THE LINE BETWEEN COPYRIGHT AND THE FIRST AMENDMENT AND WHY ITS VAGUENESS MAY FURTHER FREE SPEECH INTERESTS

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INTRODUCTION

There is fundamental tension between copyright doctrine and the First Amendment right to free speech—at least, theoretically there should be.[1] In the most basic terms: the First Amendment protects expression while copyright law regulates it.[2] The First Amendment prohibits government actions that restrict people's freedom of speech.[3] Copyright, on the other hand, is a government creation that restricts speech by prohibiting people from using certain words or images in their expression.[4] However, the relationship between copy-

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1 *See, e.g.*, Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 984 (1970) ("[C]opyright persists in its potential for conflict with the [F]irst [A]mendment."); *see also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 538 (2004) ("The current version of copyright . . . is incompatible with the First Amendment."). Even Professor Melville B. Nimmer, who first spelled out how copyright and the First Amendment *avoid* conflict, notes that "views of copyright and the first amendment, held 'side by side,' may, in fact, be contradictory." Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1180 (1970).

2 *See* Brief of Jack M. Balkin et al. as Amici Curiae Supporting Petitioners at 11, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) (representing the view of a group of scholars that "[t]he Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images"); *see also* Goldstein, *supra* note 1, at 984 ("Dispensed by the government, copyright . . . constitutes the grant of a monopoly over expression.").

3 *See* U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech.").

4 As Nimmer rhetorically asked:

> Does not the Copyright Act fly directly in the face of [the First Amendment]? Is it not precisely a "law" made by Congress which abridges the "freedom of speech" and "of the press" in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright?

Nimmer, *supra* note 1, at 1181. In other words, as Professors Mark A. Lemley and Eugene Volokh succinctly put it: "Copyright law restricts speech: it restricts you from writing, painting, publicly performing, or otherwise communicating what you please." Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998).

right and free speech is not all conflict and discord.[5] The Supreme Court has noted that copyright and the First Amendment essentially share one goal: wide dissemination of expression and ideas.[6] Copyright gives authors a limited monopoly over their creative works so that they can reap the financial rewards of their creation, thus incentivizing authors to create in the first place.[7] As the Supreme Court put it: "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[8] Copyright is therefore, at its theoretical core, largely compatible with the First Amendment's protection of free speech: copyright ensures that there is speech being created for the First Amendment to protect.[9]

This congruence in purpose—to promote speech—seems to suggest that despite the potential for conflict between copyright and the First Amendment, there is also potential for solution.

Accordingly, courts have been reluctant to recognize any real conflict between copyright and the First Amendment. Courts are confident that copyright has built-in safeguards that properly balance the protection of copyright holders' rights and allowing freedom of speech.

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5 *See, e.g.*, L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), *printed in* 46 HOUS. L. REV. 215, 308 (2009) ("[T]he subject of both [the First Amendment and Copyright Clause] is the same: communication by both speech and writing.").

6 *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[C]opyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression."); *see also* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347 (1996) ("First, through its production function, copyright encourages creative expression . . . . Second, through its structural function, copyright serves to further the democratic character of public discourse."). *But see* Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 478–79 (2010) (stating that one of the reasons "why the First Amendment has not been a more successful defense in copyright cases" is precisely because "copyright has been deemed an 'engine of free expression,' and accordingly . . . treated as a symbiotic pair [with the First Amendment,] working together toward the same goal of promoting more speech").

7 *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) ("The monopoly created by copyright . . . rewards the individual author in order to benefit the public.").

8 *Harper & Row*, 471 U.S. at 558.

9 Put another way: "The Copyright Clause . . . is relevant to the First Amendment in that it protects the right of access to learning materials." PATTERSON & BIRCH, *supra* note 5, at 308.

The conventional wisdom in the literature, on the other hand, is that courts' trust in copyright's internal free speech safeguards is misplaced—the supposed safeguards relied upon are simply too uncertain in application to effectively prevent copyright from encroaching on free speech.

This Comment will first discuss the conflict between copyright and the First Amendment in more detail. Part II will explain how the courts have thus far chosen to deal with the conflict by relying on copyright's supposed internal safeguards. Part III will discuss why, contrary to courts' reliance on them, many commentators find that the idea/expression dichotomy and fair use doctrine do not adequately reconcile copyright and the First Amendment because of their uncertain application. Lastly, the Comment will, by applying a generalized understanding of recent highly contextual behavioral studies on how people react to legal uncertainty to the particular context of copyright law, explore how and why eliminating the legal uncertainty of the idea/expression dichotomy and fair use doctrine may actually further burden free speech interests rather than accommodate them.

The purpose of this Comment is not to disprove the conventional wisdom or propose a new solution to the copyright/free speech conundrum but to highlight new considerations to be explored in evaluating suggested solutions for bridging copyright and free speech.

I. THE FIRST AMENDMENT VS. COPYRIGHT

The Copyright Clause provides that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."[10] Congress has done so through the Copyright Act, which grants an individual the right to exclude others from certain uses of his copyrighted work.[11] Section 102 of the Act extends copyright protection to "original works of authorship fixed in any tangible medium of expression."[12] Section 106 gives the copyright owner the exclusive right to reproduce the work, prepare derivative works, distribute copies, and perform or display the work in public.[13]

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10 U.S. CONST. art. I., § 8, cl. 8. This is also the Patent Clause. The entire unabridged clause reads: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

11 17 U.S.C. §§ 101–801 (2006).

12 *Id.* § 102.

13 *Id.* § 106. The entire section reads:

On the other hand, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[14]

While there is some debate over whether enforcement of copyright law constitutes state action, general consensus is that it does.[15] At the very least, the conflict is clear whenever a court enforces a copyright because it is essentially putting a restraint on what may be said or heard in public when it does so. Preliminary injunctions sought before trial on the merits are the classic form of a "prior restraint": they are judicial orders forbidding certain communications issued before such communications actually occur.[16] And the Supreme Court

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> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

14 U.S. CONST. amend. I. The full Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

15 *See* Rothman, *supra* note 6, at 507 ("Although there is disagreement about whether the private enforcement of federal laws counts as state action, the general consensus in copyright cases is that it does."); Peter K. Yu, *Copyright USA—A Collection: The Surging Influence of Copyright Law in American Life; The Graduated Response*, 62 FLA. L. REV. 1373, 1398 (2010) ("[C]ommentators have widely debated whether enforcement of copyright law could constitute state action . . . ."); *see also* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1607 n.400 (1993) ("Enforcement of property rights should be acknowledged as state action."); Lemley & Volokh, *supra* note 4, at 185 n.179 ("There's no doubt that a court's enforcement of copyright law to restrict private speech constitutes state action."); Tushnet, *supra* note 1, at 538 ("[I]f the First Amendment bars only government action, then copyright law itself ought to be unconstitutional as a government restriction on some speakers in order to improve the relative position of others.").

16 *See* Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1st ed. 1984)) ("The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'"); *see also* Lemley & Volokh, *supra* note 4, at 169 ("[C]opyright law is a speech restriction. Accordingly, injunctions against distributing a supposedly infringing work are injunctions restraining

has declared that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[17] Yet, preliminary injunctions are "issue[d] as a matter of course in copyright cases."[18]

But even absent an injunction, "[t]he current version of copyright . . . is incompatible with the First Amendment."[19] As Professor Rebecca Tushnet notes, copying—even pure copying—embodies important First Amendment interests.[20] This is true whether one grounds free speech on the theory of individual autonomy or of self-governance (or even, suggests Tushnet, any other theory).[21] Copying promotes the interests of any accounts of free speech.[22] Tushnet provides many examples of instances where copying served a vital free speech purpose[23]—instances of self-expression and political persuasion, where "[p]ersonality [was] expressed inseparably from copying,"[24] or where, because "[s]ome speech lacks a substitute," copying was necessary to public discourse as a way to persuade.[25] And yet, in spite of copying's importance to First Amendment interests, copyright law largely circumscribes it, subjugating many would-be copiers, i.e., speakers, to the will of copyright rightsholders. The conflict is

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speech; and preliminary injunctions restraining speech are generally considered unconstitutional 'prior restraints.'").

