
UCLA Journal of Law & Technology

Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap

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Doctor of Jurisprudence May 2007

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I. Introduction

[¶1] “Social norms — understandings or expectations about how [people] ought to behave, enforced not through some centralized norm enforcer, but rather through the understandings and expectations of just about everyone within a particular community — direct and constrain [people’s] behavior in a far wider array of contexts than any law.”¹ Unlike the law, norms can quickly adapt to changes in technology and culture.

[¶2] Digital technology and the rise of the internet have shifted certain norms, creating dissonance with existing copyright law in the process.² Specifically, copyright is automatically granted and protected unless explicitly waived.³ Further, a person who violates any of a copyright owner’s exclusive rights is strictly liable as an infringer.⁴ However, digital technology generally enables anyone to easily copy, distribute, and make derivative works from available digital media without regard to applicable copyright law.⁵ From these technologies new sharing norms have emerged and found expression through peer-to-peer networks, open source software, sampling, and various other technological regimes where unlicensed copying and distribution are deemed acceptable.⁶

[¶3] In this new environment, some content producers with large sunk costs may desire to restrict *all* unauthorized uses, while other content producers adhering to new

¹ Lawrence Lessig, *The Laws of Cyberspace 2* (Apr. 3, 1998) (draft of paper presented at the Taiwan Net ‘98 conference, Taipei), http://www.lessig.org/content/articles/works/laws_cyberspace.pdf.

² See generally Christopher Jensen, Note, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531 (2003).

³ 17 U.S.C. § 102(a) (2000).

⁴ 17 U.S.C. § 501(a) (2000).

⁵ See Jensen, *supra* note 2, at 556.

⁶ See David W. Opperbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1696-99 (2005).

norms may wish to waive copyright restrictions while prohibiting other behavior such as “failure to properly attribute authorship.”⁷ Yet, many others may sit between these extremes, preferring to allow certain uses while prohibiting others. This latter group of copyright owners may implement rights management systems (limits imposed via technology) or license specific uses of their works. If copyright owners do not express their preferences then the law automatically restricts all uses.⁸ This result may not reflect the owner’s preferences or technological norms.

[¶4] Digital rights management systems allow a copyright holder to “implement[] technical constraints on access to and use of digital information.”⁹ Copyright law provides supplemental protection by prohibiting the circumvention of these systems.¹⁰ A copyright owner usually chooses from one of many ready-made rights management systems.¹¹ However, when one of these ready-made systems does not reflect the rights holder’s preferences, the copyright owner may choose to forego such protection, thereby enabling free sharing. The result is the automatic reservation of all rights - a default imposed by the law that may also fail to reflect the copyright owner’s preferences.

[¶5] Licenses may be exclusive or nonexclusive, however most licenses granted to consumers are necessarily nonexclusive (except where there is only one consumer, such as a work for hire transaction). “When the totality of the parties’ conduct indicates an

⁷ CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 74 (Hyperion 2006) (quoting Columbia University law professor Tim Wu).

⁸ *See* 17 U.S.C. § 501(a); *but see* 17 U.S.C. § 107 (2000) (stating that some uses, such as for news reporting, may be fair use).

⁹ Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 50 (2001).

¹⁰ *See* Digital Millennium Copyright Act §103(a), 17 U.S.C. § 1201 (2000).

¹¹ For example, a musician can post an audio file such as an mp3 (providing little, if any, protection) as a streaming Real Audio file, or as a protected Windows Media file.

intent to grant such permission, the result is a nonexclusive license.”¹² Nonexclusive licenses may be expressly written, orally stated, *or* implied from conduct,¹³ and the scope of the implied license depends on the licensor’s intent.¹⁴ Recently, the Federal District Court for the District of Nevada found an implied license for Google to “Cache” the plaintiff’s online works where the plaintiff, with knowledge of how Google would use copyrighted works posted online, and knowledge of how to prevent such use, proceeded to place his works online without implementing such preventative measures.¹⁵ This broad reading of the implied license doctrine, gestures toward a future where copyright law is capable of accounting for copyright owner intent as defined by applicable technological constraints.

