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*The Constitution's void-for-vagueness doctrine is itself vaguely stated. The doctrine does little to describe at what point vague laws—other than those that are entirely standardless—become unconstitutionally vague. Rather than explore this territory, the Supreme Court has identified three collateral factors that affect its inclination to invalidate a law for vagueness: (1) whether the law burdens the exercise of constitutional rights, (2) whether the law is punitive in nature, and (3) whether the law overlays a defendant-protective scienter requirement. Measured against these factors, copyright law does not meet the vagueness doctrine's minimum requirement of fair notice to the public. Copyright, by its terms, restricts free speech, and the law's prolixity frustrates ex ante assessment of what speech is lawful. In addition, substantial similarity and fair use, the very provisions of copyright law that are generally held to rescue it from overbreadth, themselves admit considerable uncertainty into the infringement analysis. That substantial, extracompensatory damages are available against infringers, regardless of their state of mind, renders the copyright laws still more problematic under the vagueness doctrine. This Article argues that although a case can be made that the copyright laws are unconstitutionally vague, invalidation of all or any portion of the Copyright Act is unlikely and not constructive. Reforms undertaken specifically to cure copyright's indeterminacy are not likely to be effective, either. However, a consideration of the vagueness doctrine's collateral factors and how they apply to copyright suggests an appropriate reform of the law. For cases involving expressive use of copyrighted content, lawmakers should adopt a three-tiered system of civil infringement liability by which strict liability is preserved in cases brought for injunctive relief only, while suits for statutory and actual damages require proof of willful and negligent infringement, respectively.*

## INTRODUCTION

Much ink has been spilled over the years on the question of copyright's constitutionality as a speech restriction.<sup>1</sup> Writing most

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1. See, e.g., Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 14 (2002); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN.

recently on the subject in *Eldred v. Ashcroft*,<sup>2</sup> the Supreme Court pronounced itself satisfied that the copyright infringement action does not effect an unconstitutional regulation of protected speech, so long as Congress does not alter the “traditional contours of copyright protection.”<sup>3</sup> The *Eldred* Court drew its confidence from the Copyright Act’s “built-in First Amendment accommodations”<sup>4</sup>—namely, the affirmative defense of fair use and the distinction that the law draws between expression, which is properly the subject of copyright protection, and ideas, which are not. *Eldred*’s logic triggered a burst of renewed interest from the scholarly commentariat, all of it given over to a critical examination of the Court’s suggestion that these two core copyright doctrines, fair use and the “idea/expression dichotomy,” as the Court has described it,<sup>5</sup> rescue the law from any claim of First Amendment overbreadth.<sup>6</sup> Absent, however, from both the case law and the critical literature is any attention to whether the line marked off between lawful and infringing expression—a line that fair use and idea-expression do substantial constitutional work policing—is drawn clearly enough to rebuff a challenge that copyright is unconstitutionally vague.

It should go without saying that copyright law is “vague,” at least in layman’s terms. The simple, first-order question of whether a given instance of speech infringes another’s copyright gives rise to multiple subsidiary legal questions, many of them interrelated, and all of them potentially dispositive of an infringement claim. The Supreme Court’s void-for-vagueness doctrine commands a greater degree of specificity<sup>7</sup>—and simplicity<sup>8</sup>—from speech restrictions. Nowhere else does the law present a speech regulation remotely as complex or prolix as the copyright infringement action.

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L. REV. 1, 48 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1970).

2. 537 U.S. 186 (2003).

3. *Id.* at 221.

4. *Id.* at 219 (citing *Harper & Row Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

5. *Harper & Row*, 471 U.S. at 556.

6. See, e.g., Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083 (2010); David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393 (2009); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004); Michael D. Birnhack, *Copyright Law and Free Speech after Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003); Richard Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in Eldred v. Ashcroft*, 55 SUP. CT. REV. 143, 158–61 (2003).

7. See, e.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

8. See *infra* Part I.B. (discussing the Supreme Court’s recent rulings in *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010), and *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)).

It only compounds the problem that the two rescue doctrines identified by the *Eldred* Court are themselves fraught with indeterminacy. One cannot dispute that the “idea/expression dichotomy”<sup>9</sup> and its effectuation in copyright’s familiar substantial similarity test for infringement<sup>10</sup> are necessarily vaguely stated, *ex ante*. Judge Learned Hand wrote:

The test for infringement of a copyright is of necessity vague. In the case of verbal “works” it is well settled that although the “proprietor’s” monopoly extends beyond an exact reproduction of the words, there can be no copyright in the “ideas” disclosed but only in their “expression.” Obviously, no principle can be stated as to when an imitator has gone beyond copying the “idea,” and has borrowed its “expression.” Decisions must therefore inevitably be ad hoc.<sup>11</sup>

The defense of fair use is also poorly sketched out in the copyright statutes. Instead, it has been left to the courts to elaborate in case-specific applications, and the cases ultimately offer little guidance to speakers. Indeed, we often celebrate fair use for its flexibility and open-ended character. But the vagueness in the substantial similarity test and the fair use defense has significant implications for speakers. These are not obscure details relegated to the Copyright Act’s cobwebby corners—they are bedrock copyright principles. Taking the Court at its word, substantial similarity and the fair use defense may ensure that copyright does not proscribe or punish protected speech. Yet, to accomplish these results, they probably cannot be written with greater precision or give more advance notice to speakers.<sup>12</sup>

Thus, copyright presents a singularly complex and convoluted regulatory scheme, and the First Amendment rescue doctrines are themselves fraught with uncertainty. It remains to consider whether copyright is vague as a constitutional matter. As a practical matter, this Article does not propose that any court should (or will) invoke the void-for-vagueness doctrine to invalidate the Copyright

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9. *Harper & Row*, 471 U.S. at 556.

10. *See* *Perris v. Hexamer*, 99 U.S. 674, 675–76 (1878) (“It follows that to infringe [copy]right a substantial copy of the whole or of a material part must be produced.”); *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 137 (2d Cir. 1998) (reciting that a plaintiff must prove that “copying was improper or unlawful by showing that the second work bears ‘substantial similarity’ to [the plaintiff’s] protected expression” (quoting *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997))).

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

12. *See infra* Part III.B.

Act.<sup>13</sup> Rather, this Article argues that copyright's uncertainty raises significant due process and First Amendment concerns for speakers, and reference to the vagueness doctrine supplies a useful approach to alleviating these concerns. A review of the Supreme Court's vagueness jurisprudence and application of its principles to the Copyright Act points the way to positive reforms of the law that will fortify the copyright infringement action against constitutional vagueness challenge and, more importantly, mitigate copyright's ongoing chilling effect on speech.

Part I of this Article explores the void-for-vagueness doctrine and identifies "collateral factors" that, while not specifically relating to a law's vagueness, are nonetheless material to, and often dispositive of, a constitutional vagueness challenge. These collateral factors relate to whether a law regulates expression, imposes criminal penalties, and incorporates *mens rea* or *scienter* requirements. This Part also discusses the recent attention the Supreme Court has given to the vagueness issues presented by case-by-case or factor-intensive review of expression, issues that are especially relevant to the copyright infringement action. Part II discusses copyright's susceptibility to a vagueness challenge, with specific attention to the doctrines of idea-expression, substantial similarity, and fair use. This Part concludes that copyright does not provide adequate *ex ante* notice of what expression rises to the level of infringement. Moreover, upon application of the collateral factors to the infringement action, copyright emerges as the sort of law from which the vagueness doctrine commands a high level of written precision. Part III considers how best to resolve this constitutional problem and ultimately concludes that copyright should adopt a three-tier remedy structure for civil infringement claims involving expressive uses of protected content. Strict liability would remain an appropriate basis for granting injunctive relief, but a plaintiff could not obtain damages without first demonstrating that the defendant acted negligently in infringing his or copyright, and an election of statutory damages would require a further showing of willfulness on the defendant's part. The Copyright Act's present damages structure would remain in effect when a court has determined that the alleged infringement is not expressive in nature.

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13. See *infra* Section III.A. One court has decided a vagueness challenge to copyright, and it ruled against the challenger. See *Aharonian v. Gonzales*, No. C04-5190, 2006 WL 13067, at \*7 (N.D. Cal. Jan. 3, 2006) (declining to enter a declaratory judgment that would hold copyright law unconstitutionally vague as applied to computer code).

## I. THE VOID-FOR-VAGUENESS DOCTRINE, EXAMINED

## A. “Hallmarks” of Vague Laws

The void-for-vagueness doctrine is, at its root, a matter of due process. The notion that courts might invalidate criminal laws that do not adequately parse permissible from prohibited conduct is uncontroversial.<sup>14</sup> The Supreme Court has written:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.<sup>15</sup>

Vague laws offend the Due Process Clause when they give inadequate or defective notice of what is forbidden and therefore “may trap the innocent by not providing fair warning.”<sup>16</sup>

Unconstitutionally vague laws also do not meet the requirement “that a legislature establish minimal guidelines to govern law enforcement.”<sup>17</sup> The Supreme Court regards this characteristic of a vague law as more consequential than the failure of notice.<sup>18</sup> A vague law delegates an excess of interpretative and enforcement authority to prosecutors, police, and judges,<sup>19</sup> and this in turn raises the prospect of arbitrary or selective enforcement.<sup>20</sup> Courts have expressed concern that a vaguely written law will create an inordinately large class of violators, such that state actors charged with enforcing the law must single out certain offenders above others

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14. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citing *Int’l Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914); *Collins v. Kentucky*, 234 U.S. 634, 638 (1914)).

15. *Id.*

16. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (internal quotation marks omitted))).

17. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)) (internal quotation marks omitted).

18. See *id.* (citing *Goguen*, 415 U.S. at 574).

19. See *Wright v. New Jersey*, 469 U.S. 1146, 1148–49 (1985) (quoting *Grayned*, 408 U.S. at 108–09) (internal quotation marks omitted).

20. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261 n.96 (1994) (citing *Kolender*, 461 U.S. at 357–58).

for prosecution.<sup>21</sup> Considerations ancillary to the nature and severity of the offense—and possibly improper considerations—can leak into these judgments.<sup>22</sup> Indeed, a vague law will also invest the judiciary with an excess of discretion in applying the law.<sup>23</sup>

Finally, a law is unconstitutionally vague if “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”<sup>24</sup> Like any other law, a vaguely written law leaves the individual at his or her liberty to engage in the conduct it does not proscribe. However, when a risk-averse individual cannot confidently discern what is and is not permitted, he or she may well abandon certain conduct that a court, interpreting the law authoritatively but after the fact, would find lawful. Although the law would not punish in this case, the threat of these consequences, or even the threat of legal proceedings, constrains action and thereby infringes on individual liberty. This incursion on liberty is particularly insidious because it eludes review by the courts, which have no occasion to pass on the correctness of a risk-averse response to the law. It is for this reason that courts allow facial challenges to vague laws that implicate constitutional rights: the subject of an enforcement action in effect sues on behalf of the chilled speakers who themselves avoided controversy at the expense of exercising protected freedoms.<sup>25</sup>

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21. See, e.g., *Kolender*, 461 U.S. at 360; *Grayned*, 408 U.S. at 108–09.

22. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); see also *Kolender*, 461 U.S. at 360 (faulting a statute as unconstitutionally vague in part because it devolved “law-making to the moment-to-moment judgment of the policeman on his beat” and thereby supplied “a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure” (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)) (internal quotation marks omitted)).

23. Interestingly, the Supreme Court’s concerns about a vague law’s delegation of authority to courts relate more to the separation of powers than to any suggestion that judges are susceptible to the sort of bias and other human failings that plague police and prosecutors. Compare *United States v. Reese*, 92 U.S. 214, 221 (1875) (suggesting that a law that “leave[s] it to the courts to . . . say who could be rightfully detained, and who should be set at large” is “dangerous” because it “would . . . substitute the judicial for the legislative department of the government.”), with, e.g., *Goguen*, 415 U.S. at 575 (finding a flag contempt statute to be of “such a standardless sweep” as to “allow[] policemen, prosecutors, and juries to pursue their personal predilections”).

24. *Grayned*, 408 U.S. at 108–09 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)) (internal quotation marks omitted). This rationale might at first appear inconsistent with the Court’s earlier-expressed concern that vague laws will “trap the innocent,” *id.* at 108—or at least rooted in a diametrically opposed view of human nature—but of course there is no irreconcilable contradiction in the notion that a poorly written law might affect risk-seeking and risk-averse persons differently, but adversely all the same.

25. See *Craig v. Boren*, 429 U.S. 190, 195–96 n.4 (1976); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 28 (2000); Michael C. Dorf, *Integrating Norma-*

*B. The Vagueness Doctrine and “Prolix Laws”*

An emerging aspect of vagueness review merits special mention. In its recent campaign finance reform decisions, *Citizens United v. Federal Election Commission*<sup>26</sup> and *Federal Election Commission v. Wisconsin Right to Life, Inc.*,<sup>27</sup> the Supreme Court has looked askance at political speech restrictions that incorporate factor-intensive legal standards or otherwise call for case-by-case adjudication. In rejecting a “saving” interpretation of the federal statutory restriction on certain “electioneering communications,” the *Citizens United* Court placed considerable emphasis on the transaction costs of obtaining clarity of compliance.<sup>28</sup> The proposed interpretation was an “amorphous regulatory interpretation,” the Court held, and it introduced unacceptable “costs and burdens of litigation” in addition to exposure to a risk of criminal sanctions under the statute.<sup>29</sup> The Court wrote: “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”<sup>30</sup> In the Court’s view, complex fact- and factor-intensive laws ultimately burden speech in much the same as a standardless law might. “Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”<sup>31</sup>

The *Citizens United* Court rejected another statute-saving interpretation on the ground that it, too, would invite “intricate case-by-case determinations to verify whether political speech is banned,” and “archetypical political speech would be chilled in the meantime.”<sup>32</sup> Finally, the Court noted that the statute’s provision for issuance of advisory opinions to political speakers in effect operated as a prior restraint:

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*tive and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1816 (1997).

26. 130 S. Ct. 876 (2010).

27. 551 U.S. 449 (2007).

28. *Citizens United*, 130 S. Ct. at 889.

29. *Id.*; cf. *Polygram Holding, Inc. v. Fed. Trade Comm’n*, 416 F.3d 29, 34 (D.C. Cir. 2005) (“Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.” (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984))).

30. *Citizens United*, 130 S. Ct. at 889.

31. *Id.* (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

32. *Id.* at 892.

When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”<sup>33</sup>

The Court’s language in *Citizens United* is significant for its recognition that legal standards calling for case-by-case adjudication of the legality of speech are themselves constitutionally problematic, at least in the context of political expression.

The Court’s insights in *Citizens United* elaborated its recent pronouncement, in *Wisconsin Right to Life (WRTL)*, that a speech restriction “must eschew ‘the open-ended rough-and-tumble of factors,’ which ‘invit[es] complex argument in a trial court and a virtually inevitable appeal.’”<sup>34</sup> Applying *WRTL* to a speech regulation, the applicability of which turned on how a “reasonable person” would receive a communication “in light of four ‘contextual factors,’” the Fourth Circuit recently wrote: “This sort of *ad hoc*, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech.”<sup>35</sup> It is important to note, too, that the *Citizens United/WRTL* problem adheres whether or not a court would ultimately hold that the expression in question did not violate the law.<sup>36</sup>

The Court in *Citizens United* treats “prolix” laws as conceptually distinct from “vague” laws,<sup>37</sup> presumably on the ground that a prolix law confounds the populace with its complexity, whereas, strictly speaking, it is the very lack of elaboration in a vague law that is confounding. But this distinction is ultimately immaterial, from a constitutional standpoint. As the Court observes, whatever the cause of uncertainty, its effect is the same: it chills speech.<sup>38</sup> Moreover, a prolix law carries all the hallmarks of a classically vague law.<sup>39</sup>

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33. *Id.* at 896 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

34. *Fed. Election Comm’n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)).

