstitutional taking—a full analysis of that issue is beyond the scope of this article—but only that an overly expansive interpretation of copyrights today might easily turn into an investment-backed expectation that cannot easily be taken back tomorrow. On the other hand, judicial decisions narrowly construing property rights rarely, if ever, constitute takings.[212] Thus, to avoid Takings Clause issues, courts should construe copyrights narrowly at first, leaving Congress free to reconsider the issue and either let the decision stand or correct it by deliberately expanding the copyright.

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210 *See id.* at 1027-1028; *see also* William W. Fisher III, *The Trouble With* Lucas, 45 STAN. L. REV. 1393, 1400 (1993) (describing "ratchet" effect that arises under Takings Clause).

211 *See Eldred*, 537 U.S. at 214-15 ("Given the consistent placement of existing copyright holders in parity with future holders, the author of a work created in the last 170 years would reasonably comprehend . . . a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislative during that time.").

212 *See, e.g.*, Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 423-38 (2001) (arguing that although the Supreme Court has never squarely addressed the issue of whether judicial narrowing of "property" rights can constitute takings, its decisions suggest that judicial action should not be subject to the Takings Clause); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1455 (1990) (under Supreme Court's current view, the Takings Clause "protects only those property rights that the states voluntarily create and recognize," and therefore it is difficult to find judicial takings where common law-created property rights are "explicitly subject to change").

2. Copyrights should be construed narrowly to increase transparency in the legislative process and enhance statutory effectiveness

Although the proposed default rule of construction is normatively based in the sense that it attempts to limit the extent of special-interest influence over copyright law, the rule achieves important goals even if the total amount of special-interest influence over copyright law remains the same. First, the proposed rule increases transparency in the legislative process. Because a court would not read a benefit to a special-interest group into an ambiguous statute, those groups would have to be more forthcoming with legislators about what they want and prevail upon legislators to put explicit language in the statute to that effect. In this light, the proposed rule is similar to other "clear statement" rules frequently used by courts to "force Congress expressly to deliberate on an issue and unambiguously to set forth its will."[213] Because clear-statement rules usually are invoked where interpretation of the statute otherwise might upset "the usual allocation of institutional authority,"[214] a similar rule is appropriate here, where lawmaking is being done by interest groups rather than by elected legislators.

Second, where statutory meaning is ambiguous, courts should construe statutes in ways that reduce the risk of statutory failure. This is particularly important in the context of the Copyright Act because there is a risk of civil disobedience to the statute. As copyright law has become increasingly complex and one-sided, users of copyrighted material have been refusing to obey it more frequently because they believe that it is incomprehensible and unjust.[215] Indeed, Jessica Litman has argued that she finds a "ray of hope" for change in copyright law as a result of "consumers' widespread noncompliance" with current law.[216] This is exactly what has happened in the context of the DMCA. In the *Corley* case, for example, the defendant posted the decryption software DeCSS on its website and in its magazine and encouraged people to decrypt DVDs in order to retaliate against the movie companies.

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213 *See* Sunstein, *supra* note 11, at 458.

214 *See id.* The Supreme Court's federalism cases provide a good example of the clear statement rule in action. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)))).

215 *See* JESSICA LITMAN, DIGITAL COPYRIGHT 19 (2001).

216 *See id.* at 194.

In addition, as was previously argued, it is possible that providing greater rights to copyright owners by excluding a fair use defense misses an opportunity for marginal deterrence by giving a person who has gained access no incentive to forgo making infringing uses. Thus, very broad copyrights could hurt the special interests who lobbied for those rights, and it is possible that some copyrights could actually be enforced at a level below that which promotes copyright's purpose.

Third, regardless of the normative implications of special-interest influence over statutes like the Copyright Act, statutes should be interpreted in ways that encourage greater clarity in statutory drafting. Special interests have proved their superior ability to gain Congress's attention and influence legislative drafting of the Copyright Act, and they are more likely than the general public to make sure (either before or after a mistaken judicial interpretation) that statutory language accurately reflects legislative intent. Moreover, the interim costs of any mistaken interpretations that occur under this default rule are acceptable. In fact, the interim costs are potentially much higher if ambiguities are resolved the other way. As was discussed in the previous section on avoiding constitutional doubts, copyrights are "property" rights for purposes of the Takings Clause. If a court mistakenly errs on the side of the copyright owner and establishes a reasonable investment-backed expectation in ownership of a copyright, there is a ratchet effect that might prevent Congress from correcting that mistake for fear of either effecting an unlawful taking or disturbing property rights more generally.