[¶6] Express permission to deviate from a social norm may be easily understood. For example, a four-star restaurant may post a sign that reads “jacket and tie are optional.” Express copyright permissions, on the other hand, are necessarily expressed in legalese, a language not often understood by content consumers or many content producers. Faced with complicated licensing restrictions, consumers may simply ignore applicable legal language and use the content freely, limited only by applicable social norms, markets and technological constraints. Similarly, without a working knowledge of copyright law, many content producers who prefer not to utilize rights management systems may simply fail to express *any* preferences. One possible solution is for a rights holder to offer their work under a Creative Commons license. Unfortunately, while these

¹² 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[A][7] at 10-49 to -50 (2007).

¹³ *Id.*

¹⁴ See *Effects Assocs. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990); *Lulirama Ltd., Inc. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 882 (5th Cir. 1997).

¹⁵ See *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

licenses may offer easily understandable translations of their underlying legalese, they are non-revocable, and automatically cover all of the licensed work's manifestations.¹⁶ In addition, the enforceable license is found not in the translation, but in the underlying legalese, which the average rights holder may not properly understand.¹⁷ These limitations may fail to account for specific copyright owner preferences.

[¶7] This paper will argue that by undermining rather than bolstering owner-preferred sharing norms, current copyright law impedes its underlying purpose to aid in the progression of science. To solve this problem a mechanism within the law must reconcile owner preferences with copyright law. Sections II and III provide a brief overview of both rights management systems and copyright law. Section IV analyzes the divergence between copyright law and sharing norms, and identifies problems resulting from this gap. Section V argues that a more robust implied licensing regime could provide a legal mechanism capable of shrinking the copynorm-copyright gap. However, the scope of such a license should be interpreted narrowly by reference to applicable technology, and it should remain limited to the objective intent of the copyright owner. This interpretation would free many content aggregators, distributors, and consumers from fear of frivolous litigation, and would provide a valuable avenue for copyright owners to express legally supported preferences without requiring detailed knowledge of the law.

II. Right Management Systems

[¶8] Broadly defined, rights management systems, commonly referred to as “DRM” (digital rights management) or “ARM” (automated rights management),

¹⁶ See Creative Commons, Frequently Asked Questions, <http://www.wiki.creativecommons.org/FAQ> (last visited Oct. 31, 2007) [hereinafter *Creative Commons FAQ*].

¹⁷ *Id.*

encompass “all measures used to protect content in digital media devices and services.”¹⁸

“Much as physical barriers and spatial relations constrain behavior in actual space, technical standards constrain behavior in cyberspace.”¹⁹

[¶9] The rise of digital content has freed information from the constraints of physical media. Content can now travel thousands of miles per second, and can be almost infinitely replicated without a loss in quality or substantial costs to the copier.²⁰ In this world without walls, all cyber-property is up for grabs. Thus, the purpose behind rights management systems is to make it possible, in this new world, for content providers to enforce standard copyright claims without resort to expensive litigation.²¹

[¶10] For example, Macrovision’s Analog Copy Protection (ACP) technology has been added as a requirement for Blu-ray and HD DVD formats.²² “ACP is a clever application of digital signal processing that selectively distorts a digital video signal that is sent to an analog output player (or PC), so that the image quality for viewers is not affected but if someone tries to record the analog output digitally, the digital copy is visibly degraded.”²³ This protection expresses and enforces owner preferences against copying. Similarly, as of early 2006 Sony-BMG had released over 15 million copy-protected CDs in the United States.²⁴

¹⁸ CTR. FOR DEMOCRACY & TECH., EVALUATING DRM: BUILDING A MARKETPLACE FOR THE CONVERGENT WORLD 1 n.1 (2006), <http://www.cdt.org/copyright/20060907drm.pdf>.

¹⁹ Burk & Cohen, *supra* note 9, at 50.

²⁰ See Jensen, *supra* note 2, at 556.

²¹ Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 564 (1998).

²² See Bill Rosenblatt, *AACS to Include Macrovision’s ACP*, DRM WATCH, June 1, 2006, <http://www.drmwatch.com/standards/print.php/3610511>.

²³ *Id.*

²⁴ ELEC. FRONTIER FOUND., UNINTENDED CONSEQUENCES: SEVEN YEARS UNDER THE DMCA 6 (2006), http://www.eff.org/files/DMCA_unintended_v4.pdf.