17 Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976).

18 James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 890 (2007); *see also* Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 612–13 (1st Cir. 1988) (finding that in copyright cases, where the likelihood of success on the merits prong of the test for whether a preliminary injunction should issue is convincingly met, the balance of the harms prong should be ignored, even if defendant would suffer greater harm than the plaintiff were the injunction not granted, because "a probable infringer simply should not be allowed to continue to profit from its continuing illegality at the copyright owner's expense"); Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (finding that in copyright cases, where the likelihood of success on the merits prong of the test for whether a preliminary injunction should issue is met, the irreparable injury prong need not be proved with much detail, "because such injury can normally be presumed when a copyright is infringed"); Conrad Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1317 (2d Cir. 1969) (finding that in copyright cases, "[a]n injunction . . . should issue if plaintiff can show a reasonable probability of prevailing on the merits," without mentioning the other three prongs of the test for whether preliminary injunction should issue). For a good discussion of the leniency of the standards governing preliminary injunctions in modern U.S. copyright cases, see generally Lemley & Volokh, *supra* note 4, at 151–65.

19 Tushnet, *supra* note 1, at 538.

20 *See id.* at 562–81.

21 *See id.* at 538–40.

22 *See id.*

23 *See id.*

24 *Id.* at 571.

25 *Id.* at 578.

fundamental. As Professor Tushnet put it, "*any* system of copyright will suppress speech, and some of that speech will be quite valuable in constitutional terms."[26] The key is thus finding the optimal balance.

II. COPYRIGHT'S INTERNAL FREE SPEECH SAFEGUARDS

Despite the ostensibly inherent conflict between copyright doctrine and free speech interests, courts have rarely conducted First Amendment analyses in copyright cases, and even when they have, First Amendment challenges in copyright cases have been dismissed with surprising ease.[27] In *Eldred v. Reno*, the D.C. Circuit even went so far as to declare that "copyrights are categorically immune from challenges under the First Amendment."[28] The Supreme Court somewhat tempered the D.C. Circuit's statement in *Eldred v. Ashcroft*, stating that it "recognize[d] that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment,'" but nonetheless reiterated that "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[29] Courts, including the Supreme Court, have dismissed First Amendment challenges in copyright cases on the theory that "copyright law contains built-in First Amendment accommodations,"[30] namely: (1) the idea/expression dichotomy and (2) fair use doctrine.

A. Idea/Expression Dichotomy

The idea/expression dichotomy within copyright doctrine delineates what can be privately monopolized under copyright and what cannot.[31] Copyright does not protect an author's "ideas," only his "expression."[32] For example, the fact that Jane Yolen had already written a novel about a teenage wizard in magic school did not prec-

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26 *Id.* at 547 (emphasis added).

27 *See* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987) ("[C]ourts have consistently and almost without exception rejected the free speech defense in copyright infringement actions.").

28 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom.*, Eldred v. Ashcroft, 537 U.S. 186 (2003).

29 *Eldred*, 537 U.S. at 221.

30 *See, e.g.*, *id.* at 190.

31 *See, e.g.*, Nimmer, *supra* note 1, at 1189–90 (considering where the line between idea and expression ought to be drawn). Also, this principle of copyright is codified by statute. *See* 17 U.S.C. § 102(b) (2006) ("In no case does copyright protection for an original work of authorship 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.").

32 *See, e.g.*, Nimmer, *supra* note 1, at 1189–90.

lude J.K Rowling from writing a series of best-selling books about a teenage wizard in magic school.[33] Other authors are not allowed to copy Jane Yolen's or J.K. Rowling's words and are very likely not allowed to use the same characters, specific plot points, dialogue, or the like, but other authors are allowed to write a novel about a teenage wizard in magic school.[34] The general "teenage wizard in magic school" plot is an unprotected idea, whereas J.K. Rowling's particular expression of that idea—e.g., her words—is protected. As Professor Neil Weinstock Netanel put it: speakers may "convey the ideas and facts contained within the copyright holder's work . . . so long as they do so in words, graphics, or other expressive components that are not 'substantially similar' to those that comprise the copyright holder's work."[35]

The idea/expression dichotomy is the line on which copyright and free speech is balanced. As Professor Melville B. Nimmer, the first to articulate this concept in 1970, put it: "ideas *per se* fall on the free speech side of the line, while the statement of an idea in specific form, as well as the selection and arrangement of ideas fall on the copyright side of the line."[36]

This balance serves both copyright and First Amendment interests.[37] This balance serves the interest of copyright because the protection of authors' works through protection of their expression allows authors to financially benefit from their expression, incentivizing the creation of new works.[38] Free speech interests are served because people are still free to speak about any idea they want to as long as they do not adopt the particular expression of a prior author.[39] In this way, the "market place of ideas" is not left "utterly bereft" and "democratic dialogue" is not "stifled."[40] In short, copyright avoids conflict with the First Amendment because it already en-

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33 *Compare* JANE YOLEN, WIZARD'S HALL (1991), *with* J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1998).

34 It is true, however, that it is often difficult to determine at what point "idea" becomes "expression" or vice versa. *See* discussion *infra* Part III.A.

35 Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 13–14 (2001).

36 Nimmer, *supra* note 1, at 1190.

37 *See id.* at 1192–93.

38 *See id.*

39 *See* Netanel, *supra* 35, at 13 ("[W]hile a speaker might prefer to incorporate the copyright holder's expression, there will almost always be ample alternative formulations by which the speaker may express the ideas she wishes to convey."). *But see* Tushnet, *supra* note 1, at 578 ("Some speech lacks a substitute.").

40 Nimmer, *supra* note 1, at 1189.

compasses free speech interests by only protecting expression and not ideas.

This concept has been enormously influential.[41] Since Nimmer's revelatory 1970 article, courts, including the Supreme Court, have used the idea/expression dichotomy to quickly throw out First Amendment defenses to copyright claims with ease.[42] For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, an infringement action was brought against *The Nation Magazine* for its unauthorized publication of verbatim quotes from President Ford's memoirs, the rights to which were owned by Harper & Row.[43] Defendant argued that since President Ford's memoirs were important to democratic political discourse, in light of First Amendment values, the magazine's unauthorized copying should have been exempted from liability.[44] The Court rejected defendant's contention.[45] The Court cited to, inter alia, Nimmer and found such an exemption unnecessary. According to the Court, as long as copyright only protected expression and not ideas, First Amendment interests were properly served.[46]

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41 *See* Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL'Y 273, 282 (2009) ("Nimmer's definitional balancing formulation proved enormously influential. It was picked up by lower courts and, eventually, by the Supreme Court.").

42 For a better picture of the cases adopting Nimmer's idea/expression dichotomy, Netanel gives a brief overview of the evolution of Nimmer's judicial progeny. *See* Netanel, *supra* 35, at 7–12. There, Netanel cites a number of district court cases that invoke Nimmer in rejecting First Amendment defenses to copyright suits. *See, e.g.*, Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 383–84 (D. Conn. 1972) ("[I]nsofar as [defendants] chose 'to avoid the expenditure of time and skill necessary to evolve their own expressions, and instead copied the plaintiff's expression, there can be no first amendment justification for such copying.'" (internal citation omitted)); Jondara Music Publ'g Co. v. Melody Recordings, Inc., 362 F. Supp. 494, 499 (D.N.J. 1973) (rejecting defendants' First Amendment defense easily, stating that "[s]ince defendants concede they copy the creative works of others [the court] perceive[s] no first amendment issue"); *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577 n.13 (1977) ("[C]opyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts . . . . " (citing Nimmer, *supra* note 1)).