35. *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008).

36. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (“Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.”); *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1837 (2009) (Breyer, J., dissenting) (quoting *Dombrowski*, 380 U.S. at 494).

37. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 889 (2010).

38. *See id.*

39. *See supra* Section I.A.



Accordingly, this Article proposes to treat “prolixity” of the sort the Court critiqued in *Citizens United* as a species of vagueness.<sup>40</sup>

The law is, of course, thick with conditions under which legal liability may attach based on the application of fact- and factor-intensive standards,<sup>41</sup> but to this point the Supreme Court’s emerging vague-by-prolixity doctrine is confined to laws that burden speech—and political speech, at that. This approach is consistent with classical vagueness jurisprudence, which has tended to cluster around speech cases, given the Court’s view that the doctrine bears more heavily when an indefinite law burdens the exercise of constitutional rights.<sup>42</sup> Even if the Court ultimately elects not to export this line of jurisprudence outside the First Amendment setting, the indications given in *Citizens United* and *WRTL* of the overly complicated or “prolix” law as a new species of constitutionally problematic vagueness—or at least a cognate of the standardless law—are still significant for speech regulations generally and, as explained below, for copyright specifically.

### C. How Vague Is “Unconstitutionally Vague”?

To some extent, all laws are vague. Language is, by its nature, imprecise, and therefore always subject to down-the-line interpretation.<sup>43</sup> Any suggestion of a law presumes the formulation *ex ante* of a general rule; the *post hoc* exercise of reviewing specific conduct against the rule necessarily admits uncertainty. These might seem to be merely theoretical objections. After all, if lawmakers take due care in crafting statutory language, they may well ensure that a law applies uncontroversially to a “core” of proscribed conduct that is their target.<sup>44</sup> Although the law may reach potential applications

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40. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (“Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.”).

41. See, e.g., 15 U.S.C. § 1125(c)(2)(A)(2006) (four-factor test for “famous mark” status in trademark dilution cases); *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 280–81 (3d Cir. 2001) (ten-factor test for proof of trademark infringement by likelihood of confusion); *Burlarley v. Wal-Mart Stores, Inc.*, 904 N.Y.S.2d 826, 827 (App. Div. 2010) (five-factor test for respondent superior liability in tort cases).

42. See *infra* Section I.D.1.

43. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (“Condemned to the use of words, we can never expect mathematical certainty from our language.”).

44. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 577–78 (1974) (“To be sure, there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain.”); *Parker v. Levy*, 417 U.S. 733, 755–56 (1974) (quoting *Goguen* and holding that the defendant, whose conduct was core conduct clearly in violation of the statute, lacked standing to mount a facial void-for-vagueness challenge).

that are unanticipated or incidental to lawmakers' intentions, to reject any law on the ground that its applicability is vague at the margins would throw the baby out with the bathwater.

By necessity, then, the Constitution must tolerate some level of vagueness in the law. It remains the unenviable task of the courts to decide at what point a law's prescriptions are so imprecise as to be *unconstitutionally* vague.<sup>45</sup> Application of the vagueness doctrine, at its heart, turns on a question of degree: granting the objection that any law admits at least some uncertainty, how much uncertainty should the Constitution tolerate? The Supreme Court offers little guidance on this question. The Justices' discussion over the years of what it means to be unconstitutionally vague has been for the most part unhelpful. The rendered and repeated language on vagueness consists almost entirely of descriptions of the "aspects" or "hallmarks" of vagueness discussed above: notice failure, over-delegation of authority to law enforcement, and the chilling of potentially lawful conduct. These do not so much describe elements of a legal standard as they elaborate the objectionable qualities of a vague law. Again, every law admits some degree of uncertainty, and it follows that every law fails to some extent to give notice to the public, gives some measure of free rein to law enforcement, and will place a degree of fact-checking doubt in the mind of the risk-averse individual. The question of degree recurs: how much notice failure, free rein, or chilled conduct is constitutionally acceptable?

Given the state of the Court's jurisprudence, one could even argue that the void-for-vagueness doctrine is itself standardless, vague, and susceptible to arbitrary or selective application by the courts. To the extent any test for unconstitutional vagueness exists, it was given in *Connally v. General Construction Co.*<sup>46</sup> by Justice Sutherland: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."<sup>47</sup> Laws must not be merely vague, then, but "so vague that men of common intelligence" are flummoxed or will at least disagree on questions of the law's application. Justice Sutherland's oft-quoted rendition of the doctrine seems to supply a useful differentiation between the plain old vague law and one that offends due process. But there remains a great deal of room for disagreement even within the *Connally* for-

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45. See *Aharonian v. Gonzales*, No. C04-5190, 2006 WL 13067, at \*7 (N.D. Cal. Jan. 3, 2006) (emphasizing the distinction between "somewhat vague" and "unconstitutionally vague" or "fatally vague").

46. 269 U.S. 385 (1926).

47. *Id.* at 391.

mulation. Perhaps in order to avoid wading into this gray area, courts have incorporated into the vagueness analysis three collateral factors—each entirely collateral to the indeterminacy of a given law—that, once reviewed, do much of the work of tipping a law to one side or the other of the constitutional fence.

*D. “Collateral Factors” That Affect Void-for-Vagueness Determinations*

Although the Supreme Court has largely failed to fashion a useful and predictive legal standard for vagueness cases, the case law does describe circumstances that call for more searching judicial review of laws that draw uncertain boundaries. These circumstances, or “collateral factors,” often prove decisive of the question whether a vague law violates the Constitution. This is principally because these collateral factors disclose how much a law’s uncertainty constrains public liberty. Collateral factors may also be dispositive both because they are easy to assess and because they allow courts to opt out of answering the “*how vague is too vague?*” question. That is, the collateral factors take the otherwise airy art of assessing a law’s vagueness and render it more grounded and scientific.

Case law identifies three collateral factors that courts use in assessing the vagueness of a particular law. First, courts inquire whether the law impairs the exercise of constitutionally protected rights. Second, courts consider the extent to which the law deters lawful conduct; thus, a law that is enforced criminally or carries heavy civil penalties must be written with greater precision than a civil law that imposes a modest fine or compensates a private party for actual damages. Third, a law that does not incorporate a *scienter* or *mens rea* requirement is more susceptible to a void-for-vagueness determination.

1. Does the Law Restrict the Exercise of  
Constitutionally Protected Rights?

The first, and “perhaps the most important[,] factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.”<sup>48</sup> A law that might reach protected rights will be subjected

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48. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Women’s Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997) (quoting *Hoffman Estates*, 455 U.S. at 499); see also *Cole v. Richardson*, 405 U.S. 676, 681 (1972)

to greater scrutiny than a “purely economic regulation.”<sup>49</sup> Vague laws that affect, *inter alia*, abortion<sup>50</sup> and free speech<sup>51</sup> rights fall into the category of laws from which the Constitution requires greater definition and precision.

A vague content-based speech regulation “raises special First Amendment concerns because of its obvious chilling effect on free speech”<sup>52</sup> and must therefore be subject to “a more stringent vagueness test.”<sup>53</sup> “Because First Amendment freedoms need breathing space to survive,” the Supreme Court has written, “government may regulate in the area only with narrow specificity.”<sup>54</sup> This does not mean that governments must write speech-incident laws with perfect precision, or that anything short of airtight notice to a speaker will sink a law on vagueness grounds. One should not expect it to be any easier, after all, to skirt the denotative deficiencies of language and limits of legislative foresight when drafting laws that restrict (or might restrict) speech.<sup>55</sup> Nevertheless, lawmakers must work harder at drawing boundaries when their laws run up against expressive rights.<sup>56</sup>

## 2. What Penalties Are Available Against the Law’s Violators?

When one considers whether a “colloquially vague” law is “constitutionally vague,” one important consideration is the risk one undertakes in confronting it. “The degree of vagueness that the Constitution will tolerate—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the

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(“Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath’s meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath.”).

49. *Goguen*, 415 U.S. at 573 & n.10 (contrasting application of the vagueness doctrine in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), an expression case, with “the less stringent requirements of the modern vagueness cases dealing with purely economic regulation,” such as *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963)).

50. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 390–91 (1979); *Women’s Med. Prof’l Corp.*, 130 F.3d at 197.

51. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997); *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988).

52. *Reno*, 521 U.S. at 871–72 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991)).

53. *Hoffman Estates*, 455 U.S. at 499 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Grayned*, 408 U.S. at 109).

54. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also id.* at 438 (“Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”).

55. *Cf. Thomas*, 864 F.2d at 195.

56. *See, e.g., id.* at 194–95 (observing that it will suffice to “mark out the rough area of prohibited conduct” in “contexts other than the First Amendment,” whereas laws implicating speech rights must be drawn with at least “reasonable specificity”).

enactment.”<sup>57</sup> Thus, although civil and criminal laws alike are subject to void-for-vagueness review,<sup>58</sup> a criminal statute generally is more susceptible to vagueness challenge than a purely civil regulation. “The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images,”<sup>59</sup> whereas in the civil case, “the consequences of imprecision are qualitatively less severe.”<sup>60</sup> That said, the Supreme Court has written that where a law “exact[s] obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all,” it is immaterial whether the law is enforced criminally or civilly.<sup>61</sup>

The cases ultimately describe a notched kind of sliding-scale jurisprudence, such that the greater the consequences of violation, the more exacting vagueness scrutiny will be.<sup>62</sup> Courts will look beneath a law’s “civil” or “criminal” veneer and consider its specific provisions. Thus, a statute promising penalties that, “although civil in description, are penal in character,” will be treated as a “quasi-criminal” law that calls for “stricter vagueness review.”<sup>63</sup>

### 3. Does the Law Contain a *Scienter* or *Mens Rea* Requirement?

The Supreme Court “has long recognized that the constitutionality of a vague statutory standard is closely related to whether that

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57. *Hoffman Estates*, 455 U.S. at 498; see also *Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 396 (2d Cir. 2004) (“The degree of statutory imprecision that due process will tolerate ‘varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement.’” (quoting *Ass’n of Int’l Auto. Mfrs. v. Abrams*, 84 F.3d 602, 614 (2d Cir. 1996))).

58. See *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (citing *A.B. Small Co. v. Am. Sugar Refinery Co.*, 267 U.S. 233, 239 (1925)).

59. *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)).

60. *Hoffman Estates*, 455 U.S. at 498–99 (citing *Barenblatt v. United States*, 360 U.S. 109, 137 (1959) (Black, J., dissenting); *Winters v. New York*, 333 U.S. 507, 515 (1948) (“The standard[] of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”)).

61. *A.B. Small Co.*, 267 U.S. at 239. Later decisions—*Boutilier*, most notably—read *A.B. Small Co.*’s language as the legal standard for invalidating civil regulations on vagueness grounds, but it is not clear that the *A.B. Small* Court was not describing merely a sufficient (but not necessary) condition for invalidation. See *Boutilier*, 387 U.S. at 123 (quoting *A.B. Small Co.*, 267 U.S. at 239); *Advance Pharm.*, 391 F.3d at 396 (citing *Boutilier*, 387 U.S. at 123); *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000).

62. See *Advance Pharm.*, 391 F.3d at 396.

63. See *id.* (citing *Hoffman Estates*, 455 U.S. at 499–500; *United States v. Clinical Leasing Serv.*, 925 F.2d 120, 122 & n.2 (5th Cir. 1991) (applying closer vagueness scrutiny of a statute authorizing significant civil penalties)).

standard incorporates a requirement of *mens rea*.<sup>64</sup> “[A] *scienter* requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”<sup>65</sup> This is a sensible allowance, to be sure. The constitutional problem of penalizing any person who crosses a law’s unmarked boundary is obvious. Such a law is “a trap for those who act in good faith.”<sup>66</sup> But if the same law overlays a *mens rea* or *scienter* requirement, said liability only attaches when the defendant can be faulted for the transgression, perhaps for acting negligently, recklessly, willfully, or with full knowledge that he or she was within the forbidden zone.<sup>67</sup>

Although the Court did not invoke the vagueness doctrine *per se*, its holding in *New York Times Co. v. Sullivan*<sup>68</sup> applied similar considerations to the private, civil cause of action for defamation. The *Sullivan* Court’s ruling was predicated on a view that, in addition to regulating unprotected speech (i.e., false speech that defames an individual<sup>69</sup>), libel laws risk chilling lawful expression, to the extent that they impose strict liability for publishing a false statement.<sup>70</sup> The *Sullivan* Court introduced the “actual malice” standard, which requires a plaintiff public official in a defamation case to show that the defendant uttered a falsehood either “with knowledge that it was false or with reckless disregard for whether it was false or not.”<sup>71</sup> Imposition of the malice standard rescued a tort that, although not vague in its elements, might surely be at least colloquially vague in the application of those elements to a given set of facts: a speaker cannot always know with certainty the

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64. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

65. *Hoffman Estates*, 455 U.S. at 499 (citing *Colautti*, 439 U.S. at 395); *see also, e.g.*, *Reproductive Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1143 (8th Cir. 2005); *United States v. Hsu*, 364 F.3d 192, 197 (4th Cir. 2004) (upholding a criminal conviction notwithstanding a vagueness challenge, when the offense carried a *scienter* element that the jury concluded was satisfied); *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1154–55 (9th Cir. 2001) (rejecting a First Amendment vagueness challenge on the ground that the law required a defendant to have acted “willfully and repeatedly” in violation of its provisions).

66. *Colautti*, 439 U.S. at 395 (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)) (internal quotation marks omitted).

67. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 148 (2007) (reciting “the general principle that where *scienter* is required no crime is committed absent the requisite state of mind” (emphasis added) (citing 1 WAYNE LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.1 (2d ed. 2003))).

68. 376 U.S. 254 (1964).

69. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (observing that “there is no constitutional value in false statements of fact”).

70. *See Sullivan*, 376 U.S. at 300–01 (Goldberg, J., concurring) (“The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.”).

71. *Id.* at 279–80.

boundary between truth and falsehood.<sup>72</sup> The *Sullivan* Court observed that the Alabama libel law at issue imposed an actual malice requirement for an award of punitive damages,<sup>73</sup> but this was not enough to save the law. The lack of a fault requirement as to truth and falsehood was constitutionally problematic even in the context of the simple civil remedy of compensatory damages.<sup>74</sup> The Court later held, in *Gertz v. Robert Welch, Inc.*,<sup>75</sup> that a state libel action may introduce a lesser fault requirement for statements regarding persons who are not public officials or public figures, but the First Amendment commands that there be some fault requirement in these cases just the same.<sup>76</sup>

None of the above means to suggest that any imprecise law must, as a constitutional matter, carry a *scienter* or fault requirement.<sup>77</sup> However, the imposition of just such a requirement can be critical in negating a void-for-vagueness challenge,<sup>78</sup> particularly when the law regulates speech, and there may come a point where a law is so imprecise that only the overlay of *scienter* will save it.