¶11] The Digital Millennium Copyright Act (DMCA),²⁵ added to the copyright law in 1998, imposes civil and criminal penalties for circumventing, manufacturing, or trafficking in a technology designed to circumvent a technological measure that “effectively controls access to a work.”²⁶ The DMCA also imposes these penalties for manufacturing or trafficking in a “technology, product, service, device, component, or part thereof ... is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.”²⁷

III. Copyright Law Summary

a. General Rights Granted

¶12] Copyright protection is automatically granted to “original works of authorship fixed in any tangible medium of expression,”²⁸ including data stored in digital form.²⁹ The copyright owner’s exclusive rights described in section 106 of the Copyright Act include the right to reproduce the work, prepare derivative works, distribute copies of the work to the public, perform the work publicly, and display the work publicly.³⁰ By logical extension, these rights are divisible into smaller units.³¹ For example, the rights of reproduction and distribution include the rights to reproduce and distribute the work through each available medium.³² Thus, a copyright owner may choose to offer a song for sale on iTunes and not on Napster. Similarly, a copyright owner may choose to sell

²⁵ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

²⁶ 17 U.S.C. § 1201(a)(1)(A) (2000).

²⁷ 17 U.S.C. § 1201(b)(1) (2000).

²⁸ 17 U.S.C. § 102(a) (2000).

²⁹ See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

³⁰ 17 U.S.C. § 106 (2000). In the case of sound recordings, the copyright owner also has the exclusive right to perform the work publicly by means of a digital audio transmission. *Id.*

³¹ See 17 U.S.C. § 201(d)(2) (2000).

³² See *id.*; 17 U.S.C. § 106.

their song on CD for one price and online at a different price. However, these rights are subject to the limitations specified in sections 107 through 122 of the Act which includes the doctrine of fair use.³³ Additionally, these rights are capable of being transferred or licensed.³⁴

b. Infringement

[¶13] “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright”³⁵ Under this formulation, the plaintiff need not prove *intentional* copying.³⁶ Thus to prevail in an action for copyright infringement, a plaintiff need only prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”³⁷

[¶14] Factors underlying the requirement of ownership include originality, copyrightability of the subject matter, compliance with statutory formalities, and transfers of rights.³⁸

[¶15] Copying is a term of art which actually includes two separate components.³⁹ “First, there is the factual question whether the defendant, in creating its work, used the plaintiff’s material as a model, template, or even inspiration.”⁴⁰ Second it must be determined “whether the defendant’s work is substantially similar to plaintiff’s work such that liability may attach.”⁴¹ Courts have created various tests for determining when two

³³ See 17 U.S.C. § 106.

³⁴ See 17 U.S.C. § 201(d).

³⁵ 17 U.S.C. § 501(a) (2000).

³⁶ See *id.*

³⁷ 4 NIMMER, *supra* note 12, § 13.01, at 13-6.

³⁸ *Id.*, § 13.01[A], at 13-6 to -7.

³⁹ *Id.*, § 13.01[B], at 13-8.

⁴⁰ *Id.*

⁴¹ *Id.* at 13-9.

works are substantially similar.⁴² While these tests differ in important ways, they all seek to draw a line between the two extremes of no similarity and literal similarity.⁴³

Substantial similarity clearly results from literal or verbatim duplication.⁴⁴ In addition, nonliteral similarity and fragmented literal similarity may also qualify as substantial similarity.⁴⁵

[¶16] Nonliteral similarity deals with “the situation where there is comprehensive similarity but no word-for-word or other literal similarity.”⁴⁶ “Balanced against this principle is the countervailing consideration that copyright does not protect against the borrowing of abstract ideas contained in the copyrighted work. Therefore, if the only similarity between the plaintiff’s and defendant’s works is that of the abstract idea, there is an absence of *substantial* similarity”⁴⁷

[¶17] Fragmented literal similarity deals with the situation where the similarity, though literal, is not comprehensive.⁴⁸ Thus “no more than a line, or a paragraph, or a page or chapter of the copyrighted work has been appropriated.”⁴⁹ While no clear rule of thumb is available to determine when fragmented literal similarity constitutes substantial similarity, the guiding principle states: “If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro*

⁴² See *id.*, § 13.03[A], at 13-34.1 to -36.