43 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 541–42 (1985).

44 *Id.* at 555–56. More specifically, defendant argued that fair use doctrine should be expanded to encompass their conduct. For a discussion of the fair use doctrine, *see* discussion *infra* Part III.B.

45 *Harper & Row*, 471 U.S. at 560.

46 *Id.* at 555–60.

B. Fair Use Doctrine

Copyright's other internal free speech safeguard is fair use.[47] The fair use doctrine was originally a judge-made equitable doctrine but was codified by the Copyright Act of 1976.[48] Unlike the idea/expression dichotomy, which is essentially a label describing what is properly protected by copyright, i.e., what is copyrightable and when copying constitutes infringement, fair use is an affirmative defense that arises after infringement is established that excludes "the fair use of a copyrighted work" from liability.[49] The statute provides four non-exclusive[50] factors to be analyzed when determining whether the use of a work in any particular case is fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work.[51]

Most important to courts it seems are inquiries into whether the borrowing work is "transformative" under the first factor, that is whether it adds new material or a new critical perspective to the original,[52] and whether there exists a traditional licensing market for the copyrighted work under the fourth factor.[53]

Fair use acts as a "safety valve" for free speech: it allows a court to permit technical infringement of a copyright in certain situations where speech may be overburdened.[54] Fair use doctrine's utility as a

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47 In fact, it has even been called "the most important and far reaching" internal free speech safeguard. Patterson, *supra* note 27, at 36 ("Of the . . . free speech constraints implicit in copyright . . . fair use . . . is the most important and far reaching. Eliminate the other [free speech constraints], and a rational fair use doctrine can protect the rights of free speech.").

48 *See* 17 U.S.C. § 107 (2006).

49 *Id.* ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

50 *See, e.g.*, H.R. REP. NO. 94-1476, pt. 1, at 65 (1976) ("[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."); *see also Harper & Row*, 471 U.S. at 560 ("The factors enumerated in the section are not meant to be exclusive.").

51 17 U.S.C. § 107 (2006).

52 *See* Tushnet, *supra* note 1, at 550 ("[F]air use increasingly requires transformation, that is, the addition of new material or a new, critical perspective.").

53 *See* Gibson, *supra* note 18, at 898 ("Scholars of all stripes thus agree with the courts: the existence *vel non* of traditional licensing markets should play an important role in determining whether fair use protects an unauthorized use of copyrighted material.").

54 *See* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 293 (1979) ("[The idea/expression dichotomy] functions effectively in any situation in which the purposes of free speech are adequately served by preserving the free access to ideas, without the need for similar access to a particular form of expression. In some instances, however, the values inherent in the rights

free speech protection lies in the fact that "[i]t can operate as a defense even when there has been a substantial appropriation of expression."[55] Fair use allows for the few circumstances when free speech interests require the use of another's particular expression and not just his idea, i.e., when the idea/expression dichotomy is inadequate as free speech protection.[56]

As with the idea/expression dichotomy, courts have used the existence of the fair use doctrine to easily dispose of First Amendment defenses in copyright cases.[57] For example, in *A&M Records, Inc. v. Napster, Inc.*, a number of record companies and music publishers sued Napster, an Internet service that facilitated the transmission and retention of digital audio files by its users, for copyright infringement.[58] The district court had preliminarily enjoined Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."[59] Napster appealed, arguing, inter alia, that the preliminary injunction violated the First Amendment.[60] While the Ninth Circuit found that the injunction was overbroad and remanded it for modification on other grounds, it nevertheless addressed Napster's First Amendment de-

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of free speech and free press demand more than access to abstract ideas—they require the use of the particular form of expression contained in a copyrighted work . . . . A more broadly applicable restraint against the intrusion of copyright law into constitutional preserves is the doctrine of fair use.").

55 *Id.* at 294.

56 *See id.*

57 *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028 (9th Cir. 2001) ("We . . . briefly address Napster's First Amendment argument so that it is not reasserted on remand . . . . We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine."); *see also* Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999) (noting that the Second Circuit has "repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine"); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1378 (2d Cir. 1993) ("[E]xcept perhaps in an extraordinary case, 'the fair use doctrine encompasses all claims of first amendment in the copyright field.'" (quoting New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989))); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 115 (N.D. Cal. 1972), *aff'd in part*, 581 F.2d 751 (9th Cir. 1978) ("The determination that the defense of fair use could not be successfully asserted here would seem to resolve the further contention that the First Amendment works to prevent issuance of a preliminary injunction.").

58 *A&M Records*, 239 F.3d at 1010–11.

59 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000), *rev'd*, 239 F.3d 1004 (9th Cir. 2001).

60 *A&M Records*, 239 F.3d at 1027–28.

fense and rejected it with a few sentences, stating: "First Amendment concerns in copyright are allayed by the presence of the fair use doctrine. . . . There was a preliminary determination here that Napster users are not fair users. Uses of copyrighted material that are not fair uses are rightfully enjoined."[61]

III. INSUFFICIENCY OF COPYRIGHT'S INTERNAL FREE SPEECH SAFEGUARDS: UNCERTAINTY

Contrary to courts' reliance on the idea/expression dichotomy and fair use doctrine, several commentators have nevertheless found copyright's internal free speech safeguards lacking.[62]

The one essential criticism is that the idea/expression dichotomy and fair use doctrine are too uncertain in application to effectively protect free speech interests.[63]

A. Uncertainty of the Idea/Expression Dichotomy

For many commentators, the supposed distinction between idea and expression is illusory.[64] While stylized as a "dichotomy," the actual relationship between idea and expression is anything but binary. Rather, the distinction (if it exists at all) between idea and expression

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61 *Id.* at 1028 (citations omitted).

62 *See* Bunker, *supra* 41, at 292 ("Neither the idea/expression dichotomy nor the fair use doctrine is adequate, either together or separately, to protect First Amendment values in the copyright realm."); Netanel, *supra* note 35, at 13 ("[T]he idea/expression dichotomy, the fair use doctrine, and copyright's limited term do not continue to adequately protect free speech."); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 396–97 (1989) ("[It is] apparent that reliance on the idea/expression dichotomy to reconcile copyright with the first amendment is unjustified. Even though copyright theoretically aims only at constitutionally valueless speech, judicial interpretation of the idea/expression dichotomy has failed to leave ample room for constitutionally valuable expression.").

63 *See, e.g.*, Netanel, *supra* note 35, at 19–20 ("The First Amendment protection afforded by copyright's idea/expression dichotomy is no less uncertain, unstable and illusory than the dichotomy itself. . . . [F]air use suffers from . . . the same infirmity as the idea/expression dichotomy."); *see also* Kathleen K. Olsen, *First Amendment Values in Fair Use Analysis*, 5 JOURNALISM & MASS COMM. MONOGRAPHS 161, 189 (2004) ("[T]he courts' *ad hoc* decision-making has prevented the construction of a coherent body of fair use law based on a fundamental commitment to preserving free speech values. This in and of itself is harmful to the preservation of First Amendment values.").