## II. A VAGUENESS REVIEW OF COPYRIGHT LAW

By its terms, copyright regulates speech.<sup>79</sup> It “protects” expression, and in so doing, it withdraws certain renditions of expression from public use and reserves them to that expression’s creators and their licensees. Copyright gives private parties a right of civil action against persons who use copyrighted expression unlawfully. Of course, not all expression is subject to copyright,<sup>80</sup> and it may be

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72. See *Gertz*, 418 U.S. at 340 (“Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate . . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”).

73. *Sullivan*, 376 U.S. at 283.

74. *Id.* at 283–84.

75. 418 U.S. 323 (1974).

76. See *id.* at 347.

77. See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 396 (1979) (“[W]e need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability.”).

78. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *United States v. Franklin-El*, 554 F.3d 903, 911 (10th Cir. 2009) (“The presence of a scienter inquiry can save an otherwise vague statute.” (citation omitted)).

79. See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998); Nimmer, *supra* note 1, at 1181.

80. Expression is not eligible for copyright protection unless it is “original,” see 17 U.S.C. § 102(a) (2006); the expression of federal government authorities is statutorily denied copyright protection, see 17 U.S.C. § 105 (2006); and of course expression of a certain

that some copyrightable content, while “fixed in a[] tangible medium of expression,”<sup>81</sup> is not, by its nature, “expressive” in First Amendment terms.<sup>82</sup> Nor is it always the case that another’s infringing use of copyrighted content is expressive.<sup>83</sup> Nonetheless, it is very often the case that a claim of copyright infringement seeks to enjoin expression or punish a speaker, in addition to compensating the plaintiff for losses suffered from the speaker’s incursion on the plaintiff’s proprietary rights. Whether or not such a case presents a content-based or content-neutral restriction of speech (and learned commentators are divided on the question),<sup>84</sup> the infringement action restricts speech and therefore runs up against the First Amendment.

Like most any restriction of expression, copyright proposes to mark off unlawful, and therefore actionable, speech from protected or privileged speech.<sup>85</sup> As Section A of this Part explains, the Supreme Court is satisfied that copyright draws its boundaries in a manner that does not encroach upon constitutionally protected speech. Copyright parts ways from most other speech restrictions in that it overlays a number of interlocking legal doctrines to mark the boundary of permissible speech. As a result, copyright confronts potential speakers with a layered, uncertain, and exceedingly complex legal paradigm. Section B of this Part explores this generalized uncertainty. Section C focuses more specifically on the vagueness that inheres in two of copyright’s constituent doctrines: fair use and substantial similarity. Notably and ironically, these are the two doctrines that, in the view of the Supreme Court, rescue copyright from First Amendment overbreadth.<sup>86</sup> Section D then applies the vagueness doctrine’s “collateral factors” to copyright.

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age will shed its copyright protection and lapse into the public domain, *see* 17 U.S.C. §§ 302–05 (2006).

81. 17 U.S.C. § 102(a).

82. For example, architectural works are protected by copyright, *see id.*, but they are not “expression” for purposes of the First Amendment.

83. A defendant who infringes by producing and selling counterfeited works is poorly positioned to argue that his or her conduct is expressive—as is the user of peer-to-peer file sharing networks who downloads or makes available for download digital copies of entertainment works.

84. *See* Bohannon, *supra* note 6, at 1108–09. *Compare* Lemley & Volokh, *supra* note 79, at 186 (“Copyright liability turns on the content of what is published.”), *with* Netanel, *supra* note 1, at 48 (“To my mind, however, logical and doctrinal consistency strongly favors classifying copyright law as content-neutral, not content-based, regulation.”).

85. Lemley & Volokh, *supra* note 79, at 166–69.

86. *See* Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003).



*A. Overbreadth Challenges to Copyright*

The Supreme Court has never subjected the Copyright Act to meaningful First Amendment review.<sup>87</sup> Rather than turn a settled, stable legal paradigm on its head, the Court has looked to preexisting checks on proprietary rights to justify copyright's incursions on the expressive rights of the public. In *Eldred v. Ashcroft*,<sup>88</sup> the Supreme Court held that "copyright law contains built-in First Amendment accommodations"—namely, the fair use defense and the "idea/expression dichotomy," by which copyright protects only expression and reserves ideas for public use.<sup>89</sup> The *Eldred* Court rejected the lower court's suggestion that copyrights might be "categorically immune from challenges under the First Amendment,"<sup>90</sup> but it noted that close First Amendment review of the Copyright Act will remain unnecessary, so long as the "traditional contours of copyright protection" remain unchanged by Congress.<sup>91</sup> One can argue that the Court blithely accepted a pragmatic answer, that copyright does not offend the First Amendment, and worked backward to justify it. "The First Amendment securely protects the freedom to make—or decline to make—one's own speech," the *Eldred* Court pronounced; "it bears less heavily when speakers assert the right to make other people's speeches."<sup>92</sup>

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>93</sup> an earlier case in which the Supreme Court considered constitutional objections to a copyright infringement action, the Court embraced the proposition that "copyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still

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87. See Nimmer, *supra* note 1, at 1181 (observing that as of 1970, the conflict between copyright and the First Amendment was "largely ignored"); Netanel, *supra* note 1, at 3 & nn.7–8 (asserting that most courts "have summarily rejected copyright infringement free speech defenses" and that "[i]n almost every instance [they] have assumed that First Amendment values are fully and adequately protected by limitations on copyright owner rights within copyright doctrine itself").

88. 537 U.S. 186 (2003).

89. See *id.* at 219–20 (citing *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 560 (1985)).

90. *Eldred*, 537 U.S. at 221 (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001) (internal quotation marks omitted)).

91. *Eldred*, 537 U.S. at 221; see generally *Golan v. Holder*, 609 F.3d 1076, 1091 & n.9 (10th Cir. 2010) (upholding the Uruguay Round Agreements Act's amendment to the Copyright Act, which withdrew certain foreign works from the public domain, against First Amendment challenge in part on the ground that the amendment "does not disturb the[] traditional, built-in protections" of fair use and idea versus expression).

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

93. 471 U.S. 539 (1985).

protecting an author's expression."<sup>94</sup> For its part, *Harper & Row* did not, as the *Eldred* Court later would,<sup>95</sup> assign any similar constitutional importance to fair use, which it characterized instead as a common law privilege and "equitable rule of reason."<sup>96</sup> Although the *Harper & Row* and *Eldred* Courts reach their conclusions in so many words, the curtness with which the decisions disposed of the copyright-as-speech-restriction issue suggests a view of the Justices that copyright, at least in its present configuration, is not overbroad.<sup>97</sup> That is, it reserves to the public all expression that the First Amendment would otherwise protect.

*B. The "Insanely Complex and Vague Rules"<sup>98</sup> of Copyright, Generally*

The copyright infringement action differs from the run-of-the-mill content restriction in that it operates along a number of analytical axes. For example, applying a content restriction ordinarily turns on only two variables: the content of the expression subject to enforcement and the susceptibility of the applicable provision of law to interpretation.<sup>99</sup> In copyright, a third variable—the protected content—complicates the analysis, and it is this complication that has prompted some commentators to question the conventional wisdom that copyright is a content-based speech regulation.<sup>100</sup> Although, at the most basic level, the infringement analysis simply compares the defendant's content to the plaintiff's, the outcome of a case may well turn on other "metadata" associated with the plaintiff's content, including its originality, its date of

94. *Id.* at 556 (quoting *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)) (internal quotation marks omitted).

95. *See Eldred*, 537 U.S. at 219–20.

96. *See Harper and Row*. at 550–51, 560.

97. Whether or not this is actually true—that the Copyright Act is not vulnerable to a First Amendment challenge of overbreadth—is a question worth considering, but outside the scope of this Article.

98. LAWRENCE LESSIG, *FREE CULTURE* 19 (2004).

99. *See*, for example, *Cohen v. California*, 403 U.S. 15 (1971), in which the question of criminal liability required a review of the defendant's speech—a profane inscription about the draft on his jacket—against a general purpose state law prohibition against "disturb[ing] the peace." *Id.* at 16. Putting aside for the moment the First Amendment defense at the heart of the Supreme Court's decision, *prima facie* liability requires that two variables be fixed: one must interpret the law to define the zone of unlawful conduct, and one must determine whether the defendant's conduct lies within or outside that zone.

100. *See* Netanel, *supra* note 1, at 48–50. Professor Netanel describes copyright as a "content-sensitive," but not "content-based" restriction, because in the zone of copyright, government is not concerned with the "communicative impact" of the speech on listeners, but with its "deleterious impact on the copyright incentive." *Id.* at 48–49. Accordingly, the lawfulness of the speech depends on the further variable of preexisting, similar expression. *See id.* at 49–50.

creation, the identity of its author, and perhaps even the date of the author's death. Assuming we can conclude, after fixing these three variables at the point of litigation, that the defendant's content infringes the plaintiff's, there remains the question of statutory privileges, including fair use, that the Copyright Act reserves to the public.<sup>101</sup>

To elaborate, when a court considers a claim of copyright infringement, four "top-level" questions arise: first, whether the work allegedly infringed is eligible for copyright protection; second, whether the plaintiff has standing to sue to enforce the copyright; third, whether with regard to the work the alleged infringer has exercised any of the exclusive rights reserved to the plaintiff; and fourth, whether the defendant's use of the content is privileged by law. To answer any one of these four fundamental questions, a court may be required to apply one or more subsidiary legal doctrines. As to the first, is the allegedly infringed work original?<sup>102</sup> Is it "fixed in a[] tangible medium of expression?"<sup>103</sup> Has the work entered the public domain?<sup>104</sup> On the second top-level question, is the plaintiff the author of the allegedly infringed work?<sup>105</sup> Is the work a "work made for hire?"<sup>106</sup> If not the owner at the instant of creation, has the plaintiff validly acquired the rights by written assignment<sup>107</sup> or obtained an exclusive license that confers standing to sue for infringement?<sup>108</sup> On the third top-level question, if the defendant did not exactly copy the work, is it substantially similar to the plaintiff's copyrighted expression?<sup>109</sup> As to the fourth, did the defendant

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101. See 17 U.S.C. §§ 107–112 (2006). When courts sustain a challenge of First Amendment overbreadth, they read the Constitution to impose public privileges from outside the law. Copyright's affirmative defense of fair use, which recently acquired a kind of constitutional significance, does the same work.

102. 17 U.S.C. § 102 (2006); *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality.").

103. 17 U.S.C. § 102(a); see *Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2004).

104. See generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (reviewing constitutional challenges to extension of the copyright term).

105. Cf. 17 U.S.C. § 201(a) (2006) (providing that copyright "vests initially in the author or authors of the work").

106. See, e.g., *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 185–86 (2d Cir. 2004) (holding that the work-for-hire doctrine of 17 U.S.C. § 201(b) vested ownership of copyright in the creator's employer). See generally 17 U.S.C. § 101 (2006) (defining "work made for hire"); *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (supplying extensive further analysis and commentary on the statutorily defined term).

107. See 17 U.S.C. § 204(a) (2006).

108. See *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1146 (9th Cir. 2008) (holding that a non-exclusive licensee lacks standing to sue to enforce the licensed copyright); *United States v. Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008) (observing that only exclusive licensees can sue for infringement).

109. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.).

make “fair use” of the plaintiff’s content?<sup>110</sup> Does the defendants’ use fall within any of the several specifically stated privileges in the Copyright Act?<sup>111</sup> All of these second-level questions are material to, and the answer to any one could be dispositive of, the sort of expression the Copyright Act allows. For one reason or another—extensive judicial elaboration of the legal standards at hand, further complexity baked within the very copyright statutes, or some combination of the two—few of these issues are easily resolved.

Considering the substantial interplay between certain of the doctrines, the copyright scheme becomes even more convoluted in its structure. For example, originality and the idea/expression dichotomy are relevant to ownership. A purported joint owner of a copyright must have contributed some quantum of copyrightable content to the work.<sup>112</sup> That quantum of content must satisfy the law’s requirement of originality, and what is more, it cannot be simply an original idea. It must also be original expression.<sup>113</sup> Likewise, the “substantial similarity” test for infringement, discussed in greater detail below,<sup>114</sup> requires not just that the works be similar, but that the defendant’s work must demonstrate substantial similarity to protected elements within the original work.<sup>115</sup>

The provisions of law in 17 U.S.C. §§ 302 to 305, relating to copyright duration, comprise a thicket of their own.<sup>116</sup> The intricacy of the copyright duration provisions, and the multiplicity of statutory categories of works subject to terms of differing length, is the result of several legislative undertakings to amend and reform the duration scheme, most of which did not have retroactive application.<sup>117</sup>

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110. See 17 U.S.C. § 107 (2006); see also *infra* Part II.C.2.

111. See, e.g., 17 U.S.C. § 108 (2006) (reproduction privileges of libraries and archives); § 110(1) (face-to-face teaching exception); § 110(3) (limited performance privilege “in the course of services at a place of worship or other religious assembly”).

112. E.g., *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004) (“There has to be some original expression contributed by anyone who claims to be a co-author, and the rule . . . is that his contribution must be independently copyrightable.”); see also *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 107–08 (2d Cir. 2002).

113. E.g., *Gaiman*, 360 F.3d at 658; *Medforms*, 290 F.3d at 108.

114. See *infra* Part II.C.1.

115. E.g., *Universal Furniture Int’l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 436 (4th Cir. 2010); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999).

116. Eric M. Fraser, *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, 2010 STAN. TECH. L. REV. 1, 10 n.10 (2010) (setting forth some of the particulars of the Copyright Act’s duration provisions); see also CORNELL COPYRIGHT INFORMATION CENTER, COPYRIGHT TERM AND THE PUBLIC DOMAIN IN THE UNITED STATES (2010), available at <http://copyright.cornell.edu/resources/publicdomain.cfm>.

117. See 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.01 (Matthew Bender, rev. ed. 2011) (“Successive lengthening of the period of protection leaves works subject to disparate terms, depending on when they were created in relation to the schemes later adopted during the period of their protection.”).

Although precisely written, the copyright term provisions call for an analytical parsing so intricate and involved as to be daunting to the layman and tiresome for the lawyer.<sup>118</sup> Moreover, several critical facts pertinent to public domain determination are often not easily ascertained by research. Some examples include (1) the dates of a work's creation and first publication,<sup>119</sup> (2) whether a work was made for hire,<sup>120</sup> (3) whether the author is alive (and if not, when he or she died),<sup>121</sup> (4) whether a rightsholder was eligible to renew the copyright term,<sup>122</sup> and (5) if so, whether he or she accomplished the formalities requisite for renewal.<sup>123</sup> As a result, it is no easy task to discern whether and when a given work has lapsed into the public domain.<sup>124</sup> To be sure, the notice failure here does not necessarily inhere in the law: the root of the problem in making a public domain determination is that the facts required to apply the law in a given instance are too often lost to history. That said, although the law on copyright duration is not unclear, it is baroque in its presentation and terribly complex.