⁴³ See *id.* at 13-34.2 to -36.

⁴⁴ See *id.*, § 13.03[A][1], at 13-36.

⁴⁵ *Id.* at §§ 13.03[A][1]-[A][2]. These are terms invented by the authors. See *id.*, § 13.03[A], at 13-36.

⁴⁶ *Id.*, § 13.03[A][1], at 13-36.

⁴⁷ *Id.* at 13-37.

⁴⁸ *Id.*, § 13.03[A][2], at 13-53.

⁴⁹ *Id.* For example, sampling a few bars of a song for inclusion in a derivative work can be enough to constitute infringement. See *id.*, § 13.03[A][2][a], at 13-54 to -56.

tanto.”⁵⁰ This value judgment ultimately requires the trier of fact to “determine the importance of that material that is common to both parties’ works.”⁵¹

c. Defenses

[¶18] A defendant may prevail in an infringement action either because of the plaintiff’s failure to prove ownership and copying or “by reason of the availability of a defense, such as [fair use or] a license or assignment from the copyright owner.”⁵²

i. Fair Use

[¶19] Fair use is a judicially created doctrine recognizing “that certain acts of copying are defensible.”⁵³ This doctrine was statutorily codified in the Copyright Act of 1976 (the Act).⁵⁴ “Congress . . . intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”⁵⁵ The Act states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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

⁵⁰ *Id.*, § 13.03[A][2][a], at 13-57 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

⁵¹ *Id.* at 13-57.

⁵² *Id.*, § 13.04, at 13-153 to -154.

⁵³ *Id.*, § 13.05, at 13-155.

⁵⁴ *Id.* at 13-155 to -156.

⁵⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (alteration brackets in original) (internal citations omitted) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁶

[¶20] Despite the specific examples and factors listed in section 107, “the statute, like the doctrine it recognizes, calls for case-by-case analysis.”⁵⁷ Thus, the statute does not create any bright-line rules and “factors other than those enumerated may prove to have a bearing upon the determination of fair use.”⁵⁸

ii. Transfers and Licenses

1. Generally

[¶21] The Copyright Act defines a “transfer of copyright ownership” as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright . . . but not including a nonexclusive license.”⁵⁹ “[O]wnership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law”⁶⁰ While “transfer[s] of copyright ownership” (including exclusive licenses) *must* be in writing,⁶¹ the same requirement does not apply to nonexclusive licenses.⁶² In either case, the contract law of the state governing the license or transfer agreement “provides the rules of contractual construction of licenses to the extent that they do not interfere with the federal protection of intellectual property.”⁶³

2. Nonexclusive Licenses

⁵⁶ 17 U.S.C. § 107 (2000).

⁵⁷ *Campbell*, 510 U.S. at 577.

⁵⁸ 4 NIMMER, *supra* note 12, § 13.05[A], at 13-159.

⁵⁹ 17 U.S.C. § 101 (2000).

⁶⁰ 17 U.S.C. § 201(d)(1) (2000).

⁶¹ 17 U.S.C. § 204(a) (2000).

⁶² 17 U.S.C. § 101.

⁶³ *In re Valley Media, Inc.*, 279 B.R. 105, 140 (Bankr. D. Del. 2002).

[¶22] “When the totality of the parties’ conduct indicates an intent to grant such permission, the result is a nonexclusive license.”⁶⁴ Nonexclusive licenses can be expressly written or orally stated or even implied from conduct.⁶⁵ Additionally, “nonexclusive licenses are revocable absent consideration.”⁶⁶

a. Express Licenses

[¶23] Express nonexclusive licenses can be granted orally or in writing.⁶⁷ However, it is obviously easier to prove the existence of a written license over an oral license.⁶⁸ “[W]ritten grants of nonexclusive licenses can also exert significance in the event of a conflicting transfer of copyright ownership.”⁶⁹

b. Implied Licenses

[¶24] “In most of the cases that have found implied nonexclusive licenses, the copyrighted work was created at the express request of the implied licensee in order to be incorporated into another work or used in a particular way.”⁷⁰ However, implied licenses are not limited to this typical scenario, and “[t]he touchstone for finding an implied license . . . is intent.”⁷¹ Consequently, the *scope* of the implied license depends on the licensor’s intent.⁷² “Since a nonexclusive license does not transfer ownership of the copyright from the licensor to the licensee, the licensor can still bring suit for copyright

⁶⁴ 3 NIMMER, *supra* note 12, § 10.03[A][7], at 10-49 to -50.