64 *See* Netanel, *supra* note 35, at 19 ("[T]he problem is not merely that expression has steadily gobbled up idea, but that there is no clear line between idea and expression."); Yen, *supra* note 62, at 405 ("[T]he idea/expression dichotomy does not provide a clear, principled separation between the first amendment and copyright law.").

is better conceptualized as a continuum.[65] The difference (if it can be called that) between copyright protected "expression" and unprotected free speech "idea" is one of degree.[66]

Courts have been unable to locate the point at which idea magically becomes expression in any principled manner.[67] For example, one test that has been developed to identify the line between idea and expression is the "abstractions test" applied by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*[68] Yet, even as he applied his test for determining when something had crossed from idea into expression, Judge Hand noted that the line between idea and expression, "wherever it is drawn, will seem arbitrary."[69]

In *Nichols*, a playwright sued Universal Pictures, a movie production company, alleging its movie, *The Cohens and the Kellys*, infringed the copyright on her play, *Abie's Irish Rose*.[70] Both works involved "a quarrel between a Jewish father and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation."[71] Nevertheless, the Second Circuit found that defendant did not infringe Nichol's copyright, stating that "the defendant took no more . . . than the law allowed."[72]

Judge Hand found no infringement using what is now called the "abstractions test." Any given work can be described in a number of ways. For example, a description of Shakespeare's *Romeo and Juliet*[73] could include every last detail of the play, specifying the names of every character big and small, every scene, every line of dialogue, and

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65 *See* Yen, *supra* note 62, at 433 ("[T]he idea/expression dichotomy is at best a very amorphous distinction, one which plausibly may be construed to imply either an extremely broad scope of copyright protection or a very narrow one.").

66 *See* Goldstein, *supra* note 1, at 1018 ("Recognizing that expression is no more than an articulated idea or ideas and that the distinction is one of degree only, the law operates by degrees in determining whether a work's content is protectable or has been infringed by another work."); *see also* Yen, *supra* note 62, at 433 ("The examination revealed that the idea/expression dichotomy is at best a very amorphous distinction, one which plausibly may be construed to imply either an extremely broad scope of copyright protection or a very narrow one.").

67 *See, e.g.*, Bunker, *supra* note 41, at 286–87 ("[T]he idea/expression dichotomy . . . is so uncertain in application as to be nearly indeterminate in some cases."). Even the Supreme Court has remarked on the seeming futility of attempting to parse idea from expression, stating in a seminal free speech case: "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Cohen v. California, 403 U.S. 15, 26 (1971).

68 45 F.2d 119 (2d Cir. 1930).

69 *Id.* at 122.

70 *Id.* at 120.

71 *Id.* at 122.

72 *Id.* at 121.

73 WILLIAM SHAKESPEARE, ROMEO AND JULIET.

so on, or it could simply and just as truthfully be described as a love story. The former is undeniably protected expression and the latter, clearly unprotected idea. Between those two extremes lie an infinite number of different descriptions of differing amounts of detail, each no truer than the other. Judge Hand's "abstractions test" posits that at some point along that continuum expression becomes unprotectable idea.[74]

However, even as Judge Hand applied the test, he noted that "[n]obody has ever been able to fix that boundary, and nobody ever can."[75] Judge Hand's admission is particularly troubling considering his opinion is frequently cited to as the best test for separating idea from expression.[76]

Instead, courts repeatedly redraw the line between idea and expression on an ad hoc case-by-case basis.[77] Compare the Second Circuit's holding in *Nichols* discussed above, that protection of a literary character depends on how finely the character is delineated,[78] with the standard in *Warner Bros. Pictures v. Columbia Broadcasting System*, where the Ninth Circuit found that copyright covers only the fictional character that "really constitutes the story being told."[79]

Further, compare the way Judge Hand applied the "abstractions test" in *Nichols* to the way the Ninth Circuit applied the same test in

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74 Judge Hand stated it as follows:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols, 45 F.2d at 121.

75 *Id.*

76 *See, e.g.*, Walker v. Time Life Films, Inc., 784 F.2d 44, 49 (2d Cir. 1986); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983); Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 624 (2d Cir. 1982); *see also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) ("[I]n attempting to distill the unprotected idea from the protected expression. No court or commentator in making this search has been able to improve upon Judge Learned Hand's famous 'abstractions test.'"); Yen, *supra* note 62, at 405 ("[T]he consensus view is that Hand's attempt to solve the idea/expression dichotomy is the best effort to date.").

77 *See* Netanel, *supra* note 35, at 19 ("The idea/expression dichotomy is notoriously malleable and indeterminate, far more useful as a shorthand for justifying judges' case-by-case conclusions."); *see also* Yen, *supra* note 62, at 397 ("Problems connected with separating idea from expression have caused many copyright decisions to rest upon the courts' ad hoc sense of what is permissible copying rather than upon any tangible principles.").

78 *Nichols*, 45 F.2d at 121 ("[T]he less developed the characters, the less they can be copyrighted.").

79 Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).

Roth Greeting Cards v. United Card Co.[80] and *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,[81] which "strongly suggest[ed] that the very mood a work creates constitutes its protectable expression"[82]—a seemingly much higher "level of abstraction" than where Judge Hand drew the line in *Nichols*.

Roth Greeting involved two corporations in the greeting card business.[83] One sued the other for copyright infringement of its greeting cards.[84] The Ninth Circuit found that defendant copied plaintiff's protected expression by copying the "total concept and feel" of its works, which included, in part, "the mood they portrayed."[85]

In *Sid & Marty Krofft*, a television production company sued McDonald's Corporation, claiming that certain McDonald's television commercials aimed at children infringed upon one of its children's television series.[86] Defendant admitted copying the idea of plaintiff's work—it also created "a fantasyland filled with diverse and fanciful characters in action"—but argued that it did not copy plaintiff's expression.[87] As proof, defendant dissected the two works and pointed out the dissimilarities in characters, setting, and plot.[88] The Ninth Circuit, however, ignored the defendant's analysis, calling it "improper," and found infringement because "the total concept and feel" of the two works were substantially similar.[89]

The line between idea and expression simply cannot be reliably pinned down. Judge Hand admitted as much when he noted: "no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression,'" and that such "decisions must therefore inevitably be *ad hoc*."[90]

B. Uncertainty of Fair Use Doctrine

For many commentators, the fair use doctrine is equally, if not more, ambiguous than the idea/expression line.[91]

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80 429 F.2d 1106 (9th Cir. 1970).

81 562 F.2d 1157 (9th Cir. 1977).

82 Yen, *supra* note 62, at 411.

83 *Roth Greeting Cards*, 429 F.2d at 1107.

84 *Id.*

85 *Id.* at 1110.

86 *Sid & Marty Krofft*, 562 F.2d at 1160–61.

87 *Id.* at 1165.

88 *Id.*

89 *Id.* at 1165–67.

90 Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

91 *See* Netanel, *supra* note 35, at 21 ("[C]ommentators have bemoaned [fair use doctrine's] unprincipled, inconsistent application."); *see also* Bunker, *supra* note 41, at 288 ("In terms

As a non-exclusive multi-factor balancing test, fair use doctrine is almost inevitably amorphous.[92] One district court called it "exceptionally elusive, even for the law."[93] Further, since "[f]air use analysis . . . always calls for case-by-case analysis," case law has not helped clarify what constitutes fair use.[94]

For example, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court found that a work that took from and parodied a prior work was transformative, and thus more likely fair use despite its commercial purpose, because it added "new expression, meaning, or message" to the prior work.[95] In contrast, the Second Circuit, in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, focused heavily on purpose. It held that a work that took from a prior work was not transformative, and thus less likely fair use, because of its "lack of transformative purpose," without examining whether it actually added anything to the prior work.[96] And in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*, the Ninth Circuit instead focused on whether a work was a parody.[97] It found that a work mimicking the style of a children's book to tell the story of the infamous O.J. Simpson murder trial was not transformative despite clear differences between the two works because "the critical issue . . . is whether [the work in question] is a parody" and the work had "no critical bearing on the substance or style of" the original and was thus not a "parody."[98]

It is exceptionally difficult to predict how a court will apply the fair use test, let alone forecast what it will ultimately find in any particular case. As a result, there is "confusion regarding the scope and

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of legal uncertainty, the idea/expression dichotomy is child's play next to the fair use doctrine."); Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and Users' Rights*, 56 J. COPYRIGHT SOC'Y U.S.A. 485 (2009) (criticizing fair use doctrine for offering no reasonable means by which one might predict the outcome of any particular case).