The preceding discussion of copyright's vagaries is of course far from exhaustive. It should be sufficient to note the following: any

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118. Andrew Chin, *Foreword*, 11 N.C. J.L. & TECH. 401, 402 (2010) (acknowledging Professor Laura Gasaway for her publication of a chart that "untangles the intricate interplay among various copyright term provisions in the 1909 and 1976 Copyright Acts, the Berne Convention Implementation Act, and the Copyright Term Extension Act"); D'Lesli M. Davis, *The Copyright Primer for the Lawyer Who Doesn't Even Know How To Spell Copywrite, Er, Copyright*, 45 THE ADVOCATE (TEXAS) 31, 33 (2008) ("The Act provides complex schemes for determination of the term of copyright protection in works created prior to January 1, 1978, and non-copyright lawyers should probably head to an expert if the copyright in question is pre-1978.")

119. 17 U.S.C. § 302 (2006) (applying to works created on or after January 1, 1978); *id.* §§ 303, 304 (applying to works created before January 1, 1978).

120. *Id.* § 302(c); § 303(a)(1)(B)(2) (specifying copyright terms for works made for hire).

121. *See id.* § 302(a)-(b) (providing a copyright term of life of the author(s) plus seventy years, for works created after January 1, 1978).

122. *See id.* § 304(a) (specifying a copyright term for works eligible for term renewals as of January 1, 1978).

123. *See* 9 NIMMER & NIMMER, *supra* note 117, § 9.05 (observing that for pre-1978 works, a failure to file a timely renewal registration before expiration of the initial 28-year term would cause a work to lapse into the public domain by default).

124. There is hope that the Internet and digital media will supply opportunities to alleviate this problem through database management and increased collaboration. *See, e.g., The Determinator: Behind the Scenes at the Stanford Copyright Renewal Database*, available at [http://fairuse.stanford.edu/commentary\\_and\\_analysis/2007\\_08\\_calter.html](http://fairuse.stanford.edu/commentary_and_analysis/2007_08_calter.html) (last visited Dec. 11, 2010) (discussing Stanford University's effort to compile variously formatted Copyright Office registration and renewal records into a single online database); *WorldCat Copyright Evidence Registry*, <http://www.worldcat.org/copyrightevidence/registry/about> (last visited Dec. 11, 2010) (describing WorldCat's collaborative platform for sharing information pertinent to the copyright status of books). Some certainties emerge: most notably, a work published before 1923 is *per se* in the public domain. *Société Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1189 (9th Cir. 2008).

attempt to answer the simple yes/no question of infringement triggers a cascade of subsidiary legal questions. The very metaphor of the ordinary content-based speech restriction, that the law “draws a boundary” between lawful and unlawful expression, is inapposite to copyright. It is true that certain subsidiary copyright doctrines, for example, substantial similarity and fair use, may be said to draw dividing lines. But writ large, the copyright infringement tort raises vagueness questions not because it is standardless or because its legal standards are too imprecise, but because it is overloaded with interlocking standards. Questions of infringement are difficult and costly to settle at the point of litigation. It stands to reason that at the point of *expression*, when a speaker is poised to utter expression that is similar to another person’s, copyright’s “insanely complex and vague rules,” as Professor Lessig has described them,<sup>125</sup> may well chill the speaker from delivering lawful speech.<sup>126</sup>

As noted above, the Supreme Court has rejected substantially less complex regulatory schemes for political speech, on the ground that their prolixity would offend the Constitution.<sup>127</sup> Copyright, at least as it applies to expressive uses of owned content, cries out for similar treatment. One might object here that the recent Supreme Court cases did involve political speech, which merits the highest level of First Amendment protection,<sup>128</sup> whereas the Court wrote in *Eldred* that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.”<sup>129</sup> The extent of protection owed to the underlying speech, however, is to some extent immaterial because the chilling dynamic is the same: a law that regulates speech based on reference to multiple factors incorporates substantial *ex ante* uncertainty and therefore chills protected speech. The Court might well regard chilled political speech as more constitutionally consequential, but for that matter, the *Eldred* Court failed to consider that “other people’s speeches” might surely be deployed for all sorts of constitutionally important

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125. LESSIG, *supra* note 98, at 19.

126. *See id.* at 185 (“The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open.”); Randall P. Bezanson & Joseph M. Miller, *Scholarship and Fair Use*, 33 COLUM. J.L. & ARTS 409, 445 (2010) (“When . . . problems [ascertaining the boundaries of fair use] are compounded for the scholar by practical questions about copyrightability, the length of the copyright term, competing claimants, risk aversion, conflicts of interest and significant financial costs of litigation, the scholarly enterprise can be, and indeed often is, crippled.”); *cf.* Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 889 (2010) (observing that “[p]rolix laws,” like vague laws, “chill speech”).

127. *See supra* Section I.B.

128. *See* R.A.V v. St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (“Core political speech occupies the highest, most protected position . . .”).

129. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

purposes, including political argument and commentary.<sup>130</sup> And of course, the copyright infringement action's very purpose is to get at the question of whether the speech at issue is fairly described as "the speaker's," and not "other people's." It therefore assumes too much to discount vagueness concerns in copyright based on the Court's devaluation of "other people's speech."

### C. *The Vagueness of Copyright's First Amendment Rescue Doctrines*

At the micro-level, too, copyright law is fraught with vagueness. Perhaps nowhere is the uncertainty more pronounced than in the two doctrines that purport to rescue copyright from a constitutional claim of overbreadth: substantial similarity and fair use.

#### 1. Substantial Similarity

The concept of "substantial similarity" is fundamental to copyright. We accept as black letter law that a defendant's work need not be identical to a plaintiff's work in order to be infringing, and we further accept that a similar but not identical work will infringe if the similarity to another work's protected elements is "substantial." As Judge Learned Hand observed in *Nichols v. Universal Pictures Corp.*,<sup>131</sup> "[i]t is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."<sup>132</sup> Yet, beyond recitals like these,

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130. See Bohannon, *supra* note 6, at 1086 ("Unfortunately, the Court's simplistic distinction between speaking and 'making other people's speeches' cannot support the analytical weight it is being forced to bear. The use of copyrighted material has substantial speech value to both the user and the public, whether or not it is copied."); *id.* at 1091 (noting that in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court did not discount the First Amendment interests of the *New York Times* in reprinting the Pentagon Papers). See generally Tushnet, *supra* note 6.

131. 45 F.2d 119 (2d Cir. 1930) (Hand, J.).

132. *Id.* at 121; see also *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 112 (1st Cir. 2006) (observing that "two works need not be exact copies to be substantially similar" and that "the mere existence of differences is insufficient to end the matter in the defendant's favor"); *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 511 (7th Cir. 1994).

In their review of copyright claims, factfinders may have occasion to assess the "similarity" of two works twice—and for two different purposes: the first toward the end of proving that the defendant "actually copied" his or her copyrighted content, and the second to show that the defendant's content is substantially similar to the copyright-protected elements of the plaintiff's work. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010); *Situation Mgmt. Sys., Inc. v. ASP Consulting LLC*, 560 F.3d 53, 58 (1st Cir. 2009) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). There is

decades of applying the substantial similarity “test” have brought little clarity to the law. Nimmer does not court controversy when he writes that “[t]he determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.”<sup>133</sup>

The case law commonly recites that works are substantially similar only if they are substantially similar in both their ideas and expression.<sup>134</sup> That a defendant copied the plaintiff’s idea is not enough to prove infringement, and in this respect the requirement to prove substantial similarity of expression gives effect in the courts to copyright’s idea/expression dichotomy.<sup>135</sup> In the “abstractions” passage of his decision in *Nichols*, Judge Hand famously observed that there is a point at which two works, although similar, sufficiently diverge in their expression as to support a finding of no infringement, on the ground that the defendant only copied ideas:

Upon any work, . . . 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 of only 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.<sup>136</sup>

The problem courts continue to face is in specifying, in a manner that will permit useful guidance to speakers *ex ante*, precisely where that flexion point lies, beyond which copied ideas become

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potential for confusion here, and the Second Circuit has proposed to label the first test—the test of similarity that, with access, is probative of “actual copying”—as the “probative similarity” test. *Repp v. Webber*, 132 F.3d 882, 889 n.1 (2d Cir. 1997) (citing *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 140 (2d Cir. 1992)); see also *T-Peg*, 459 F.3d at 112. Although these two tests are undertaken for different purposes, one “merges somewhat” with the other. See *T-Peg*, 459 F.3d at 112; see also *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 67 n.3 (1st Cir. 2009).

133. 4 NIMMER & NIMMER, *supra* note 117, § 13.03; see also Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 721–23 (1987); William Patry, *Does Substantial Similarity Analysis Make Sense?*, THE PATRY COPYRIGHT BLOG (Sep. 08, 2005, 10:02 AM), <http://williampatry.blogspot.com/2005/09/does-substantial-similarity-analysis.html>.

134. See e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977); *Gaito Architecture*, 602 F.3d at 67 (citing *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 90–91 (2d Cir. 1976)).

135. *Gaito Architecture*, 602 F.3d at 67; *Krofft Television Prods., Inc.*, 562 F.2d at 1165.

136. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).



copied expression, and permissibly similar expression becomes substantially similar expression. Judge Hand himself wrote despairingly in the *Nichols* case: “Nobody has ever been able to fix that boundary, and nobody ever can.”<sup>137</sup> “[A]s soon as literal appropriation ceases to be the test,” Judge Hand added, “the whole matter is necessarily at large, so that . . . the decisions cannot help much in a new case.”<sup>138</sup> Thirty years later, he was no more hopeful: “Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.”<sup>139</sup>

More recent decisions applying substantial similarity strive to give content to the test, but these decisions, too, express misgivings about the feasibility of the project.<sup>140</sup> In many cases, courts simply overlay analytical frameworks that do little to elaborate the doctrine, reciting, for example, that substantial similarity is to be assessed from the perspective of the “ordinary observer.”<sup>141</sup> The invocation of the “ordinary observer” participates in the “reasonable man” tradition of tort law, which has long been subject to criticism for its indeterminacy.<sup>142</sup> The “ordinary observer” test proposes to settle

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137. *Id.*

138. *Id.* (“In determining the effect of the use of [copyrighted] material, we can derive little aid from a restatement of the decisions arrived at by the courts in the reported cases, for each case was decided upon its own facts.” (citing *Fendler v. Morosco*, 171 N.E. 56, 60 (N.Y. 1930))).

139. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *see also, e.g.*, *Rubinfeld*, *supra* note 1, at 14 (“Distinguishing ideas from expression is notoriously tricky.”); Stephen McJohn, *Scary Patents*, 7 Nw. J. TECH. & INTELL. PROP. 343, 347 (2009) (characterizing copyright’s idea/expression distinction as “illusory”).

140. *See, e.g.*, *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1148 (11th Cir. 2007) (observing that substantial similarity “occupies a non-quantifiable value on the legal spectrum between no similarity and identicalness”); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) (“It is thus impossible to articulate a definitive demarcation that measures when the similarity between works involves copying of protected expression . . .”); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3rd Cir. 1975) (“A review of copyright infringement decisions confirms the observation that most cases are decided on an *ad hoc* basis.”); *Jarvis v. A & M Records*, 827 F. Supp. 282, 290 (D.N.J. 1993) (“As courts and commentators have repeatedly noted, the test for substantial similarity is difficult to define and vague to apply . . .”).

141. *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 67 (1st Cir. 2009); *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005).

142. *See* Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 171–72 (2008) (quoting, *inter alia*, OLIVER WENDELL HOLMES, THE COMMON LAW 88–89 (Mark DeWolfe Howe, ed., The Belknap Press of Harvard Univ. Press 1963) (1881) (“vague test”). Indeed, the “ordinary observer” standard even invites comparison with the “men of common intelligence must necessarily guess at its meaning” test for vagueness, *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), which, as standards go, hardly draws a useful boundary between a constitutional and an unconstitutional law. *See supra* text accompanying notes 46–47. Reference to these fictional personifications of objectivity becomes ever more constitutionally problematic when one proposes to apply them to speech restrictions.

the infringement question based on whether said observer would be “disposed to overlook any disparities in the works.”<sup>143</sup> Articulated in this way, the standard approaches tautology.<sup>144</sup> Citing Judge Hand and Professor Nimmer, the Second Circuit observes that the question “typically presents an extremely close question of fact” that is generally not appropriate for summary judgment.<sup>145</sup> Presumably, then, the ordinary observer approach to substantial similarity is uncertain enough that reasonable minds can disagree on whether a given instance of expression is unlawful.<sup>146</sup> That sort of uncertainty surely chills speech.

The Ninth Circuit appears to be the court most determined to develop a working *ex ante* standard for substantial similarity, with the result that perhaps no other court has made such a tangle of the doctrine. Ninth Circuit law requires fact finders assessing substantial similarity to apply both “extrinsic” and “intrinsic” tests.<sup>147</sup> The extrinsic test, which calls for “analytic dissection” and often “expert testimony,”<sup>148</sup> seeks out similarity in “the type of artwork involved, the materials used, the subject matter, and the setting for the subject.”<sup>149</sup> In the case of literary works, the extrinsic test calls for objective comparison of the works’ respective plots, themes,

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143. *Coquico*, 562 F.3d at 67; *see also* Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010).

144. *See, e.g.*, Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1165 (9th Cir. 1977) (“To constitute an infringement, the copying must reach the point of ‘unlawful appropriation,’ or the copying of the protected expression itself.”); *see also* Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 373 (5th Cir. 2004) (recounting the plaintiff’s argument that jury instructions on substantial similarity were “merely tautological, essentially stating nothing more than that two works are substantially similar if they are substantially similar”). It is noteworthy that the *Positive Black Talk* court never directly addressed the plaintiff’s “tautology” challenge; it simply sustained the trial court’s instructions on the ground that they tracked Fifth Circuit precedent. *Id.* at 374.

145. *Gaito Architecture*, 602 F.3d at 63 (“[S]ummary judgment has traditionally been frowned upon in copyright litigation.” (quoting *Hoehling v. Universal City Studios Inc.*, 618 F.2d 972, 972 (2d Cir. 1980))).

146. *See* FED. R. CIV. P. 56 (providing that summary judgment is appropriate only when “the movant shows that *there is no genuine dispute as to any material fact* and the movant is entitled to judgment as a matter of law”) (emphasis added).

147. *See* *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990).

148. *See Shaw*, 919 F.2d at 1356.

149. *See Krofft Television Prods.*, 562 F.2d at 1164. It is by virtue of the extrinsic test, with its gestures toward objective analysis, that the Ninth Circuit is perhaps more amenable than its sister circuits to ruling on substantial similarity as a matter of law. *See Benay*, 607 F.3d at 624 (observing that substantial similarity is a “fact-specific” inquiry, but one as to which the Ninth Circuit has “frequently” been in a position to affirm entry of summary judgment for copyright defendants); *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (“A plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.” (internal quotation marks omitted)).

dialogue, mood, setting, pace, and sequence.<sup>150</sup> By contrast, the intrinsic test reprises the “ordinary observer” test discussed above,<sup>151</sup> and at least one court has described its application, critically, as “virtually devoid of analysis,” the exercise of “a mere subjective judgment as to whether two literary works are or are not similar.”<sup>152</sup> And so the Ninth Circuit’s model of substantial similarity admits speech-averse uncertainty coming and going.