⁶⁵ *Id.*

⁶⁶ *Id.*, § 10.02[B][5], at 10-28.1.

⁶⁷ *Id.*, § 10.03[A][7], at 10-49.

⁶⁸ *See id.*, § 10.03[A][7], at 10-52.1.

⁶⁹ *Id.*

⁷⁰ Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 183 (2005).

⁷¹ John G. Danielson, *Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003).

⁷² *See Effects Assocs. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990); *Lulirama Ltd., Inc. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 882 (5th Cir. 1997).

infringement if the licensee’s use goes beyond the scope of the nonexclusive license.”⁷³

However, the burden is on the plaintiff to show that the defendant’s use exceeded the scope of the implied license.⁷⁴

[¶25] For example, in *Lulirama Ltd., Inc., v. Axxess Broadcast Services., Inc.*, the Fifth Circuit held that the defendant had not exceeded the scope of the implied license where the plaintiff presumably intended a work for hire agreement which consequently would have granted the defendant “the right to take any action consistent with copyright ownership.”⁷⁵ This is true even though the implied license was not in writing and thus could not constitute a valid work for hire agreement.⁷⁶ By comparison, the Ninth Circuit in *Oddo v. Ries* held that the implied license granting the plaintiff the right to use the defendant’s articles had been exceeded.⁷⁷ Oddo and Ries had formed a partnership to create and publish a book where Oddo would provide previously written articles for use in the book and Ries would provide capital.⁷⁸ Ries, unhappy with Oddo’s manuscript, hired another writer who incorporated portions of Oddo’s pre-existing articles.⁷⁹ “By publishing the other writer’s book, Ries exceeded the scope of his implied license to use Oddo’s articles.”⁸⁰

i. Field v. Google

[¶26] In a recent and groundbreaking opinion, the district court in *Field v. Google* held that Field granted Google an implied license to copy and distribute Field’s

⁷³ *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 779 (3rd Cir. 1991) (quoting *Effects Assocs.*, 908 F.2d at 558 n.5).

⁷⁴ *Quinn v. City of Detroit*, 23 F. Supp. 2d 741, 749 (E.D. Mich. 1998).

⁷⁵ *Lulirama*, 128 F.3d at 882.

⁷⁶ *Id.*

⁷⁷ *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984).

⁷⁸ See *Effects Assocs.*, 908 F.2d at 558 (summarizing *Oddo v. Ries*).

⁷⁹ *Id.* at 558 n.5.

⁸⁰ *Id.*

copyrighted works by caching them.⁸¹ “Google . . . uses an automated program . . . to continuously crawl across the Internet, to locate and analyze available Web pages,” and “stores the HTML code from those pages in a temporary repository called a cache.”⁸² “Google automatically provides ‘Cached’ links for pages that are included in its index and search results unless instructed otherwise.”⁸³ These “‘Cached’ links allow users to view pages that the user cannot, for whatever reason, access directly.”⁸⁴ A web site owner can easily place a meta-tag on their web pages instructing Google not to archive, index or provide these “Cached” links.⁸⁵ Field had created a web site publishing fifty one of his copyrighted works where web surfers could access the works for free.⁸⁶ Further, “Field consciously chose not to use the . . . meta-tag [instructing Google not to archive] . . . his Web site.”⁸⁷ “As Field expected, [Google automatically] visited his site and indexed its pages, making the pages available in Google search results.”⁸⁸ “When Google learned that Field had filed . . . his complaint, Google promptly removed the ‘Cached’ links to all of the pages of his site.”⁸⁹

[¶27] The court held that “[a]n implied license can be found where the copyright holder engages in conduct ‘from which the other party may properly infer that the owner consents to his use.’”⁹⁰ Further, “[c]onsent to use [a] copyrighted work need not be manifested verbally and may be inferred based on silence where the copyright holder

⁸¹ Field v. Google Inc., 412 F. Supp. 2d 1106, 1115-16 (D. Nev. 2006).