A similar default rule of construction has been employed in patent law. In patent law, there is evidence of heavy lobbying in Congress, but much of the detailed negotiation takes place at the patent prosecution stage where prospective patentees negotiate detailed claims covering the scope of individual patents with the Patent and Trademark Office (PTO). Interpretation of patent claims, like interpretation of any other document, begins with the ordinary meaning of the language in the claims. When that language is ambiguous as to the scope of a claim, a court tries to determine the meaning of the claim by applying ordinary interpretive methods to the patent. Thus, courts often resolve ambiguities by considering the claim in the context of other language in the same claim, language in other claims, the

specification of the invention, etc.[217] The court may also consider the prosecution history of the patent (which is somewhat analogous to legislative history of a statute) and perhaps invoke the doctrine of prosecution history estoppel when a patentee argues for a broader interpretation of patent claims than he conceded in negotiations with the PTO.

However, when ambiguity remains in the scope of the claims despite the court's best efforts to determine their meaning, the Federal Circuit has sometimes used a default rule that resolves ambiguities in the meaning of claims in favor of the narrower construction.[218] The Federal Circuit has also used a similar default rule in the context of determining whether there has been infringement under the doctrine of equivalents. In *Sage Products, Inc. v. Devon Industries, Inc.*,[219] the court first affirmed the lower court's judgment that the defendant's system for disposing of sharp medical instruments did not literally infringe the plaintiff's patented system because the defendant's system embodied slight differences in its elements or arrangement of elements when compared to the plaintiff's system. The court then considered whether the defendant's system infringed under the doctrine of equivalents. Although infringement under the doctrine of equivalents is ordinarily an issue for the fact finder, the *Sage Products* court withheld application of the doctrine as a matter of law, explaining that "as between the patentee who had a clear opportunity to negotiate broader claims but did not do so, and the public at large, it is the patentee who must bear the cost of its failure to seek protection for this foreseeable alteration of its claimed structure."[220]

Thus, the *Sage Products* court held that where it is ambiguous whether there has been infringement under the doctrine of equivalents, such ambiguity will be construed against the patentee,

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217 *See, e.g.*, Housey Pharm., Inc. v. Astrazeneca Ltd., 366 F.3d 1348 (Fed. Cir. 2004); Brookhill-Wilk v. Intuitive Surgical, Inc., 326 F.3d 1215 (Fed. Cir. 2003).

218 *See, e.g.*, Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp., 93 F.3d 1572, 1581 (Fed. Cir. 1996) (adopting narrow construction of patent claim in literal infringement action on the ground that, under *Athletic Alternatives*, "a patent claim may be interpreted only as broadly as its unambiguous scope," so "that to the extent that the claim is ambiguous, a narrow reading which excludes the ambiguously covered subject matter must be adopted"); Athletic Alternatives, Inc. v. Prince Mfg., Inc., 73 F.3d 1573, 1581(Fed. Cir. 1996) (adopting narrow construction of patent claim in literal infringement action on the ground that "[w]here there is an equal choice between a broader and a narrower meaning of a claim, and there is an enabling disclosure that indicates that the applicant is at least entitled to a claim having the narrower meaning, we consider the notice function of the claim to be best served by adopting the narrower meaning").

219 126 F.3d 1420 (Fed. Cir. 1997).

220 *See id.* at 1425.

at least with regard to foreseeable alterations of the invention. The court's reasoning for this default rule is plainly adaptable to ambiguities in the Copyright Act. Writing for the court, Judge Rader explained as follows:

> This court recognizes that such reasoning places a premium on forethought in patent drafting. Indeed this premium may lead to higher costs of patent prosecution. However, the alternative rule — allowing broad play for the doctrine of equivalents to encompass foreseeable variations . . . also leads to higher costs. Society at large would bear these latter costs in the form of virtual foreclosure of competitive activity within the penumbra of each issued patent claim . . . . Given a choice of imposing the higher costs of careful prosecution on patentees, or imposing the costs of foreclosed business activity on the public at large, this court believes the costs are properly imposed on the group best positioned to determine whether or not a particular invention warrants investment at a higher level, that is, the patentees.[221]

Clearly, this default rule reiterates the basic point that the burden to resolve uncertainties in the scope of exclusive rights should be borne by those groups with the best information and means to do so because such a rule encourages better drafting.[222] In the context of the Copyright Act, this would mean that special-interest statutory provisions, such as the exclusive right to prepare derivative works and the prohibitions of the DMCA, should be construed narrowly so that the copyright owner groups bear the burden of obtaining a legislative change.

However, the Federal Circuit also bases this default rule of patent claim construction on its concern that uncertainty in the scope of patent claims could chill competitive activity.[223] Copyrights generally confer less market power than patents do,[224] so courts might not deem it necessary to adopt a similar default rule for construing exclusive rights under the Copyright Act. But there is an important reason why the proposed default rule should apply in copyright law, and it lies in the very reason why copyrights do not confer much market power: Copyrights are more limited in

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221 *See id.*

222 *See id.*

223 The Federal Circuit cited the Supreme Court's *Markman* decision for a discussion of "the importance of certainty in defining the scope of exclusive rights." *See id.*

224 *See Assessment Techs.*, 350 F.3d at 647 (stating that a difference between patent law and copyright law is that "patents tend to confer greater market power on their owners than copyrights do, since patents protect ideas and copyrights . . . do not").

scope than are patents.[225] Probably the most important limitation on the scope of a copyright is the idea/expression dichotomy, which holds that copyright law protects expression but not the ideas underlying that expression. If copyrights protected ideas, then they, like patents, also might foreclose a significant amount of competitive activity.[226] Thus, because statutory construction of the Copyright Act requires courts to interpret the scope of the idea/expression dichotomy, it could have similar effects on competitive activity as construction of patent claims.