92 *See* Bunker, *supra* note 41, at 288 ("As the multi-factor 'nonexclusive' test suggests, the doctrine is notoriously ambiguous.").

93 Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970).

94 Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998) (internal quotation marks and citation omitted); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (stating that "[t]he task" of finding fair use "is not to be simplified with bright-line rules, for . . . [it] calls for case-by-case analysis"); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1496 (2007) ("The judicial path of fair use is paved with split courts, reversed decisions, and inconsistent opinions.").

95 *Acuff-Rose*, 510 U.S. at 579.

96 *Castle Rock*, 150 F.3d at 142–43.

97 Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997).

98 *Id.* (citing *Acuff-Rose*, 510 U.S. at 580).

nature of fair use."[99] "As it currently exists . . . the fair use doctrine is irrational."[100] There is simply no reasoned way to reliably differentiate between infringer and fair user.

C. Effect of Uncertainty

For critics of copyright's supposed internal safeguards, the legal uncertainty involved with the idea/expression dichotomy and fair use doctrine preclude them from effectively protecting free speech.[101] Even worse, the idea/expression dichotomy and fair use doctrine, due to their imprecision, not only fail as free speech safeguards but also have a "chilling effect" on speech and affirmatively hinder free speech.[102]

Copyright's suppression of speech "may be direct," as when a speaker is enjoined from copying, but it may also "result from a chilling effect caused by legal uncertainty."[103] Indeed, the most damning

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99 Patterson, *supra* note 27, at 44.

100 *Id.* at 36.

101 *See, e.g.*, Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 402–03 (2009) ("Given the constitutional interests at stake, the standards-based approach of fair use law is troubling. Whether any particular use is fair should not be unknowable until a judge interprets the fair use standards and decides a case that has made its way to court. Indeed, the uncertainty of fair use law is in tension with . . . First Amendment principles."); Netanel, *supra* note 35, at 19 ("[G]iven the ad hoc nature of distinguishing idea from expression, how are speakers to know whether their speech is infringing reproduction or permissible reformulation of existing expression?"); *see also* Bunker, *supra* note 41, at 287–88 ("[U]uncertainty is immensely problematic from a free speech perspective."). *But see* Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990) (discussing whether the imprecision and lack of clarity of fair use doctrine is a strength or a weakness and concluding that a bright-line standard should not be adopted unless it is a good one, and that no such standard currently exists).

102 *See* Netanel, *supra* note 35, at 19–20 ("At the very least, the idea/expression dichotomy's very vagueness induces considerable speaker self-censorship. Copyright supposedly encourages speakers to incorporate and build upon existing ideas. But given the indeterminate character of the idea/expression dichotomy, speakers who seek to do so often risk finding themselves on the receiving end of a copyright infringement action. That chilling effect alone ought to give pause to any court willing to examine afresh the dichotomy's efficacy as a limiting principle for protecting First Amendment interests."); *see also* Olsen, *supra* note 62, at 189 ("[W]ithout consistent principles for applying fair use, potential users cannot be sure what is and is not permissible. The uncertainty may create a 'chilling effect,' inhibiting potential fair users of copyrighted works from exercising their fair use rights for fear of an infringement suit, especially in close cases."); Yen, *supra* note 62, at 397 ("Problems connected with separating idea from expression have caused many copyright decisions to rest upon the courts' ad hoc sense of what is permissible copying rather than upon any tangible principles. Such unprincipled decision making is constitutionally suspect because it leaves courts and citizens uncertain about the contours of constitutionally significant doctrine. This uncertainty ultimately causes copyright's unacceptable chilling effect.").

103 Tushnet, *supra* note 1, at 582.

aspect of commentators' criticism of the idea/expression dichotomy and fair use doctrine as free speech safeguards is that because of their uncertainty, an actor will not be able to tell ex ante whether his potentially infringing speech will be allowed and will thus choose not to speak at all,[104] exactly the "kind of self-censorship [that] is traditionally a matter of concern to the First Amendment."[105]

It is well recognized in the law and economics literature that "vague standards cause overdeterrence."[106] Vagueness in laws that restrict speech have thus particularly troubled courts because overdeterrence in such contexts significantly burdens First Amendment freedom of speech. As the Supreme Court has observed, the freedom of speech is "delicate and vulnerable, as well as supremely precious in our society. . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[107] Indeed, the Court has even stated that "standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[108] Thus, a "central tenet of First Amendment law is that speech restrictions should rest on standards that are as definite and nondiscriminatory as possible."[109]

Courts' free speech concerns thus play themselves out with particular force in the copyright context where, as has been discussed,[110]

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104 *See, e.g.*, Yen, *supra* note 62, at 424 ("[U]uncertainty creates three identifiable fears among individuals. First, they may not know if their conduct is illegal. Second, even if they correctly believe that their conduct is legal, the system may mistakenly punish them anyway. Third, even if individuals know that they will vindicate themselves, the mere cost of litigation alone creates a fear of what it might cost to protect constitutional rights. These fears deter individuals from acting.").

105 Tushnet, *supra* note 1, at 545; *see also* Bunker, *supra* note 41, at 287 ("Robust free speech protection needs a sufficient degree of clarity so that a speaker may have some idea, in advance, if his or her speech will ultimately find protection in the courts or will occasion civil or criminal liability.").

106 Parchomovsky & Goldman, *supra* note 94, at 1498. Further, the tendency for vague laws to overdeter is not just observed by law and economics scholars, but is hinted at by courts as well, whose fear of vague laws and their tendency to overdeter is a part of the theoretical grounds for the "void for vagueness" doctrine. *See, e.g.*, Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

107 NAACP v. Button, 371 U.S. 415, 433 (1963).

108 *Id.* at 432–33 (citations omitted); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]here a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms." (alterations in original) (citation omitted) (internal quotation marks omitted)).

109 Lemley & Volokh, *supra* note 4, at 203.

110 *See* discussion *supra* Part III.

the supposed internal free speech safeguards are not "definite," but rather riddled with uncertainty.

Take, for example, the hypothetical documentary filmmaker used by Professor James Gibson in his article, *Risk Aversion and Rights Accretion in Intellectual Property Law*.[111] The filmmaker wants to use a piece of particularly poignant footage that makes incidental and transformative, but nevertheless potentially infringing, use of copyrighted material.[112] The filmmaker has essentially three options: (1) go forward by engaging in fair use, risking liability; (2) take precautions by getting authorization; or (3) self-censor by minimizing use of the footage.

Because of the uncertainties of the doctrine, the filmmaker will most likely not engage in fair use. To rationally do so, the filmmaker would need to know the risk of liability. If she knows ex ante that a court will find her use fair, she would without a doubt choose option one. Or if she could estimate ex ante the likelihood of winning her fair use defense, she could calculate the expected cost of going forward without authorization, weigh it against her expected benefit, and make a rational decision on whether to proceed. But alas, to a "prospective defendant wondering whether a given act will prove to be infringing, fair use is too ambiguous to provide much ex ante guidance."[113] There is no way for the filmmaker to predict whether she can successfully defend against a copyright infringement suit and thus no way for her to determine whether it would be in her best interest to speak freely.