⁸² *Id.* at 1110.

⁸³ *Id.* at 1113.

⁸⁴ *Id.* at 1111.

⁸⁵ *See id.* at 1112-13.

⁸⁶ *See id.* at 1114.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1116 (alteration brackets omitted) (quoting *De Forest Radio Tel. & Tel. Co. v. United States*, 273 U.S. 236, 241 (1927)).

knows of the use and encourages it.”⁹¹ Consequently, “with knowledge of how Google would use the copyrighted works [which Field] placed on [his web] pages, and with knowledge that he could prevent such use, Field instead made a conscious decision to permit [the use].”⁹² Thus, Field’s “conduct [was] reasonably interpreted as the grant of a license to Google for [such] use.”⁹³

IV. The Copynorm – Copyright Gap, and Why Existing Regimes Fail to Bridge the Divide

a. Democratized Content and Emerging Norms

[¶28] Professor Lawrence Lessig argues that behavior is generally regulated by four types of constraints – norms, architecture, markets, and law.⁹⁴ Social norms impose non-legal sanctions for “failure to comply with conventional standards of conduct.”⁹⁵ “[A]rchitecture constrains the set of possible behaviors.”⁹⁶ Markets regulate by price which sets a range of opportunities available to a consumer.⁹⁷ Finally, law regulates behavior by imposing sanctions *ex post*.⁹⁸ While these regulators can be conceptualized separately, each constraint can affect the other three.⁹⁹ This section reviews how these regulatory constraints specifically apply to the internet and digital media environment. This section then concludes that changes in architecture have resulted in a new set of norms which widely diverge from applicable copyright law.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

⁹⁵ Jensen, *supra* note 2, at 535.

⁹⁶ Daniel B. Levin, Note, *Building Social Norms on the Internet*, 4 YALE J.L. & TECH. 97, 99 (2002), <http://www.yjolt.org/files/levin-4-YJOLT-97.pdf>.

⁹⁷ Lessig, *supra* note 94, at 507.

⁹⁸ *Id.*

⁹⁹ *See* Levin, *supra* note 96, at 99; *See* Jensen, *supra* note 2, at 536.

i. Social Norms

[¶29] “Like law, norms regulate by threatening punishment ex post. But unlike law, the punishments of norms are not centralized. Norms are enforced (if at all) by a community, not by a government.”¹⁰⁰ Various “factors . . . affect whether a norm will influence people’s behavior,” including perceptions of peer behavior, relevant peer groups, self-interest, and reciprocity.¹⁰¹

[¶30] “Currently, a norm exists that accepts the copying of copyright protected digital files.”¹⁰² For example, before being shut down, Napster enabled as many as 62 million users to freely share files.¹⁰³ More recently, Sweden’s “Pirate Party” political group released a new “darknet”¹⁰⁴ file sharing service called Relakks.¹⁰⁵ “Founded in January [2006], Pirate Party say [sic] it has three issues on its agenda: shared culture, free knowledge and protected privacy.”¹⁰⁶

[¶31] These norms permitting the “copying, distribution, and use of expressive works” have been referred to as “copynorms.”¹⁰⁷ “Copynorms moderate, extend, and undermine the effect of copyright law.”¹⁰⁸ Various factors may have contributed to the rise of these copynorms. One factor may be that intellectual property is nonrivalrous, and thus unauthorized use may appear to be a victimless crime.¹⁰⁹ Another factor may

¹⁰⁰ Lessig, *supra* note 94, at 507.

¹⁰¹ Mark Schultz, *Copynorms: Copyright and Social Norms*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* (Peter Yu ed., forthcoming), available at BERKELEY CTR. FOR LAW & TECH., 2006, Paper 26, at 12-17, <http://repositories.cdlib.org/bclt.lts/26>.

¹⁰² Levin, *supra* note 96, at 132.

¹⁰³ See Brad Stone, *Good to the Last Drop*, NEWSWEEK, Feb. 26, 2001, at 59.