The extrinsic test is multifactorial, intricate, and complex: that is, just the sort of analysis the *WRTL* Court rejected in the context of speech restrictions, on the ground that a speaker cannot expect to settle the extent of his or her expressive rights without resort to costly litigation.<sup>153</sup> The intrinsic test, for its part, disposes of an infringement question based on the gut-feel of the fact finder.<sup>154</sup> Perhaps the two tests are complementary, each compensating for the deficiencies of the other. Indeed, the fact that the plaintiff must satisfy both tests may be a boon to free expression, but the practical effect of the Ninth Circuit’s approach is to heap one vague legal standard on top of another. This model may be defensible to the extent that it systematizes the manner in which courts address infringement questions. It does not, however, provide fair notice to speakers, and the essential problem of substantial similarity’s vagueness remains unresolved despite all the courts’ efforts.

## 2. Fair Use

A fair use of copyrighted content is not an actionable infringement of copyright.<sup>155</sup> By definition, then, fair use distinguishes lawful use from unlawful use, and as applied to expressive uses,<sup>156</sup>

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150. *See Shaw*, 919 F.2d at 1356–57; *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984).

151. *See, e.g., Benay*, 607 F.3d at 624 (explaining that the intrinsic test “‘focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works’” (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (internal quotation marks omitted))).

152. *Shaw*, 919 F.2d at 1357.

153. *See Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007).

154. William Patry writes generally of the subjectivity of the substantial similarity test: “Right now, copyright law exists at the crude level of Potter Stewart’s ‘I know it when I see it.’” *See Patry, supra* note 133.

155. 17 U.S.C. § 107 (2006).

156. Just as not all uses of content are expressive, *see supra* text accompanying notes 80–82, not all fair uses are expressive, either. *See, e.g., Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003) (reverse engineering of software as fair use); *Field v. Google*

fair use theoretically draws a line between what can and cannot be spoken. Indeed, as we have noted, the law relies on fair use to carve out adequate space from copyright for free expression. The Supreme Court's holdings on this score, which maintain that fair use accomplishes this task sufficiently well to settle any constitutional quarrel with the copyright regime,<sup>157</sup> have been received with skepticism by commentators.<sup>158</sup> The concerns expressed in the literature relate to the positioning of the line fair use draws; that is, they wonder whether fair use falls short of privileging otherwise infringing uses of content that should be protected by the First Amendment. These concerns relate to copyright's overbreadth.

Whether fair use actually draws any line at all is a question that bears on copyright's constitutionality under the vagueness doctrine. This question is one that is easily and immediately answered: it does not. The statutory language in 17 U.S.C. § 107 is assuredly vague on its face: "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."<sup>159</sup> To its credit, the law offers examples of appropriate purposes—core fair use values—for which one may make use of copyrighted content. But, as Congress has written § 107, use of content even for these purposes is not per se lawful: the use must also be "fair." Whether or not the effect of this language is ultimately speech-protective, from the standpoint of balancing creators' rights against public privileges, the law misses an opportunity to supply some clarity. Likewise, § 107's list of approved purposes is not exclusive.<sup>160</sup> The fact that copyrighted content might be lawfully used for all manner of unlisted purposes could help to overcome complaints about copyright's overbreadth, but in this respect, too, the statute displays a hostility to definition.

To be sure, § 107 does provide guidance beyond its simple statement that "fair" use is lawful use. It codifies the four principal factors that courts have historically considered in making fair use determinations:

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Inc., 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006) (indexing of web content for use in a search engine as fair use).

157. See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003); *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

158. See, e.g., Tushnet, *supra* note 6, at 547–48; Netanel, *supra* note 1, at 20–23.

159. 17 U.S.C. § 107.

160. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (interpreting § 107's "such as" language to be "illustrative and not limitative"); *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (quoting *Campbell*, 510 U.S. at 577–78).

- (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; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>161</sup>

These factors may give structure to a court's *post hoc* fair use analysis, but a speech law characterized by such an "open-ended rough-and-tumble of factors" will assuredly chill lawful expression.<sup>162</sup> It bears mentioning, too, that the statute does not constrain a court's review to these four factors.<sup>163</sup> At least one commentator has described § 107 as "almost entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant . . . ."<sup>164</sup> In this respect the law standing alone, without the additional gloss supplied by the cases, surely falls short of the bare minimum requirement that courts impose in vagueness cases; that is, § 107 is "so vague and indefinite as really to be no rule or standard at all."<sup>165</sup>

Ultimately, though, the fair use doctrine is comprised almost entirely of judge-made law. The fair use inquiry, with all its factors, whether statutorily imposed or applied *ad hoc* in litigation, reduces to an "equitable rule of reason."<sup>166</sup> It was and is a creature of the common law, requiring case-by-case adjudication,<sup>167</sup> and yet fair use (like substantial similarity) stands out in the common law for the

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161. 17 U.S.C. § 107.

162. Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469 (2007) (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).

163. See *Petter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1307–08 (11th Cir. 2008); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 939 (2d Cir. 1994) ("[T]he statutory list is not exhaustive or exclusive." (citing *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985))).

164. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1564 (2004).

165. *A.B. Small Co. v. Am. Sugar Refinery Co.*, 267 U.S. 233, 239 (1925).

166. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984)) (internal quotation marks omitted).

167. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574–78 (1990) (describing fair use's origins in the common law and affirming the Copyright Act's commitment to the "common-law tradition" of "case-by-case analysis" of fair use); see also *Harper & Row*, 471 U.S. at 549–50.

failure of its decisions to supply any real predictive guidance to future content users.<sup>168</sup> Some general principles may be distilled from the case law, but in the end, the law cannot hope to capture *ex ante* even a fraction of the uses one can make of copyrighted content, so every case is *sui generis*.

Small wonder, then, that Professor Rubenfeld should pronounce fair use “notoriously opaque,”<sup>169</sup> or that other commentators might label it “resistant to generalization,” “unpredictable,” and “subjective.”<sup>170</sup> Subjectivity is, of course, derivative of these other defects: an altogether unanswerable question, posed to different authorities, will of course yield different answers. Judge Leval commented that the fair use doctrine admits subjectivity even in its core applications: “[h]istorians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass, the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges.”<sup>171</sup>

It has been suggested that fair use’s “open-endedness” and the prospect of reversal by an appeals court may make ruling on the defense “an intimidating experience” for trial court judges.<sup>172</sup> If the very essence of a vague law is that “men of common intelligence must necessarily guess at its meaning and differ as to its application,”<sup>173</sup> it should raise a red flag that learned judges find the fair use doctrine so unsettling. After all, a judge who guesses wrong will receive only a chastening reversal from the Court of Appeals. A

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168. See, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) (“[L]eading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair.”).

169. Rubenfeld, *supra* note 1, at 16–17. Professor Rubenfeld notes in passing that the “vagueness of the fair use doctrine is . . . a First Amendment problem.” *Id.* at 17 n.75.

170. *Id.* at 16–17 (quoting Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990) (“resistant to generalization”)); Naomi Abe Voetgli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1266 (1997) (“unpredictable, if not incomprehensible”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1005 (1990) (“subjective”).

171. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1132 (1990); see also *id.* at 1135 (“Writers, publishers, and other would-be fair-users lack a reliable guide on how to govern their conduct.”).

172. See William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 670 (1993). On this point, Patry quotes Judge Leval’s candid admission that “[i]t has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami.” *Id.* at 670 n.18 (quoting Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. CORP. SOC’Y 167, 168 (1989)).

173. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

speaker whose *ex ante* assessment of his case differs from a court's faces the prospect of statutory damages.

Access to legal counsel does not improve matters. Professor Fisher observed in the wake of the Supreme Court's decision in *Harper & Row* that attorneys advising scholars on the use of copyrighted content all but encouraged their clients to avoid relying on the defense.<sup>174</sup> Professor Fisher wrote that "the disarray of the doctrine impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly."<sup>175</sup>

For all the work they do to reconcile copyright and the First Amendment, the substantial similarity and fair use defenses give with one hand and take with the other. By their nature, they define what expression infringes copyright, but the two rescue doctrines are not themselves susceptible to *ex ante* definition. It is a rather severe irony that these two doctrines are assigned the constitutional business of carving out space for protected speech, yet they give so little notice to speakers as to what speech falls within and without that protected zone.

#### *D. Application of the Vagueness Doctrine's Collateral Factors to Copyright*

To assess the full extent of the constitutional problem of copyright's vagueness, the law must be reviewed against the vagueness doctrine's three collateral factors. That review reveals that copyright law burdens constitutionally protected rights, that the infringement action contains a quasi-criminal remedy in the right of plaintiffs to select statutory damages, and that the law lacks a meaningful *scienter* requirement.

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174. See William T. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1692–94 (1988) (describing university counsel advice regarding classroom uses of copyrighted content as "distinctly unhelpful" (citing Dale P. Olson, *Copyright and Fair Use: Implications of Nation Enterprises for Higher Education*, 12 J.C. & U.L. 489, 508 (1986); Michael Les Benedict, *Historians and the Continuing Controversy over Fair Use of Unpublished Manuscript Materials*, 91 AM. HIST. REV. 859, 875 (1986))).

175. Fisher, *supra* note 174, at 1693; see also Randall P. Bezanson & Joseph M. Miller, *Scholarship and Fair Use*, 33 COLUM. J.L. & ARTS 409, 445 (2010) ("The strictly legal problems presented for fair use scholarly claims are themselves complex, usually indeterminate and sufficiently real to force a busy scholar without large resources and a risk-averse publisher to back down, if challenged, or simply to avoid any risk, even if there is no real likelihood of it ripening into a claim.").

## 1. Copyright Restricts the Exercise of Constitutionally Protected Rights

As noted above, it is uncontroversial that copyright restricts expression in many, if not most, of its applications.<sup>176</sup> The law sets aside proprietary rights in original expression and imposes legal liability on speakers whose own expression “copies” the appropriated speech. This aspect of copyright has invited courts and commentators alike to consider whether the infringement action might in turn infringe the First Amendment rights of defendants.<sup>177</sup> Copyright’s tension with First Amendment values therefore puts the infringement action on the same footing as the content-based speech regulations to which courts have applied close scrutiny under the vagueness doctrine.<sup>178</sup>

## 2. Copyright Law Contains Criminal and Quasi-Criminal Remedies

Copyrights may be enforced civilly or criminally. 17 U.S.C. § 506 provides a criminal charge against certain willful infringers of copyright; 18 U.S.C. § 2319 specifies the penalties for criminal infringers, who may be imprisoned for up to ten years for their conduct. The *mens rea* requirement of willfulness greatly alleviates any concern about constitutional vagueness, because criminal liability will only attach when the defendant “intentional[ly] violat[es] a known legal duty.”<sup>179</sup> It is significant, too, that the criminal provisions are directed at only a subset of infringing conduct: that is, infringement “for purposes of commercial advantage or private financial gain,” reproduction or distribution of works totaling over \$1,000 in retail value, and digital distribution of works “being prepared for commercial distribution.”<sup>180</sup> Although one can imagine circumstances in which § 506 criminalizes a defendant’s own expression, the law for the most part regulates acts of in-

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176. See *supra* text accompanying notes 79–84.

177. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003); text and notes *supra* note 1.

178. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (applying close vagueness scrutiny to content-based restrictions on speech); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (same).

179. *Cheek v. United States*, 498 U.S. 192, 200 (1991) (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973) (quotation marks omitted)); accord *United States v. Moran*, 757 F. Supp. 1046, 1048–49 (D. Neb. 1991) (quoting *Cheek* in criminal copyright infringement proceedings in the course of rejecting the government’s suggestion that willfulness requires only that the defendant intended to copy, rather than to infringe).

180. 17 U.S.C. § 506(a)(1) (2006).



fringement that are not in themselves expressive: namely, trafficking in pirated and counterfeited works and copying works in bulk. With the added overlay of the willfulness requirement to protect a defendant from blundering into liability, copyright's expressly criminal provisions ultimately present a less consequential vagueness problem than the civil infringement remedies do.

The far more common mode of copyright enforcement is the civil action for injunctive relief and/or damages.<sup>181</sup> Injunctive relief is, in essence, an instruction to discontinue infringing and is therefore difficult to characterize as punitive in nature, notwithstanding that in certain applications (for example, an injunction calling for removal of a publication from the market) a defendant can incur significant losses as a result of compliance. An award of a plaintiff's actual damages is compensatory and therefore civil in nature. These remedies are accordingly less offensive, although not entirely inconsequential, in the vagueness analysis.<sup>182</sup>

A plaintiff's right to elect statutory damages, however, is more problematic. Statutory damages do not only compensate a plaintiff for his or her losses; they "sanction and vindicate the statutory policy of discouraging infringement" and are therefore both "compensatory and punitive" in character.<sup>183</sup> The Second Circuit writes that "[t]he purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to statutory damages awards in cases of willful infringement."<sup>184</sup> It bears emphasis that statutory damages do more than "punish and prevent malicious conduct." They punish neutral and even innocent conduct. The Copyright Act erects three tiers of statutory damages awards: one for willful infringers (ranging from \$750 to \$150,000), one for innocent infringers (\$200 to \$30,000), and a generally applicable range for infringers who fall into neither category (\$750 to \$30,000).<sup>185</sup> In a given case, the measure of damages adequate to compensate a rightsholder for copyright infringement case may fall well short of the minimum figure in the

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181. *Id.* (injunctions); *id.* § 504 (damages) (2006). The law also authorizes a court to order the confiscation and/or destruction of infringing articles. *Id.* § 503 (2006).

182. *See* *Ragin v. N.Y. Times Co.*, 726 F. Supp. 953, 964 (S.D.N.Y. 1989) (refusing to apply the vagueness doctrine to invalidate a civil suit over commercial speech and distinguishing the defendant's citations to cases in which vague laws provided for criminal fines and incarceration).

183. *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009) (quoting *L.A. News Serv. v. Reuters Television Int'l*, 149 F.3d 987, 996 (9th Cir. 1998)) (internal quotation marks omitted).

184. *On Davis v. Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001).

185. 17 U.S.C. § 504(c); *see infra* Part II.D.3.

applicable statutory damages range.<sup>186</sup> Where this occurs, the civil infringement action takes on a punitive character<sup>187</sup> and ought to be recognized as “quasi-criminal” in the Supreme Court’s vagueness analysis.<sup>188</sup>

The availability of statutory damages in civil copyright infringement actions presents the worst of both worlds from a vagueness perspective, as the law imposes an extra-compensatory and therefore punitive remedy without supplying the many procedural protections due to criminal defendants.<sup>189</sup> One at risk of criminal penalties between \$750 and \$30,000 must be proved guilty of the pertinent offense beyond a reasonable doubt, whereas statutory damages in copyright suits are available on a more-probable-than-not standard of proof.<sup>190</sup> Moreover, a criminal defendant would have to catch the attention of a prosecutor, who does not stand to benefit financially from the windfall of an extra-compensatory remedy. The rightsholder can bring a civil suit at his or her initiative and will likely be more motivated to do so.

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186. For example, in *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 112 (D. Mass. 2010), a recent case involving a challenge to a statutory damages award, the court estimated that a jury's award of statutory damages of \$22,500 per instance of willful infringement amounted to at least a 1500:1 ratio of punitive to compensatory damages, adding that the figure could rise as high as 32,143:1, based on market pricing of the infringed works. Assuming *arguendo* that Mr. Tenenbaum was neither willful nor innocent in his infringement, the minimum statutory damages of \$750 per infringement would prescribe at least a 50:1 ratio. The \$200 minimum award for innocent infringement would have punished Mr. Tenenbaum at more than 13 times the rate of damages actually caused to the plaintiffs.