Further exacerbating the situation, "[n]ot only is fair use famously ambiguous," making the risk of liability impossible to predict, "but the price of making the wrong call is prohibitively high."[114] Losing the fair use argument and being found liable could mean "not only a permanent injunction, but a myriad of other sanctions—statutory damages, disgorgement of profits, [and] attorney's fees."[115] Indeed, lawsuits, regardless of their outcome, are not cheap. "[E]ven if her fair use claim would ultimately . . . prove[] meritorious," the filmmaker could still easily be enjoined preliminarily,[116] which would "bring her production to a screeching halt and force her to negotiate

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111 *See* Gibson, *supra* note 18, at 887–88.

112 In Professor Gibson's hypo, an interviewee stands in front of a famous building, holds a prominent magazine with its cover clearly visible, and sings the lyrics of a well-known song to make his point. *See id.*

113 *Id.* at 889.

114 *Id.* at 890.

115 *Id.*

116 *Id.* ("Injunctions issue as a matter of course in copyright cases.").

permissions from those who hold her livelihood hostage."[117] Not to mention the fact that even absent a preliminary injunction, "a successful fair use defense is expensive."[118] Of course, if the filmmaker could know ex ante that she will be found a fair user, she would go forward. But of course, as noted, she cannot.

Thus, due to "the vagueness of the fair use standard," actors like Gibson's filmmaker cannot "precisely discern[] the optimal level of investment."[119] And even if they could, "the expected cost faced by unauthorized users is likely to far exceed the expected, often quite modest, benefit."[120] "As a result, actors find it in their best interest to err on the side of safety," refrain from engaging in fair use, "and either overcomply," i.e., self-censor, "or overinvest in precautions" such as licenses.[121]

Licensing, in turn, is fraught with its own perils. It is not a viable solution in cases "involving high transaction costs, strategic holdups, and unconscious or inadvertent copying."[122] And to make things worse, "th[e] 'license, don't litigate' tendency" also allows copyright holders to expand their rights at the expense of users and the public.[123] So not only does the uncertainty of copyright's supposed free speech safeguards deter speakers from speaking questionable-but-possibly-non-infringing speech, but it also shrinks the amount of non-infringing speech available to them.[124]

IV. IS UNCERTAINTY SUCH A BAD THING?

Accordingly, some commentators' solutions for reconciling copyright and the First Amendment focus on eliminating the uncertainty of copyright's internal safeguards in some way.[125]

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117 *Id.*

118 Tushnet, *supra* note 1, at 545; *see also* Gibson, *supra* note 18, at 894 ("[B]eing held liable is a secondary concern. It's being sued at all that poses the greater threat.").

119 Parchomovsky & Goldman, *supra* note 94, at 1498.

120 *Id.*

121 *Id.* Note that even if an actor wants to take a chance on fair use despite its uncertainty, her publisher or distributor will likely not. *See id.* ("[E]ven in cases where authors are motivated by ideological reasons to take a chance on fair use, their publishers and distributors are likely to oppose the idea.").

122 *Id.* at 1499.

123 Gibson, *supra* note 18, at 891, 936.

124 *See id.* at 887–906, 931–33.

125 *See, e.g.*, Bunker, *supra* note 41, at 297 (arguing for a particular solution utilizing a heightened substantial similarity standard because "it could offer greater protection, and . . . greater legal certainty, to speakers than the current 'built-in' protection regime"); Olsen, *supra* note 62, at 191 ("[T]he Supreme Court should clarify its own fair use rulings

However, while it is hard to deny the ambiguity and malleability of copyright's internal safeguards,[126] it may be that eliminating the legal uncertainty of the idea/expression dichotomy and fair use doctrine may, at best, do nothing for free speech, and at worst, further burden free speech interests rather than accommodate them.

Critics of the free speech aspects of the idea/expression dichotomy and fair use doctrine rest their criticism on well-reasoned and established free speech theory.[127] However, recent behavioral studies exploring how people actually react to legal uncertainty may belie the basis on which critics have attacked copyright's internal safeguards.[128]

A. Uncertainty? What Kind of Uncertainty?

Generally, uncertainty in law is treated as a single category.[129] However, certain behavioral studies suggest that it should not. Rather, "people perceive and are affected by different types of legal probabilities in distinct ways."[130] Uncertainty can be divided into different subcategories. People face different kinds of uncertainty when dealing with the law and react differently depending on what kind of uncertainty they face.[131]

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in order to give the lower courts clear guidance as to the parameters of fair use and its importance in preserving First Amendment values.").

126 Even commentators that more or less support the adequacy of the idea/expression dichotomy and fair use doctrine as free speech safeguards seem to acknowledge that the concepts are amorphous and susceptible to becoming ambiguous. *See* Denicola, *supra* note 54, at 315–16 (calling for an additional First Amendment privilege to support copyright's internal safeguards despite finding that "[c]opyright law . . . long has respected the values inherent in the first amendment" and that "confrontation with freedom of speech therefore is not severe" because if copyright is "left to carry the constitutional burden unaided, it will become disfigured and eventually cease to perform effectively its traditional function").

127 *See* Olsen, *supra* note 63, at 189 (analogizing fair use to statutes affecting speech that have been found unconstitutional under the First Amendment due to their vagueness); Yen, *supra* note 62, at 421–34 (arguing that the uncertainty of the idea/expression dichotomy has a "chilling effect" on speech by analogizing the Copyright and First Amendment tension to libel cases); *see also* Baggett v. Bullitt, 377 U.S. 360, 372 (1964) ("Those . . . sensitive to the perils posed by indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.").

128 *See* Yuval Feldman & Doran Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980 (2009); Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 MICH. L. REV. 467 (2008).

129 *See* Guttel & Harel, *supra* note 128, at 467 ("Legal scholarship . . . has traditionally treated uncertainty as a single category."); *see also* Feldman & Teichman, *supra* note 128, at 980 ("Generally, legal economists treat different legal probabilities as fungible.").

130 Feldman & Teichman, *supra* note 128, at 980; *see also* Guttel & Harel, *supra* note 128, at 467.

131 *See* Guttel & Harel, *supra* note 128, at 467; Feldman & Teichman, *supra* note 128, at 980.

Professors Yuval Feldman and Doron Teichman analyze certain recent behavioral studies and differentiate between "legal uncertainty" and "enforcement uncertainty."[132] Professors Ehud Guttel and Alon Harel distinguish between "future uncertainty" and "past uncertainty."[133]

B. Uncertain Law vs. Uncertain Enforcement

Feldman and Teichman focus on the distinction between "legal uncertainty" and "enforcement uncertainty."[134]

Legal uncertainty is the uncertainty that results from either "the limitations of language" or "of ambiguous legal terms . . . that depend on a probabilistic ex post determination of an adjudicator."[135] To illustrate "the limitations of language," Feldman and Teichman use the example of "a law that forbids 'vehicles' from entering a park"—does it "appl[y] to bicycles, roller skates, or even toy automobiles"?[136] Faced with such a law, a bicyclist deciding whether to ride into a park faces uncertainty regarding the legal consequences of her choice—whether her bicycle is a forbidden "vehicle."[137] "[A]mbiguous legal terms" include "terms such as 'negligence' in tort law, 'good faith' in contract law, and 'fair use' in copyright law."[138]

Enforcement uncertainty is the uncertainty resulting from the "difficulties associated with detecting wrongdoers and with assigning legal liability to them in accordance with different legal procedural rules."[139] For example, even if the bicyclist knows she is prohibited from entering the park because her bicycle is a "vehicle," she still faces uncertainty regarding whether she will be caught, and even if caught, whether she will be ticketed or merely warned and let go.