¹⁰⁴ “Darknet is a generic term for a closed network in which only existing members can let in new members.” *Relakks Says Relax with Its Anonymous File-Sharing Service*, ONLINE REP., Aug. 19, 2006, http://www.onlinereporter.com/article.php?article_id=7522.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Schultz, *supra* note 101, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ Jensen, *supra* note 2, at 540.

involve a perceived lack of legitimacy concerning copyright laws, which have historically been viewed as benefiting only a small group of narrow interests.¹¹⁰ Further, copyright owners have historically enforced their rights against commercial rivals rather than consumers, thereby reducing most public deterrent effect.¹¹¹ Due to technological limitations, “[m]ost consumers had never before needed to *choose* whether to comply with copyright law and thus had little reason to consider whether compliance was the right thing to do.”¹¹² Finally, lawsuits by the RIAA may have caused consumers to infer that a large number of their peers were engaged in file-sharing, thereby suggesting widely-held normative acceptance.¹¹³

[¶32] Some copynorms spawned by the internet include the middle ground protection norms offered under Creative Commons, a general attribution norm, viral open source programming norms, search engine caching norms, and e-mail quotation (i.e. as in a reply e-mail) norms.¹¹⁴ While various normative frameworks exist in this forum, all copynorms share one unifying quality: they all require that the copyright owner permit users to exercise *some* amount of the owner’s exclusive rights.

[¶33] Producers and users express adherence to copynorms by signaling.¹¹⁵ People signal their normative preferences by voluntarily engaging in costly actions such as gift giving or attribution and shunning individuals who fail to act in accordance with these norms.¹¹⁶ These signals help repeat players to earn a good reputation within their

¹¹⁰ *Id.* at 540-541.

¹¹¹ *Id.* at 543-544.

¹¹² Schultz, *supra* note 101, at 33.

¹¹³ *See id.* at 13.

¹¹⁴ *Id.* at 18-25.

¹¹⁵ Levin, *supra* note 96, at 107-08.

¹¹⁶ *Id.*

applicable normative community.¹¹⁷ Thus, whether the copyright owner allows use of their content in multiple formats, allows each user to make a set amount of copies, or offers their content for free, the copyright owner’s reputation requires that these permissions be clearly and easily expressed.

ii. Architecture

[¶34] Architecture in cyberspace consists of “the software and hardware that constitutes cyberspace as it is—the set of protocols, the set of rules, implemented, or codified, in the software of cyberspace itself, that determine how people interact, or exist, in this space.”¹¹⁸ Users “don’t choose whether to obey the structures that [architecture] establishes — hackers might choose, but hackers are special. For the rest of us, life in cyberspace is subject to the code.”¹¹⁹ Thus, architectural constraints define the default rules by which content use is regulated.

[¶35] Before the digitization of media, users “lacked . . . the technological wherewithal to reproduce works on a commercially significant scale. Accordingly, copyright owners had little reason to concern themselves with the [presence] of a widely embraced copyright norm.”¹²⁰ However, the emergence of the digital media and the internet has democratized production, reproduction, and distribution on an unprecedented scale.¹²¹

[¶36] The internet architecture itself does not constrain users. Without any digital fences, internet user behavior is mostly left to be regulated by law, norms, markets, and user-created architecture (rights management systems). The consequent flood of free

¹¹⁷ *Id.*

¹¹⁸ Lessig, *supra* note 1, at 4.

¹¹⁹ *Id.*

¹²⁰ Jensen, *supra* note 2, at 550.

¹²¹ *Id.*

content has shifted value from the content itself to uploader reputation.¹²² Since a good reputation draws traffic, and traffic can be turned into money, reputation now represents precious internet currency.¹²³

1. Architecture of Rights Management Systems

[¶37] Since the *internet* architecture itself fails to constrain users, content creators increasingly incorporate digital fences into their *content*. These “technical controls can impose conditions that formerly might have been the subject of a detailed license agreement, [thus] such controls might be viewed as equivalent to a sort of licensing regime.”¹²⁴ A content producer can signal various quasi-licensed permissions by implementing one of the many available rights management systems.¹²⁵

[¶38] In addition to imposing useful technological barriers, these architectural changes can transform norms by shifting the social meaning attributed to unauthorized copying.¹²⁶ Specifically, *hackers* may be able to pick any of these digital locks thereby reducing the efficacy of the architectural regulation. However, “[t]he difficulty [for the *average user*] of obtaining the bypassing software, along with the fact th[at] most users who do attempt to download the program will receive a message that their behavior is in some normative sense ‘wrong,’ may deter individuals from using the circumvention

¹²² See ANDERSON, *supra* note 7, at 73-75.