As was previously discussed, the concern over effects on competition explains why courts supplemented the idea/expression dichotomy with the merger doctrine, which provides that when expressive elements of a work merge with the underlying idea, neither the idea nor the expression is copyrightable. In light of expanding copyrights, however, the traditional idea/expression and merger doctrines are no longer adequate to protect the public domain of ideas. For instance, the prohibitions on access to copyrighted works in the DMCA apply to all works that have any portion of copyrighted material in them, even if most of the work consists of uncopyrightable ideas or facts. If the DMCA is interpreted not to include a defense for purely noninfringing uses, it could chill competition by keeping uncopyrighted ideas from the public domain. The *Chamberlain* court rejected this interpretation, saying that:

> [it] would allow any manufacturer of any product to add a single

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225 *See id.* As Judge Posner has explained, "[t]he narrow scope of the property right implies the existence of close substitutes." Richard A. Posner, *How Long Should a Copyright Last?*, 50 J. COPYRIGHT SOC'Y USA 1, 6 (2003).

226 There are also other reasons why this distinction should not prevent adopting the same default rule for resolving ambiguities in patent and copyright cases. First, although the Supreme Court has held that there is a presumption of market power for both patented and copyrighted products, at least in antitrust tying cases, courts have since expressed doubt about the appropriateness of that presumption. *See, e.g.*, Independent Ink, Inc. v. Illinois Tool Works, Inc., 396 F.3d 1342, 1351 (Fed. Cir. 2005) (adhering to Supreme Court precedent establishing presumption despite extensive critical commentary and saying that "[t]he time may have come to abandon the doctrine, but it is up to the Congress or the Supreme Court to make this judgment"), *cert. granted*, 125 S.Ct. 2937 (2005); *see also* IIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 518 (2d ed. 2002) (arguing that although a string of early Supreme Court decisions applied a presumption of market power for patents, those decisions "applied the presumption only in tying cases . . . at a time when the market power requirement for tying was nominal or nearly nonexistent," and that "[m]ore recent decisions have called the presumption into doubt, and lower court decisions since the 1980s have largely rejected the presumption."). Second, there are some areas of copyright, such as computer software, that often do confer a large amount of market power. Third, because the term of copyright protection is significantly longer than the term of patent protection, whatever effect uncertainty in copyright law has on competition will accumulate over a longer period of time than in patent law.

> copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial "encryption" scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products. In other words, [it] would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.[227]

Thus, the concerns that led the Federal Circuit to use a default rule of construction in patent law that construes ambiguities in the scope of patent claims against the patentee (or against a finding of infringement) are often present in copyright law as well. As such, it makes sense to adopt an analogous rule of construction in copyright law that construes a copyright owner's rights narrowly, at least where those rights, if broadly construed, would conflict with public-interest provisions of the Copyright Act. This default rule of narrow construction will serve the public interest by preserving access to copyrighted works for noninfringing uses and also encourage clearer statutory drafting by giving special-interest groups an incentive to lobby for explicit language delineating the rights that Congress intends to give them.

VI. Conclusion

While copyright law historically has served the public interest in encouraging creativity, recent copyright legislation increasingly reflects special-interest capture. Until now, the dominant view among lawyers and academics has been that courts should deal with this special-interest influence by invalidating affected copyright provisions as unconstitutional. Constitutional invalidation poses significant threats for separation of powers and other values, however, and, as a practical matter, courts are very unlikely to invalidate economic legislation on constitutional grounds.

This article has proposed a theory of statutory construction to deal with special-interest influence over the Copyright Act. Under this theory, courts should resolve ambiguities in statutory provisions by reference to the public- or private-interest nature of those provisions. Thus, ambiguities between private-interest provisions, such as the derivative works right or the DMCA's prohibitions, and public-interest provisions, such as the idea/expression dichotomy or the fair use defense, should be resolved

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227 *See Chamberlain*, 381 F.3d at 1201 (internal citations omitted).

by adopting a narrow construction of the copyright, or, put another way, against a finding of infringement.

This approach to statutory interpretation serves a number of goals. First, it effectuates legislative intent or meaning because it interprets the statute in a way that (1) enforces the special-interest deal that was struck in Congress and (2) is consistent with the stated purpose of the statute. Second, this approach serves substantive and process-oriented goals, including vindicating constitutional norms, increasing transparency in the legislative process, decreasing the extent of statutory failure, and improving statutory drafting. Thus, through statutory construction, the proposed theory reclaims the Copyright Act for the public interest.