Upon analyzing certain behavioral studies on how people react to uncertainty, Feldman and Teichman found that "people are less likely to comply when uncertainty stems from the imprecision of law's substance than when uncertainty stems from the imperfect enforcement of clear law."[140] This is because "legal uncertainty undercuts the

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132 *See* Feldman & Teichman, *supra* note 128, at 980.

133 Guttel & Harel, *supra* note 128, at 467.

134 Feldman & Teichman, *supra* note 128, at 984–85 ("[W]e wish to compare two sources of uncertainty regularly created by the legal system. The first is legal uncertainty. . . . The second is enforcement uncertainty.").

135 *Id.* at 985.

136 *Id.* at 989.

137 *Id.*

138 *Id.*

139 *Id.* at 985.

140 *Id.* at 980.

law's normative force and thus provides more leeway for people to justify self-interested behavior."[141] It "allows people to justify their choices to themselves by focusing on the possibility that their acts may be deemed legal,"[142] while enforcement uncertainty involves "situations in which the illegality of an action is clear [which] leaves people with no choice but to view the behavior itself as wrong."[143] Thus, legal uncertainty "result[s] in more noncompliance than . . . enforcement uncertainty."[144]

C. Legal Uncertainty and Prediction vs. Postdiction

Guttel and Harel parse uncertainty into future uncertainty and past uncertainty.[145] An actor faces future uncertainty when the uncertain event succeeds his decision to act.[146] He faces past uncertainty when the uncertain event precedes his decision to act.[147] Thus, future uncertainty forces an actor to predict the future, while past uncertainty forces him to "postdict" the past—that is, to retrospectively determine what happened at the time of the event after the event has already occurred.[148]

The distinction is important because "individuals treat postdictions differently than predictions."[149] According to certain behavioral findings, people are more willing to take risks when faced with future uncertainty and asked to predict the future than when faced with past uncertainty and asked to postdict the past.[150]

According to Guttel and Harel, this distinction between prediction and postdiction has various implications for legal theory: one such implication is its effect on the choice between rules and standards.[151] For example, "in the context of constitutional rights," the

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141 *Id.* at 1010.

142 *Id.* at 1010–11.

143 *Id.* at 985.

144 *Id.*

145 *See* Guttel & Harel, *supra* note 128, at 468.

146 *See id.* at 468 ("For example, when purchasing a used car, the buyer could be uncertain of the date the manufacturer will terminate the production of this model (future) . . . .").

147 *See id.* ("For example, when purchasing a used car, the buyer could be uncertain of . . . the maintenance history of the vehicle (past).").

148 *See id.*

149 *Id.*

150 *See id.* This difference in the way people treat predictions and postdictions is "grounded in deeply rooted behavioral dispositions." *See id.* at 471–79 (laying out and explaining "the experimental literature that explores how prediction and postdiction affect risk perception").

151 *See id.* at 479–86. Guttel and Harel also list other legal implications of the prediction/postdiction distinction. *See id.* at 479, 487–98.

"traditional legal preference" is "for specified and precise regulations," i.e., rules.[152] It is traditionally thought that "vague legal norms operate to inhibit the exercise of freedoms" because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked.'"[153]

However, the behavioral findings on prediction/postdiction challenge this traditional approach.[154] Since people are more willing to predict than postdict, "rules . . . may induce even greater inhibition of lawful behavior" than an equivalent standard.[155] In other words, "an attempt to use legal rules may in fact increase rather than decrease the chilling effects of legal norms."[156] Thus, it may be that "where legislatures replace standards found to be void for vagueness with . . . rules designed to replace vague terms, they may paradoxically generate *greater* chilling effects than the chilling effects of the standards found to be void under existing doctrine."[157]

D. Copyright's Uncertain Free Speech Safeguards Revisited

While critics of copyright's internal free speech safeguards find that the uncertainty of the idea/expression dichotomy and fair use, at best, prevents them from effectively protecting free speech,[158] and, at worst, affirmatively "chills" free speech,[159] the aforementioned behavioral studies indicate that the legal uncertainty of the idea/expression dichotomy and fair use doctrine may in fact have no effect, or even, the beneficial effect of actually promoting free speech.

The uncertainty of the idea/expression dichotomy and fair use doctrine complained about by First Amendment advocates is, in Feldman and Teichman's taxonomy, "legal uncertainty," rather than "enforcement uncertainty."[160] It is "uncertainty associated with the substance of the law," and not that "associated with imperfect enforcement."[161] Commentators attack the ambiguity and fuzziness of

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152 *Id.* at 483. Guttel and Harel point to "the doctrine of 'void for vagueness'" as the "clearest manifestation of this preference." *Id.* at 483–84.

153 *Id.* at 484 (quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)).

154 *See id.* at 483.

155 *Id.* at 484.

156 *Id.* at 485.

157 *Id.* at 484–85.

158 *See* discussion *supra* Part III.C.

159 *See id.*

160 *See* Feldman & Teichman, *supra* note 128, at 980.

161 *Id.*

the idea/expression dichotomy and fair use[162]—"the imprecision of [the] law's substance"—not their "imperfect enforcement."[163] In fact, Feldman and Teichman specifically mention fair use as an example of legal uncertainty in their article.[164]

According to Feldman and Teichman, such "uncertainty creates an ideal setting for people who value themselves as law-abiding people to possibly justify, in their own eyes, not complying with the law."[165] Feldman and Teichman go further and suggest that "the uncertainty created by standards . . . encourages people to violate them."[166] Standards provide a "window of legality" that "might attract some people to behave in a way that is not in accordance with the standard."[167]

While noncompliance with the law is usually undesirable,[168] within the copyright/First Amendment realm a certain amount of noncompliance with the law might not be so bad. Due to the peculiar, balanced, yin-and-yang relationship between copyright and free speech,[169] violation of copyright law, which probably harms copyright interests, actually *furthers* free speech interests. Copyright bars certain speech.[170] Not complying with copyright law thus produces certain speech. If the First Amendment concern is "that copyright imposes a speech burden," then noncompliance with copyright law is an instance where that concern is forestalled—where speech is not deterred and "copyright's speech-burdening effects" are avoided.[171]

Thus, the legal uncertainty of the idea/expression dichotomy and fair use doctrine may, rather than "chill" speech, actually allow for more speech by giving people that suspect their speech may infringe the wiggle room to justify speaking anyway. Their uncertainty may actually invite a number of people to speak that would not otherwise, by allowing them "to view their choices ex ante as ones that *may* be

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162 *See* discussion *supra* Part III.

163 *See* Feldman & Teichman, *supra* note 128, at 980.

164 *See id.* at 988–89 ("This Article focuses on uncertainty created by the law itself. . . . [T]he law includes an array of standards that depend on *ex post* evaluation of actors' acts in order to impose legal liability. Terms such as . . . 'fair use' in copyright . . . create uncertainty regarding the legal consequences of an act.").

165 *Id.* at 1013.

166 *Id.* at 1016.

167 *Id.* at 1017 (internal quotation marks omitted).

168 Particularly in the areas of law mentioned in Feldman and Teichman's article: tax law and criminal law. *See id.* at 1011–15. Few would refute the desirability of having people pay their taxes and avoid committing crimes.

169 *See* discussion *supra* Parts I–II.

170 *See* discussion *supra* Part I.

171 *See* Netanel, *supra* note 35, at 8.

determined by an adjudicator ex post to be . . . legal."[172] In this way, the legal uncertainty of the idea/expression dichotomy and fair use doctrine may actually *allow* for the creation and distribution of speech—speech that would otherwise not be produced if the balance between copyright and free speech were better defined. In other words, the idea/expression dichotomy and fair use doctrine may be doing what they are supposed to be doing.