187. See Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1206 (2007) (describing “high statutory damages awards” as “punitive-like” and suggesting that the prospect of such awards may chill free speech); Celia Goldwag, Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320, 336 (1979) (“When statutory damages exceed what would be necessary to compensate the copyright holder, they have the effect of penalizing the infringer’s speech.”).

188. Where it does not occur, then the appropriate award, and the one a plaintiff should favor, is one for actual damages.

189. *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964) (describing the measure of damages available under a state civil libel law; noting that “ordinary criminal-law safeguards” like “an indictment and . . . proof beyond a reasonable doubt” were not available to the civil defendant; and ultimately characterizing the law as “a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (internal quotation marks omitted)).

190. See, e.g., *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1369 (Fed. Cir. 2007) (applying Eleventh Circuit law); *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 358 (4th Cir. 2001).

### 3. A Civil Action for Copyright Infringement Does Not Require Proof of *Scienter*

Although criminal copyright infringement requires proof of willfulness,<sup>191</sup> civil copyright infringement is a strict liability action: liability attaches regardless of the infringer's knowledge or intent.<sup>192</sup> To be sure, the law provides stronger civil remedies for willful infringement,<sup>193</sup> but, all the same, an award of statutory damages is available absent proof of willfulness and even in cases where the factfinder is satisfied that the defendant inadvertently infringed the copyright.<sup>194</sup>

The Copyright Act does make some gestures in the direction of protecting defendants who have acted in good faith. For example, a court may reduce an award of statutory damages to as low as \$200 per instance of infringement if the defendant infringer can establish that he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."<sup>195</sup> Yet this provision falls far short of a *scienter* requirement as an element of infringement. The defendant bears the burden of proving innocent infringement of this sort,<sup>196</sup> liability attaches notwithstanding an innocent infringer finding,<sup>197</sup> and the court retains the discretion not to reduce the damages award, notwithstanding the evidence the defendant may offer on this point.<sup>198</sup> Moreover, the Copyright Act empowers a rightsholder to overcome an innocent infringer defense simply by posting a copyright notice on published content to

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191. See 17 U.S.C. § 506(a) (2006).

192. See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 537 (6th Cir. 2004) (citing *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963); see also *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) ("Intention to infringe is not essential . . .").

193. See 17 U.S.C. § 504(c)(2) (2006) (setting a \$150,000 ceiling for statutory damage awards in cases where the plaintiff has proved willful infringement, as opposed to a \$30,000 ceiling in cases where willfulness has not been proved).

194. See *id.* § 504(c).

195. See *id.* § 504(c)(2).

196. See *id.* (authorizing a reduction in statutory damages "[i]n a case where the infringer sustains the burden of proving, and the court finds" innocent infringement); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1544 (S.D.N.Y. 1991).

197. See *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) ("The fact that infringement is 'subconscious' or 'innocent' does not affect liability, although it may have some bearing on remedies."); *ABKCO Music, Inc. v. Harrison's Music, Ltd.*, 722 F.2d 988, 998–99 (2d Cir. 1983) (observing that "innocent copying can nevertheless constitute an infringement") (internal quotation marks omitted).

198. See 17 U.S.C. § 504(c)(2); *Columbia Pictures Indus., Inc. v. Garcia*, 996 F. Supp. 770, 772 (N.D. Ill. 1998) (writing that the court would exercise its discretion not to reduce a statutory damages award, "even if Garcia could 'sustain the burden of proving' that his infringement was innocent").

which the defendant is proved to have had access.<sup>199</sup> Courts hold that a plaintiff satisfies the “access” requirement merely by showing that it published a work with the notice affixed to it; the plaintiff need not prove that the defendant personally encountered the notice.<sup>200</sup> Remarkably, a plaintiff’s copyright notice will defeat any sort of innocent infringer defense, even one in which the defendant concedes an awareness that the content was copyrighted and instead interposes a good faith belief that his or her use was fair or not substantially similar to the noticed content.<sup>201</sup>

Copyright incorporates a more robust good faith defense that requires a court to remit an award of statutory damages in its entirety, but its availability is substantially more limited: the defendant must have relied on fair use (as opposed to simply believing, say, that his or her work was not substantially similar to the plaintiff’s, or that the plaintiff’s work was in the public domain), and that reliance must have been objectively reasonable.<sup>202</sup> Even so, only two categories of infringer are entitled to statutory *remittitur* on these grounds. First, “an employee or agent of a nonprofit educational institution, library or archives” has the benefit of *remittitur*, but only when he or she has infringed by reproducing the plaintiff’s work while acting within the scope of employment.<sup>203</sup> Second, “a public broadcasting entity” or person acting “as a regular part of the nonprofit activities of a public broadcasting entity” can obtain *remittitur* of damages for infringement by performing or reproducing a transmission of “a published nondramatic literary work.”<sup>204</sup> No reported case has applied this provision of the Copyright Act to remit statutory damages.<sup>205</sup>

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199. See 17 U.S.C. § 401(d), § 402(d) (2006).

200. See *Maverick Recording Co. v. Harper*, 598 F.3d 193, 198–99 (5th Cir. 2010) (holding that § 402(d) “gives publishers the option to trade the extra burden of providing copyright notice for absolute protection against the innocent infringer defense”); *BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005). The “extra burden” described by the *Maverick* court is, of course, negligible.

201. See Alan E. Garfield, *Calibrating Copyright Statutory Damages To Promote Speech*, 38 FLA. ST. L. REV. 1, 43–44 (2010) (identifying this problem and proposing an appropriate amendment to 17 U.S.C. § 504(c)(2)).

202. 17 U.S.C. § 504(c)(2).

203. See *id.* § 504(c)(2)(i).

204. See *id.* § 504(c)(2)(ii).

205. The statutory *remittitur* provisions are so narrow in scope that litigants rarely invoke them in infringement cases. On the few occasions when they have, courts have declined defendants’ requests to remit statutory damages. See *Bosch v. Ball-Kell*, Civ. No. 03-1408, 2006 WL 2548053 (C.D. Ill. Aug. 31, 2006); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1545–47 (S.D.N.Y. 1991) (rejecting a print shop’s bid for statutory *remittitur*, which was predicated on an argument that the print shop was an “agent” of a higher education institution).

Finally, the infringement action calls for the plaintiff to prove, by evidence direct or circumstantial, that the defendant “actually copied” his or her work.<sup>206</sup> Although inadvertent and even unconscious<sup>207</sup> copying is actionable, the law allows that an “independently created” work, however similar it might be to copyrighted content, is not infringing.<sup>208</sup> The actual copying element protects the defendant against a situation in which he or she renders expression without any awareness that the plaintiff had done so first. It is of no use to the defendant who acted in good faith but strayed into the infringement zone for other reasons.

Thus, although copyright is not insensitive to the concept of the good faith or innocent infringer, the sensitivity it does show is reflected in an odd patchwork of very limited exceptions to the general rule of strict infringement liability. These indulgences ought to be unsatisfying to a court looking for a *scienter* requirement to rebuff a constitutional vagueness challenge.

### III. VAGUENESS REVIEW AS A PATHWAY TO COPYRIGHT REFORM

If we accept that the Copyright Act and its supporting common law doctrines and judicial interpretations (1) do not provide adequate notice to speakers, (2) may often chill speech, and (3) are at least “colloquially vague,” then the next question is, of course, what should be done about it. Section A of this Part argues that courts are not likely to invalidate the Copyright Act for vagueness. Nor is this necessarily an attractive or constructive result. Moreover, Section B explains that there is little that lawmakers can do to cure the notice failure that inheres in the copyright infringement action, generally, or for that matter in the rescue doctrines that resolve copyright’s First Amendment overbreadth problem.

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206. See, e.g., *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010); *Situation Mgmt. Sys., Inc. v. ASP Consulting LLC*, 560 F.3d 53, 58 (1st Cir. 2009) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)); see also *supra* note 132 (discussing the “access + substantial similarity” avenue to proof of actual copying by circumstantial evidence).

207. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998–99 (2d Cir. 1983) (affirming a liability finding against the defendant songwriter *et al.*, notwithstanding a claim that the infringing song’s substantial similarity to a preexisting work was “subconscious”) (citing, *inter alia*, 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13.08 (1983) (“Innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personalty.”)).

208. See, e.g., *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997) (“The Copyright Act forbids only copying; if independent creation results in an identical work, the creator of that work is free to sell it.”); *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 3 (1st Cir. 1996).

All that said, the vagueness doctrine may nonetheless point the way to meaningful reform of the copyright laws, particularly in light of the collateral factors that courts routinely apply in the course of their constitutional review. Although application of these collateral factors to copyright law only amplifies the constitutional concerns raised above, Section C shows that these factors also suggest meaningful reforms that will reduce the consequences of notice failure for speakers and thereby mitigate copyright's chilling effects on lawful speech.

### A. *The Unlikely Prospect of Voiding Copyright Law for Vagueness*

Invalidation of the Copyright Act, in whole or in part, is unlikely. The one judge asked to consider the question, Judge Marilyn Patel in *Aharonian v. Gonzales*,<sup>209</sup> declined to take it up. In *Aharonian*, the *pro se* plaintiff petitioned the district court to excise computer code from the corpus of content subject to protection under the Copyright Act.<sup>210</sup> Aharonian argued that § 102(b) of the Copyright Act, which distinguishes copyrightable “expression” from “ideas,” was unconstitutionally vague as applied to software.<sup>211</sup> Aharonian quoted Judge Hand's observation that “the test for infringement . . . is of necessity vague,”<sup>212</sup> and he argued that the copyright laws implicate free expression and in some instances even criminalize speech.<sup>213</sup>

Describing Aharonian's quotation of Judge Hand as “strange[,],” Judge Patel pronounced that “[t]he fact that the test is necessarily somewhat vague does not mean that it is unconstitutionally so.”<sup>214</sup> In support of that conclusion, Judge Patel relied on the proposition—often cited by courts when they sustain laws against a void-for-vagueness challenge<sup>215</sup>—that all laws are to some extent

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209. No. C 04-5190 MHP, 2006 WL 13067 (N.D. Cal. Jan. 3, 2006).

210. *See id.* at \*1.

211. *See id.* at \*6.

212. *See id.* at \*7 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)) (internal quotation marks omitted).

213. *See id.* at \*6–\*7 (citing 17 U.S.C. § 506 (criminal liability); *Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003) (reconciling copyright values to the First Amendment)).

214. *Id.* at \*7.

215. Courts rejecting constitutional vagueness challenges commonly recite that “we can never expect mathematical certainty from our language.” *E.g.*, *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (statute prohibiting solicitations outside health care clinics); *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (use regulations for municipal band shell); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (municipal anti-noise ordinance); *see also City of Chi. v. Morales*, 527 U.S. 41, 112 (1999) (Thomas, J., dissenting) (quoting the language in support of an anti-loitering ordinance).

vague.<sup>216</sup> Judge Patel wrote that uncertainty in the law “is a bedrock assumption of our common law system.”<sup>217</sup> Of course, all laws do carry some inherent vagueness, and the Constitution must and does admit the possibility of “a certain degree” of after-the-fact judicial interpretation.<sup>218</sup> The question is whether, in light of the fact that copyright burdens free expression—a fact that considerably narrows the ability of lawmakers to cede application and interpretation to *post hoc* litigation<sup>219</sup>—the amount of *post hoc* interpretation it admits goes beyond that “certain degree.”<sup>220</sup> Without any real discussion of why, Judge Patel wrote that it does not.

Judge Patel did write in support of copyright, that it “works in tandem with the First Amendment to further free expression.”<sup>221</sup> If we accept that copyright serves as an “engine of free expression” even as it restricts free expression,<sup>222</sup> then the applicability of the “constitutionally-protected right” collateral factor is surely reduced, because even though the infringement action might chill or penalize the speech, the grant of proprietary rights does the countervailing work of promoting speech. This fact may allow a court to tolerate a greater degree of *ex ante* uncertainty in its vagueness review than it otherwise might. This assumes, however, that the court is in a position to apply a meaningful vagueness standard to a “somewhat” vague law in the first place. It assumes that higher courts have supplied the sort of guidance that will allow lower courts to reach a principled answer. In this respect, Judge Patel cannot be faulted for simply deciding the case without offering doctrinally satisfying review under the void-for-vagueness doctrine. To be sure, the Supreme Court cannot be faulted for having fashioned the doctrine in a way that, collateral factors aside, cannot give substantial advance guidance regarding at what point “somewhat vague” becomes *too* vague.<sup>223</sup> Crafting a test of this sort for application to unanticipated, down-the-line laws is as difficult as determining *ex ante* the point at which “similar” works become “substantially similar,” and for the same reasons.<sup>224</sup> As with any doctrine

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216. See *Aharonian*, 2006 WL 13067, at \*6 (“Language is unavoidably inexact . . .”).

217. *Id.*

218. *Id.*

219. See *supra* Section I.D.1. It is noteworthy that the several examples of “necessarily broad” terms that Judge Patel invoked in support of allowing *post hoc* interpretation—“due process of law,” “obvious,” and “restraint of trade,” *Aharonian*, 2006 WL 13067, at \*6 (citing U.S. CONST. amend. V, 35 U.S.C. § 103(a) (patents); 15 U.S.C. § 1 (Sherman Act), respectively), do not generally have applications that will chill expression.

220. *Aharonian*, 2006 WL 13067, at \*6.

221. *Id.* at \*7.

222. See *Harper & Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

223. See *Aharonian*, 2006 WL 13067, at \*7.

224. See *supra* Section II.C.1.

of jurisprudence, legal standards and precedent take a judge only so far. The vagueness doctrine is remarkable only for the sheer amount of discretion left to a judge after he or she steps out from the cover of prior judicial amplification of the legal standard.

Of course, these truths about the vagueness doctrine only explain why Judge Patel's decision is not satisfying as a jurisprudential matter. Why she ruled as she did bears further discussion. First, Aharonian did not present a compelling constitutional case. The conduct Aharonian described in his declaratory judgment complaint, "the wholesale copying of source code," fell amply within the zone of conduct any reasonable person would regard as infringing.<sup>225</sup> More importantly, the conduct alleged by Aharonian was not expressive in nature. In short, Aharonian sought to mount a facial vagueness challenge on the question of copyright's application to a species of non-expressive conduct.<sup>226</sup>

Second, vague as they may be, the copyright laws have considerable historical momentum behind them. Courts have been aware of, and have tolerated, copyright's notice defects for decades.<sup>227</sup> Although the declaration Aharonian sought, that the court rule copyright vague and therefore invalid as applied to software code, was relatively narrow in scope, the logic he deployed was no less applicable to the several other subjects of copyright. If Judge Patel had accepted Aharonian's vagueness argument, there would be no basis to distinguish a more general vagueness challenge to copyright. Holding any provision of copyright law void for vagueness would be a grand, disruptive step with significant consequences for the content industries constructed on the current copyright framework. A court would not take such a step without good reason, and Aharonian, for his part, did not supply one.

Even assuming a set of facts more friendly to a constitutional challenge—say, a defendant's documented good-faith reliance on a fair use defense against infringement claims brought by a plaintiff whose apparent motive in suing was to suppress the defendant's

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225. See *Aharonian*, 2006 WL 13067, at \*7 ("While it may be that certain prohibitions by the copyright laws are in tension with the First Amendment, the conduct alleged by plaintiff—the wholesale copying of source code—lies at the core of what copyright law seeks to protect. Thus there is no problem of vagueness or lack of notice in this case.").

226. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 & n.6 (2008) (observing that outside the context of the First Amendment, a facial challenge will not succeed unless the law is unconstitutional in all its applications); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (requiring a facial challenge brought on vagueness grounds to establish that the law is "impermissibly vague in all of its applications").

227. See, e.g., *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).



political speech—it is unlikely that any court would rule differently than Judge Patel. A judge taking due consideration of the politics that attend the question of copyright’s constitutionality will be inclined to rule conservatively,<sup>228</sup> and the case law will provide all the cover he or she needs to reject a vagueness challenge. The Supreme Court adhered to this very paradigm in *Eldred*,<sup>229</sup> wherein the Court declined to engage in any serious review of the plaintiff’s argument of overbreadth.<sup>230</sup>

Courts will surely be reluctant to invalidate all, or even some, of the Copyright Act’s vague prescriptions. Given that invalidation would be an extreme and not very constructive (but surely eye-catching) gesture at solving the vagueness problem, such reluctance is understandable. Accordingly, this Article proposes instead to examine the possibility of reform.

### B. *The Incurability of Copyright’s Notice Failure*

The most obvious and straightforward approach to correcting copyright’s vagueness problem would be to write more and better definition into the law, and yet it is difficult to see how copyright law could provide more notice to speakers than it does. The copyright infringement action cannot be simplified without eliminating many of the law’s top-level, potentially dispositive doctrines. Work-for-hire, originality, copyright duration, the registration requirement, and the several use privileges reserved to the public in §§ 108–110 are all instrumental to the copyright scheme. To mark any or all of them for deletion would sacrifice important policy values and make copyright only marginally less vague.

Likewise, little constructive work can be done to ameliorate the inherent vagueness of the rescue doctrines, substantial similarity and fair use. Judge Hand did observe, after all, that the “test for infringement” was “*of necessity* vague.”<sup>231</sup> As this Article notes, efforts to impose some definition and predictability upon substantial

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228. Cf. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 534 (2004) (arguing that “political considerations” have inclined Congress and the courts to tip copyright’s balance of private rights and public privileges decidedly toward rightsholders (citing WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* ch. 15 (2003))).

229. *Id.* at 536 (arguing from the “result in *Eldred*” that courts are unlikely to address “the increasing detachment of U.S. copyright law from its constitutional underpinnings”).

230. See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003). One commentator has described the *Eldred* Court’s ruling as “very conservative,” “accommodationist,” and “insufficiently critical.” Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L. REV. 2, 9, 22, 24 n.69.

231. *Peter Pan Fabrics*, 274 F.2d at 489 (emphasis added).

similarity have been self-defeating. The cause of this should be obvious: the substantial similarity test is written generally to apply to every claim of infringement of every copyrighted work; thus, the range of the rule's applications is so broad that one must step back to an extreme level of abstraction to capture it all.<sup>232</sup> From that panoramic point of abstraction, little can be said to elaborate substantial similarity other than the bland generalities deferring the question to an ordinary observer's gut feel. In truth, the only effective way to resolve substantial similarity's vagueness would be to abandon the doctrine outright in favor of a bright-line rule confining the infringement action to instances in which the defendant exactly copied the plaintiff's protected work. This approach begs an important question: how can copyright law handle the hypothetical case Judge Hand proposed in *Nichols*, wherein a "plagiarist" seeks to "escape" liability by introducing "immaterial variations?"<sup>233</sup> Courts have interposed the possibility of proof by substantial similarity precisely to address the concern that infringers might game the system in this way.<sup>234</sup> A requirement that the defendant have rendered a literal, perfect copy of a work would accomplish a radical reorientation of proprietary rights and public privileges, again exchanging longstanding policy values to address just one of copyright's several pockets of vagueness.<sup>235</sup>

An attempt to bring greater definition to fair use would not be constructive, either, in the respect that it would only trade a vagueness problem for overbreadth. Viewed from one perspective, fair use's vagueness is speech-supportive. Rather than settle into law an array of specific approved uses of copyrighted content, as most for-

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232. See, e.g., Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 746 (2009) (affirming Judge Hand's intuition that substantial similarity "cannot rely much on previous case law" because the test "is fact- and context-driven"); Daniel Fox, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223, 227–28 (2006) ("In this respect, copyright infringement cases are unique, for it is impossible to say how much taking is too much without reference to the specific works at issue.").

233. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

234. See, e.g., *id.*; 4 NIMMER & NIMMER, *supra* note 117, § 13.03; see also *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 n.25 (11th Cir. 1996); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1234 (3d Cir. 1986).

235. Theoretically, a court might extend an infringement claim to the plaintiff who shows only *de minimis* differences and can prove that the variations were introduced simply to provide a litigation buffer between the two works. But this model is *Nichols* all over again. The mere fact that a defendant sought to construct such a buffer against infringement should not be enough to incur liability, without a further showing that the defendant otherwise misappropriated the plaintiff's work. Absent recourse to a standard for liability that turns on the defendant's intentions as to the plaintiff's work—and this is not featured in the civil infringement action, as presently configured, see *supra* Section II.D.3—we can only draw our conclusions about misappropriation based on the extent of similarity between the works in question.

eign jurisdictions have done,<sup>236</sup> U.S. law accepts the possibility that the public might identify reasonable uses of copyrighted content that lawmakers have not contemplated and approved.<sup>237</sup> Of course, the flipside of this open-endedness is vagueness. We do not know which unanticipated uses are fair until a court has ratified them.<sup>238</sup> As to uses that the law clearly does contemplate, such as “criticism, comment, news reporting, teaching . . . scholarship, or research,”<sup>239</sup> the nature and extent of the use passable as fair is necessarily context-dependent.<sup>240</sup> It is not surprising that efforts to generate extrajudicial guidelines in these contemplated areas have seen only limited success. Guidelines may ultimately not prove serviceable because of their failure to obtain buy-in from both publishers and users,<sup>241</sup> and, more significantly, because the very concept of specific guidance is irreconcilable with the law’s formative presentation of fair use as an “equitable rule of reason.”<sup>242</sup>

This is not to suggest that more cannot be done to bring clarity to the fair use defense. Efforts by commentators to systematize the doctrine from the jumble of cases in the Federal Reporters allow us to distill principles from the precedent and extrapolate from

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236. See Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 872 (2010) (citing PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 293–94 (2001)).

237. Cf. Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 572 (2008) (describing the doctrine’s “open-ended and flexible texture” and its “ability to capture a wide range of considerations” as “its great strength”).

238. See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1620 (2009) (“[F]air use effectively circumscribes the grant [of proprietary rights] ex post.”).

239. 17 U.S.C. § 107 (2006).

240. See Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 153 n.78 (2007) (“The fair use test codified in 17 U.S.C. § 107 is more a standard than a rule, left deliberately open-ended in order to permit contextual judgment to trump mechanical pigeonholing of cases.”); Balganesh, *supra* note 238, at 1616–17 (“Incentives tend to vary from one inventor or creator to another or one area of application to another, necessitating significant contextual fine-tuning.”).

241. See, e.g., BRUCE A. LEHMAN, *THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE* (1998) (setting forth the findings of a joint undertaking by publisher and user constituencies to devise agreed guidelines for educational fair use of published content—and describing several areas in which the parties failed to reach agreement); see also Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 423 (2009) (describing unilateral efforts by librarians and documentary filmmakers to articulate fair use guidelines, without publishers’ input).

242. See Harper & Row Publ’rs, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); see also Mazzone, *supra* note 241, at 424 (citing Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1920 (2007); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 665 (2001)).

them.<sup>243</sup> And of course, the law designates certain uses of content as *per se* reasonable and defensible.<sup>244</sup> It is important to note, however, that these *per se* privileged uses are not themselves denominated as “fair.” Thus, although they offer the relief of the bright-line rule and express something about Congress’s intention to balance proprietary rights and public privileges, they ultimately do little to inform us about the fair use defense in particular.<sup>245</sup> Finally, Congress could always go the further step of codifying certain core uses it deems fair and reasonable.<sup>246</sup> Notwithstanding these opportunities, whatever commentators and Congress do to describe a heartland of fair use values, an open-ended fair use defense will remain indeterminate at the margins.

In short, copyright law accepts as a fundamental premise, in a way that other category-based content regulations do not, that its restrictions will be applied flexibly, on a case-by-case basis, and with due attendance to circumstances.<sup>247</sup> Introducing bright-line rules to supply greater advance notice to speakers would subvert many of copyright’s objectives.<sup>248</sup>

### *C. Copyright’s Answer to a Vagueness Challenge: A Three-Tiered Remedies Model Keyed to Level of Fault*

Based on the analysis set forth above, we can draw the following conclusions about the copyright infringement action, with respect to the void-for vagueness doctrine: (1) copyright infringement claims are fraught with complexity and uncertainty, even (and

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243. See generally WILLIAM PATRY, PATRY ON FAIR USE (2010) (canvassing the fair use case law); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009) (same).

244. See, e.g., 17 U.S.C. §§ 108–12.

245. See, e.g., 17 U.S.C. § 108(f) (2006) (limited preservation and distribution rights of libraries and archives) (“Nothing in this section . . . in any way affects the right of fair use as provided by section 107 . . .”).

246. See David Fagundes, *Crystals in the Public Domain*, 50 *B.C. L. REV.* 139, 175–76 (2009); cf. William McGeeveran, *The Trademark Fair Use Reform Act*, 90 *B.U. L. REV.* 2267, 2302–17 (2010) (proposing categorical bright-line principles as a first recourse to defendants seeking to raise fair use defenses in trademark cases, toward the end of alleviating the infringement action’s chilling effect on speech).

247. See Balganesch, *supra* note 238, at 1616–17 (suggesting that the “innumerable vague standards” of copyright are “largely beneficial,” because “[s]tandards enable courts to calibrate the scope of the entitlement to its underlying purpose and function”); McJohn, *supra* note 139, at 347 (arguing that the “very vagueness of the test” for infringement allows courts to write law that “balances a number of competing policies”).

248. To be sure, there are areas of copyright law in which some greater clarity could be more easily achieved. Most notably, lawmakers could write reform provisions that settle what works are in the public domain.

arguably, especially) in the aspects of law that are said to salvage copyright from challenges of First Amendment overbreadth; (2) copyright regulates expression; (3) the civil infringement claim<sup>249</sup> is quasi-criminal in nature; and (4) defendants do not have the benefit of a *scienter* buffer to insulate them from civil liability when they act in good faith. It is clear that something has to give. Given that little can be done to alleviate conclusions (1) and (2), lawmakers may best address copyright's vagueness problem by turning their attention to the quasi-criminal statutory damages and the lack of a *scienter* requirement for infringement.

Accordingly, this Article proposes that copyright law adopt a three-tiered remedy structure for cases in which the subject is the defendant's expression, leaving the current remedy structure in place for all other infringement suits. The law would differentiate between cases brought against pure non-expressive conduct—such as reproduction of software, trafficking in counterfeited works, or the wholesale copying of entertainment works purely for consumptive purposes—and cases in which the allegedly infringing conduct carries some quantum, however small, of the defendant's own expression. Concededly, bifurcating remedial schemes around the question of expression/non-expression creates an additional opportunity for litigation in an already complicated area of law. Yet from a vagueness perspective, such a model would be a net gain, as the reformed law would mitigate the effects of copyright's indeterminacy where they are most consequential: that is, where they burden speech rather than “purely economic” activity.<sup>250</sup>

The remedies structure proposed here for infringement claims brought against a defendant's expression is as follows: first, strict liability would remain the standard for obtaining injunctive relief; second, a plaintiff would have to establish some amount of culpability, likely negligence, to recover any damages in an infringement action; and third, a plaintiff would not be able to elect statutory damages without first showing willfulness.

### 1. Strict Liability for Injunctive Relief

The Copyright Act authorizes a court to “grant temporary and final injunctions on such terms as it may deem reasonable to prevent

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249. As I have noted, copyright's criminal provisions are enforceable only against willful infringers, *see* 17 U.S.C. § 506 (2006); 18 U.S.C. § 2319 (2006), and so likely do not offend due process. *See* cases cited *supra* note 65.

250. *See e.g.*, *Smith v. Goguen*, 415 U.S. 566, 573 & n.10 (1974).

or restrain infringement of a copyright.”<sup>251</sup> Such relief, in and of itself, is not a matter of concern from the standpoint of the vagueness doctrine. In an injunction case, the defendant who has strayed by accident into the enforcement zone will encounter only an instruction from the court to take appropriate steps to cease and desist from the infringing conduct. So long as the injunction itself is not vague,<sup>252</sup> the legal risk that copyright’s uncertainty shifts onto speakers has negligible vagueness doctrine significance. The injunction does not deprive the defendant of a liberty interest he or she otherwise had, nor does he or she forfeit property because of the law’s vagueness.<sup>253</sup>

Put another way, an injunction is not remotely the sort of criminal or quasi-criminal remedy that commands the closest vagueness scrutiny, nor is it as consequential, for purposes of the vagueness doctrine, as a civil claim for actual damages.<sup>254</sup> The constitutionally offensive “hallmarks” of a vague law, as discussed above,<sup>255</sup> do not adhere where the remedy for a violation is a go-no-further injunction. There is no notice failure, and the law does not “trap the innocent for not providing fair warning,”<sup>256</sup> because an injunction both supplies the notice and accomplishes the warning. Nor can the prospect of an injunction, standing alone, be said to have a chilling effect on speech, as the court’s entry of the injunction supplies a defendant with a final opportunity to turn back before

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251. 17 U.S.C. § 502(a) (2006).

252. See, e.g., *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001) (quoting Federal Rule of Civil Procedure 65(d)’s requirement that “[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained”); *Metro. Opera Ass’n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 178–79 (2d Cir. 2001) (dissolving a preliminary injunction on vagueness grounds).

253. To be sure, a defendant may incur reliance costs by guessing wrong—for example, by sinking costs into the print edition of a work that is subsequently enjoined. But these costs are circumstantial and attenuated by at least one remove from the actual remedy, which cannot be said in and of itself to deprive the defendant of a property interest.

254. I do not mean to understate the dangers that injunctions pose to free speech; indeed, the Supreme Court has suggested that a prior restraint may offend First Amendment values more than the threat of criminal prosecution—or prosecution itself. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the government could not invoke the espionage laws to effect a prior restraint on publication of the Pentagon Papers, while concurring justices suggested that post-publication prosecution of the *Times* remained a viable option for the government). And one can easily imagine instances in which a copyright infringement plaintiff obtains an injunction to achieve a censorious purpose. But in cases like these, the injunctions are objectionable for reasons other than that they issued under a vague law, and recourse to the vagueness doctrine is not the appropriate means for addressing the implications for speech.