Furthermore, in light of Guttel and Harel's article on uncertainty, not only is there possibly no need to undergo the costs[173] of reducing the uncertainty of the idea/expression dichotomy or fair use doctrine at all, but it is also possible that solutions to the copyright/free speech conundrum that add certainty to the idea/expression dichotomy and fair use doctrine may actually be counterproductive.

A solution to the copyright/free speech conflict that adds certainty to the idea/expression dichotomy and fair use doctrine would essentially "[t]ransform[] a standards-governed activity into a rule-governed activity."[174]

The idea/expression dichotomy and fair use doctrine are perfect examples of legal standards.[175] They exhibit what Guttel and Harel indicate is the hallmark of legal standards: future uncertainty. Since it is impossible for a potential speaker to know whether her speech is copying idea and not expression, or is fair use or not,[176] she must "predict" whether her speech will be considered by a court to be infringing unfair use in the future. Thus, the uncertainty facing a potential speaker who faces copyright liability forces her to "guess the results of future events" rather than "guess the results of past events."[177] The idea/expression dichotomy and fair use doctrine are "open-ended norms" that "allow[] the adjudicator to make fact-specific determinations."[178] While adding certainty will not automatically convert the idea/expression dichotomy and fair use doctrine into legal rules, "[t]he distinction between rules and standards is . . . a matter of degree."[179] It is undeniable that clarifying the idea/expression dichotomy and fair use doctrine will make them

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172 Feldman & Teichman, *supra* note 128, at 1017 (emphasis added).

173 *See id.* at 1014 ("Reducing uncertainty entails direct costs.").

174 Guttel & Harel, *supra* note 128, at 482.

175 *See, e.g.*, Gibson, *supra* note 18, at 936 ("[T]he idea/expression dichotomy . . . and the fair use defense . . . are all standards.").

176 *See* discussion *supra* Part III.

177 Guttel & Harel, *supra* note 128, at 498.

178 *Id.* at 480.

179 *Id.*

"more specific and concrete" and "leave[] less discretion to the decision maker than a standard," making them more rule-like.[180]

In other words, clarifying the idea/expression dichotomy and fair use doctrine will not eliminate the uncertainty an actor meets when deciding whether to speak in the face of potential copyright liability, but rather change it from future uncertainty to past uncertainty, thus changing the actor's expected behavior as well.[181]

While critics of copyright's internal free speech safeguards believe that such a change would benefit First Amendment interests by eliminating the "chilling" effect of uncertainty, the behavioral research of Guttel and Harel suggest that it is quite possible such a shift from standard toward rule may actually increase the "chilling" effect because "[t]he uncertainty generated by the rule (past uncertainty) may be more chilling than the uncertainty generated by [the] equivalent standard (future uncertainty)."[182] In other words, a clearer idea/expression line or fair use doctrine may actually deter more people from speaking.

Guttel and Harrel use the example of a statute that makes it unlawful for someone to approach within eight feet of another person, and within one hundred feet of a health care facility entrance, for the purpose of protesting.[183] They note that:

> [a] protester may be chilled from exercising his free speech rights not because the provision is too vague but because it is too precise. Since it is difficult for a person to precisely evaluate the distance between herself and an object, a rule requiring a distance of "100 feet of the entrance to any health care facility" and "eight feet of another person" can be hard to follow. The uncertainty generated by the rule . . . may be more chilling than the uncertainty generated by . . . a standard requiring the maintenance of "reasonable distances."[184]

Rather than wonder whether a court will find that the distances she maintained were "reasonable," a protester will instead wonder whether she is eight feet from another person, or one hundred feet from a health facility. One question is not teleologically more "chilling" than the other.

The same intuition applies to making the idea/expression dichotomy or fair use doctrine more rule-like. It might not eliminate un-

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180 *Id.*

181 *See id.* at 482 ("Transforming a standards-governed activity into a rule-governed activity transforms uncertainty . . . from future uncertainty into past uncertainty. This change is likely to affect conduct.").

182 *Id.* at 485.

183 *See id.*

184 *Id.*

certainty as a whole, but merely substitute one kind of certainty, past certainty, for another, future uncertainty. And the past uncertainty generated by making the idea/expression dichotomy and fair use more rule-like will not necessarily lessen their "chilling" effect on speech.

Take for example, a safe harbor providing that "for any literary work consisting of at least one hundred words," exactly "three hundred words may be copied without the permission of the copyright holder."[185] Such a law could not be any more rule-like, it is seemingly impeccably "precise and predictable."[186] Yet even there, while the rule avoids the uncertainties of fair use analysis,[187] a different kind of uncertainty takes it place.

Even something as "precise and predictable" as a word count has its share of uncertainty. I only mean to be quasi-facetious here—determining word counts poses a real, though admittedly trivial, problem for real people.[188] Take the preceding sentence for example: Microsoft® Word 2008 for Mac, version 12.2.7 and *www.wordcounttool.com* give a word count of twenty words, while Google Docs (*http://docs.google.com*) and *www.wordcounter.net* give a count of twenty-one. Different word counting programs may give different results.[189]

Thus, instead of wondering whether a court will find her a fair user in the future, the would-be copier/speaker will instead face the prospect of having to wonder whether she had actually copied three hundred words or fewer in the past. Working around this "uncertainty" is probably easy, but I use it to illustrate a point: that the uncertainty of predicting the outcome of a fair use analysis may, in accordance with the conventional wisdom, still be more "chilling" than the uncertainty of postdicting whether a word limit was adhered to, but, suggests Guttel and Harel's article, it may not—one kind of uncertainty is not intrinsically more optimal a deterrent than the other.

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185 Parchomovsky & Goldman, *supra* note 94, at 1511.

186 *Id.* at 1512.

187 *See id.*

188 *See, e.g.*, *FAQ: What if There's a Discrepancy Between What My Word Count Said and What Yours Comes Up With?*, NATIONAL NOVEL WRITING MONTH, http://www.nanowrimo.org/eng/node/402943 (last visited May 11, 2011); *Why Do I Get Different Results from Different Word-Counters?,* YAHOO! ANSWERS, http://answers.yahoo.com/question/index?qid=20100716221119AAhO1ei (last visited May 11, 2011).

189 *See, e.g.*, *Why Do I Get Different Results from Different Word-Counters?*, YAHOO! ANSWERS, http://answers.yahoo.com/question/index?qid=20100716221119AAhO1ei (last visited May 11, 2011).

That is not to say the solutions already suggested by the literature are erroneous. Rather, Feldman & Teichman's and Guttel & Harel's articles merely suggest that we may not know if the "solutions" are solutions at all without further inspection. The key insight to be generalized from Feldman & Teichman's and Guttel & Harel's highly contextual behavioral findings on uncertainty is that there are different kinds of uncertainty that affect people's behavior in different ways. This Comment intends only to point out that attacks on the ability of the idea/expression dichotomy and fair use doctrine to safeguard free speech have largely focused on uncertainty as a broad category—an approach that may do copyright a disservice. Feldman & Teichman's and Guttel & Harel's articles demonstrate that *some*times the conventional wisdom is wrong, that *some*times a rule is more "chilling" than an equivalent standard. It is impossible to know whether this is the case for any of the proposed solutions for buttressing copyright's internal free speech safeguards; however, it might be worthwhile to find out.

CONCLUSION

Despite the common belief that only standards are uncertain and thus cause chilling effects, behavioral studies suggest that rules can induce even greater "chilling" effects. With this in mind, the usual attack on copyright's internal free speech safeguards should be reevaluated—or rather, further analyzed. It may be that their supposed weakness is actually their strength. It may be that courts have gotten it right—that copyright's internals safeguards have been functioning effectively all along. At the very least, recent behavioral studies suggest that new considerations, overlooked by the conventional wisdom, should be explored when evaluating proposals for reconciling copyright and free speech.