255. See *supra* Part I.A.

256. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *City of Chicago v. Morales*, 527 U.S. 41, 58 (1998).

he or she incurs any real penalty. At least where the remedy is exclusively injunctive relief, the defendant is eligible for a “mulligan.” That said, a vague law that authorizes injunctive relief arguably does delegate an excess of authority to judges, who are given substantial latitude to create case-specific law.<sup>257</sup> For their part, however, judges tend to think rather highly of their colleagues’ capacity to act appropriately, when given broad discretion.<sup>258</sup>

## 2. Fault Requirement/Negligence for Actual Damages

When a plaintiff seeks compensation for damages as a result of infringement, he or she should be required to show that the defendant acted at least negligently with regard to the plaintiff’s proprietary rights. Such an approach would have the virtue of introducing free speech protections equivalent to what the Supreme Court fashioned for defendants in *New York Times Co. v. Sullivan*<sup>259</sup> and *Gertz v. Robert Welch, Inc.*,<sup>260</sup> its landmark cases on defamation and the First Amendment.<sup>261</sup> After all, among regulations of expressive content, the copyright infringement action is most similar in nature to a defamation action: both laws are enforced civilly by private litigants to vindicate injured private interests. Yet, in marked contrast to copyright’s tradition of strict liability, defamation liability does not adhere unless the plaintiff can prove some measure of fault on the part of the defendant in uttering his or her false statement.<sup>262</sup>

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257. *Cf. Walker v. City of Birmingham*, 388 U.S. 307, 316 (1967) (expressing vagueness concerns about a municipal ordinance, based on which the city obtained an injunction against demonstrations).

258. *See, e.g., Walker*, 388 U.S. at 319 (rejecting petitioners’ attempts to overturn criminal contempt findings for violating the injunction, in part on the ground that the injunction issued *ex parte*, and “if the court had been presented with the petitioners’ contentions, it might well have dissolved or at least modified its order in some respects”); *see also supra* note 23.

259. 376 U.S. 254 (1964).

260. 418 U.S. 323 (1974).

261. *Compare* *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198–99 (1931) (“Intention to infringe is not essential under the [Copyright] Act.”), *with, e.g., Gertz*, 418 U.S. at 347 (holding that state tort law provisions for defamation may “not impose liability without fault”).

262. The extent of fault required of course varies based on whether the plaintiff is a public figure. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment requires a defamation plaintiff who is a public figure to prove “actual malice,” *i.e.*, that the defendant uttered a false statement “with knowledge that it was false or with reckless disregard of whether it was false or not”); *see also Gertz*, 418 U.S. at 347 (allowing the several states to specify their own levels of fault for defamation of nonpublic figures, provided that, at a minimum, they require a showing of negligence).

To be sure, the *Sullivan* and *Gertz* Courts did not specifically reference the vagueness doctrine in announcing their fault requirements, as, strictly speaking, defamation's uncertainty problem does not inhere in the elements of the tort. The elements draw the line between protected and prohibited conduct adequately enough; rather, defamation liability raises constitutional concerns because it positions a speaker to stray into the zone of liability based on a mistake of fact as to whether a statement is true.<sup>263</sup> The overarching concern, however, is the same as in copyright: the defamation action admits the sort of uncertainty that, if strict liability applies, will chill free expression.<sup>264</sup> Accordingly, the Supreme Court ruled in *Gertz* that strict defamation liability, even for compensatory damages, offends the First Amendment.<sup>265</sup> In the case of copyright, where uncertainty is more substantial, is more pervasive, and infects the law's very definition of what is and is not lawful speech, one would expect the Supreme Court's defamation logic to apply a fortiori.<sup>266</sup>

The *Gertz* fault requirement is generally read to require, at a minimum, proof of negligence as to the truth of the defendant's statement about the plaintiff,<sup>267</sup> so it falls well short of willfulness or *scienter* on the continuum of culpability. How the ordinary "duty and breach" tort law construction of negligence might apply to the truth element of a defamation claim is not immediately obvious, but the Restatement (Second) of Torts suggests two alternative formulations of the test:

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263. In this respect, the falsity element of defamation poses the same problem as the question whether a given work is in the public domain. See *supra* text accompanying notes 119–124.

264. See, e.g., *Gertz*, 418 U.S. at 340–41 ("Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

265. See *id.*

266. Again, see *supra* text accompanying notes 128 and 129. One could argue that defamation law's concessions to the First Amendment mean principally to protect high-value speech of public interest, whereas the Supreme Court has downgraded the First Amendment value of using "other people's speeches." See *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003). However, the apt analogy to draw between defamation and copyright infringement is not between speech of public interest and other people's speeches—it is between falsehood and other people's speeches, either of which may involve matters of public interest. Compare *Gertz*, 418 U.S. at 340–41 ("[A]lthough the erroneous statement of fact is not worthy of constitutional protection, . . . [t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."), with *Eldred*, 537 U.S. at 191.

267. See, e.g., 2 DAN B. DOBBS, *THE LAW OF TORTS* § 491, at 1179 (West Group 2001) ("The states have overwhelmingly adopted negligence as the standard of fault to be required where a private person sues."); see also, e.g., *Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Comm. Comm'n*, 518 U.S. 727, 741 (1996) (describing the *Gertz* holding as "allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard").



Insofar as the truth or falsity of the defamatory statement is concerned, the question of negligence has sometimes been expressed in terms of the defendant's state of mind by asking whether he had reasonable grounds for believing that the communication was true. Putting the question in terms of conduct is to ask whether the defendant acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.<sup>268</sup>

Under the "state of mind" model of negligence, a plaintiff in a copyright case could obtain actual damages only by showing that the defendant lacked reasonable grounds for concluding that his or her expression was non-infringing.<sup>269</sup> The latter, "conduct"-based form of negligence inquiry would have damages liability turn on whether the defendant "acted reasonably" in adjudging whether he or she infringed.<sup>270</sup>

### 3. Willfulness Requirement for Statutory Damages

Finally, awards of statutory damages should be confined to cases in which a plaintiff has shown willfulness. The reason for this is straightforward: it is in (1) the award of extra-compensatory damages, (2) against instances of defendant expression, (3) without a *scienter* requirement, that copyright's vagueness is most constitutionally problematic. All three of the collateral factors point to a constitutional violation. The protections owed to defendants in civil infringement suits, brought against expressive conduct for statutory damages made available on a preponderance of the evidence standard of proof, must therefore be significant. The concept of willfulness, already integrated into copyright as the state-of-mind predicate for criminal penalties and *increased* statutory damages,<sup>271</sup> is not alien or inapposite to the infringement action.

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268. RESTATEMENT (SECOND) OF TORTS § 580B, cmt. g ("The negligence standard").

269. *Cf., e.g.*, *Am. Future Sys., Inc. v. Better Bus. Bureau of Eastern Pa.*, 923 A.2d 389, 397 (Pa. 2007) (endorsing a negligence test for defamation claims by which the plaintiff must show the defendant had "no reasonable grounds to believe the defamatory matter was true"); *Winn v. United Press Int'l*, 938 F. Supp. 39, 43 (D.D.C. 1996) ("lacked reasonable grounds for such belief") (applying Virginia law).

270. *Cf. Winn*, 938 F. Supp. at 39, 43, 44–46 (holding that the defendant did not act unreasonably in republishing an untrue statement from a reputable source that was not, on its face, improbable).

271. *See* 17 U.S.C. §§ 504(c)(2), 506 (2006); *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1148 (10th Cir. 2009).

Courts would simply apply it more broadly in actions for statutory damages.

A willfulness requirement for statutory damages is more difficult to reconcile with defamation law, copyright's publication tort analogue. The *Gertz* Court did hold that, in defamation cases, a court cannot constitutionally presume damages (as the plaintiff's right to elect statutory damages allows) or award punitive damages (as statutory damages typically are, when elected) absent a showing of actual malice; that is actual knowledge of untruth or reckless disregard for truth.<sup>272</sup> Given this holding, a willfulness requirement for statutory damages—the primary purposes of which are to punish and deter infringement and to spare the plaintiff the difficulty of proving actual damages<sup>273</sup>—seems even more appropriate in the copyright setting. However, a subsequent Supreme Court decision, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>274</sup> narrowed the *Gertz* holding, ruling that in cases not involving matters of public concern, an award of presumed or punitive damages does not require proof of actual malice.<sup>275</sup>

*Dun & Bradstreet's* defamation ruling notwithstanding, a willfulness requirement for statutory damages is more consistent with vagueness doctrine values, which command that greater protections be given to defendants as the consequences of violating the law grow more severe, and specifically, as they cross over from civil to quasi-criminal and criminal. Lawmakers could choose to bring copyright in line with the Supreme Court's public/private treatment of defamation in *Dun & Bradstreet* and *Gertz*, by requiring a showing of willful infringement when the content of the defendant's expression involves a matter of public concern and accepting simple negligence otherwise. Of course, to achieve complete congruence with defamation law, one would be required to take account of *New York Times Co. v. Sullivan*<sup>276</sup> and set down a willfulness standard for any damages in infringement suits targeting expression of public concern. The result of this parsing would be that a showing of willfulness would be required in order to obtain

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272. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

273. *See supra* text accompanying notes 183, 184 (punish and deter); 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1170 (1994) ("Since actual damages and profits frequently are difficult to prove, the Copyright Act provides for minimum and maximum statutory damages.").

274. 472 U.S. 749 (1985).

275. Three justices so held in a plurality opinion, *see id.* at 761, and two others wrote separate decisions suggesting that they would have overruled *Gertz* outright, *see id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).

276. 376 U.S. 254 (1964).

actual or statutory damages in public concern cases, whereas negligence would supply a sufficient predicate for damages of either sort in all others. The law would draw no principled distinction between cases warranting statutory damages and those for which actual damages are adequate, a result that would nullify the effect of the vagueness doctrine's "criminal/quasi-criminal remedies" collateral factor. Thus, it would seem most consistent with the vagueness doctrine, and at the same time would introduce less confusion and disruption into the civil action for infringement, to abandon outright the defamation cases' public/private distinction and instead require willfulness for statutory damages and negligence for actual damages in the copyright context.

#### *D. The Rightsholder's Complaint*

A rightsholder might protest that the reform proposed above abrogates the longstanding principle that intention is irrelevant to infringement,<sup>277</sup> and that, in contrast to review of criminal laws (or civil regulations), the cost of steps taken to resolve the vagueness of a civil claim is borne by private parties—in this case, the rightsholders who find their grants of exclusivity diluted and devalued.<sup>278</sup> After all, whatever an infringer intended, his or her acts are undertaken in derogation of a property right that often (if not always) causes economic losses to the rightsholder. In the reform model set forth above, however, strict liability would still adhere if the plaintiff would be satisfied with an injunction. Accordingly, the introduction of state-of-mind requirements for compensatory and punitive damages does not require a rightsholder to endure the consequences of ongoing expression that innocently infringes his or her rights. For that matter, given that the current remedies structure would remain in place for instances of counterfeiting, piracy, and consumptive infringement (among other forms of infringing conduct in which defendants cannot claim an expressive stake), rightsholders could tackle the conduct that is of greatest commercial concern on the same terms as they do now.

Of course, reforms undertaken to protect defendant speakers necessarily reduce the value of a plaintiff's copyright. In fact, it has been suggested that the chilling effect of copyright's vague standards is attractive because it supplies a further creative motivation to

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277. See *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198–99 (1931); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 537 (6th Cir. 2004); *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997).

278. See *Balganesh*, *supra* note 238, at 1617.

authors “who need *ex ante* incentives in excess of [copyright’s] curtailed entitlement.”<sup>279</sup> However, in the zero-sum game of private rights versus public privileges, these benefits of legal uncertainty accrue to creators at the expense of public expressive rights. While it is true that copyright’s incentive scheme has constitutional status just as free expression does,<sup>280</sup> and that courts have embraced the view that the grant of proprietary rights in fact promotes free expression,<sup>281</sup> it does not follow that the public should absorb the consequences of a vague law simply because vagueness might serve to support the law’s purpose. Indeterminacy will always serve to amplify the restrictive effect of a speech regulation and thereby advance that law’s purposes. In copyright’s case, the vast majority of freely uttered speech is not “fixed in a tangible medium of expression,”<sup>282</sup> and still less speech is commercially exploited. The result is that copyright provides a rather limited service as “engine” of expression, and this service is likely overemphasized in the case law. More importantly, the Constitution only *empowers* Congress to enact property-based schemes to “promote the Progress . . . of the Sciences;” the First Amendment *commands* that Congress refrain from infringing the right of free speech.<sup>283</sup>

## CONCLUSION

This Article does not claim to supply a definitive answer to the question whether copyright law is unconstitutionally vague. Given the nature of the void-for-vagueness doctrine, there probably is no definitive answer, other than that to which five or more agreeable Supreme Court Justices subscribe and so extend the force of law. Surely, though, a vagueness challenge to copyright holds a great deal more constitutional substance than Judge Patel was willing to recognize in the *Aharonian* case. Courts and commentators accept that copyright’s speech-protective doctrines, such as substantial similarity and fair use, are vague by necessity. It seems fair to argue, further, that copyright is so complicated and thickly thatched with potentially dispositive legal issues as to raise vagueness questions about the infringement action generally.

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279. *Id.*

280. *See* U.S. CONST. art. I, § 8, cl. 8.

281. *See, e.g.,* Harper & Row, Publ’rs. v. Nation Enters., 471 U.S. 539, 558 (1985).

282. 17 U.S.C. § 102 (2006).

283. *Compare* U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have power . . . .”), *with* U.S. CONST. amend. I (“Congress shall make no law . . . .”).

Whether or not copyright's vagueness problem lands it on the wrong side of the Constitution, there is indeed a problem, it is constitutional in nature, and the Supreme Court's teachings on the vagueness doctrine point the way to worthwhile reforms. Concededly, the Court's writings on vagueness *qua* vagueness have historically been themselves vague. This probably cannot be helped, and the same is largely true of copyright's vagueness: vagueness persists in the law either because it advances another First Amendment value (as with fair use), or because it has proven to be an unshakeable side effect of core copyright policy (idea v. expression, substantial similarity). The Court's vagueness cases do, however, offer some concrete guidance in the form of the three collateral factors: specifically, the void-for-vagueness doctrine looks askance at laws that burden free speech, are criminal or quasi-criminal, and do not admit a *scienter* requirement. The civil copyright infringement action, in its current and longstanding configuration, comes up wanting as to all three of these important collateral factors.

If, as argued here, the vagueness itself is so ingrained in copyright that the law cannot be cured of it, it follows that lawmakers should look to the collateral factors for ways to mitigate the constitutional consequences of vagueness. A radical approach to vindicating the vagueness doctrine would do away with copyright's provision for statutory damages altogether and impose a strict requirement that a plaintiff prove willful infringement to establish a right to actual damages. Indeed, for all we know about how the collateral factors interrelate with a given law's measure of uncertainty, the vagueness doctrine might well require this result. This Article proposes a more measured reform that does less violence to copyright's current balancing of private rights and public privileges and instead incorporates, as applicable, the wisdom of the Supreme Court's defamation jurisprudence. This approach, which would retain strict liability for claims for injunctive relief while requiring proof of negligence for actual damages and willfulness for statutory damages, is more likely to appeal to lawmakers.

To date, the courts have deflected questions about copyright's constitutionality with the assertion that copyright itself incorporates protections that reconcile the law's restrictions on speech with the First Amendment. Even if we take the courts at their word, the problem remains that these protections do next to nothing *ex ante* to clarify what expression copyright protects. One cannot know whether the three-tiered infringement action proposed here is constitutionally necessary, or for that matter, whether it would be

sufficient to save the civil infringement claim from the void-for-vagueness doctrine. That said, it would surely be an improvement on the existing scheme, which confronts a would-be speaker with an impossible tangle of unsettled legal issues that directly pertain to his or her right to engage in free speech. It is small consolation that the law promises determinacy through costly and protracted litigation, after which, if the speaker guesses right, he or she will have avoided the levy of a self-consciously punitive award of statutory damages.