¹²³ See *id.*

¹²⁴ Burk & Cohen, *supra* note 9, at 51.

¹²⁵ It has been argued that rights management systems allow “copyright owners [to] determine the rules that are embedded into the technological controls.” *Id.* at 50. However, it is unlikely that most copyright owners are sufficiently proficient computer programmers to be capable of designing intricate technological controls reflecting their specific permissions. Thus, the majority of content creators must simply choose from available technologies.

¹²⁶ See Levin, *supra* note 96, at 132.

technology.”¹²⁷ Thus, code does not have to prevent restricted uses, only foster a norm that discourages such uses.¹²⁸ “[A] perfect encryption solution is not necessary.”¹²⁹

[¶39] However, any ready-made rights management system may not reflect a copyright owner’s particular preferences. For example, an artist selling a song may wish to allow consumers to copy their purchased song onto any personal digital music player. Currently, two of the most prominent online music marketplaces (iTunes and Zune Marketplace) offer users rights managed files that are only compatible on their respective devices (iPod and Zune).¹³⁰ In this situation, the copyright owner may decide to release their song as an mp3 (an almost universal format with few, if any, architectural constraints). As stated above, expression of preferences, or signaling, builds a user’s reputation. Where none of the available system allow the copyright owner to signal his or her actual copynorm preferences, the owner may forego any rights management system intending to permit free sharing. However, by default under the law, such an action results in a reservation of all rights. This automatic reservation may also fail to account for the copyright owner’s preferences, and undermine effective signaling.

iii. Markets

[¶40] As argued above, the internet architecture has contributed to content’s devaluation, and a reputation economy has emerged. “Measured by the amount of attention a product attracts, [copyright creator] reputation can be converted into other things of value: jobs, tenure, audiences, and lucrative offers of all sorts.”¹³¹ Thus,

¹²⁷ *Id.* at 134.

¹²⁸ *See id.* at 132-33.

¹²⁹ *Id.* at 132.

¹³⁰ *See* Sean Captain, *Why Can’t All the Music Players Just Get Along?*, N.Y. TIMES, Nov. 16, 2006, at C9.

¹³¹ ANDERSON, *supra* note 7, at 74.

reputation market therefore requires many copyright owners to abide by a copynorm framework to build reputation value.

[¶41] On the other hand, market constraints don't really restrict the user.¹³²

Users can connect to the internet at a relatively low cost, and upon connection, information can be transferred without additional cost to the user.¹³³

iv. Law

[¶42] “Despite the impressive arsenal of legal weapons available to copyright owners, disregard for copyright laws remains widespread.”¹³⁴ Without architectural or law-reinforcing normative restrictions, “there are simply too many copyright infringers and not enough resources to enforce the law.”¹³⁵

[¶43] It has been argued that the law has an expressive function – “the function of law in ‘making statements’ as opposed to controlling behavior directly.”¹³⁶ In fact, “defining certain conduct as ‘against the law’ can ‘inculcate both shame and pride’ in the minds of individuals.”¹³⁷ Thus, by utilizing its expressive function, laws can reinforce social norms.¹³⁸ Similarly, social norms can encourage or discourage compliance with law.¹³⁹ In fact, norms can influence people to act differently than prescribed by default rules created by law.¹⁴⁰

¹³² See Jensen, *supra* note 2, at 556.

¹³³ See *id.*

¹³⁴ *Id.* at 538.

¹³⁵ *Id.* at 562.

¹³⁶ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

¹³⁷ Jensen, *supra* note 2, at 562 (citing Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 958-59 (1996)).

¹³⁸ *Id.*

¹³⁹ Schultz, *supra* note 101, at 11.

¹⁴⁰ *Id.*

[¶44] “For law to perform its expressive function well, it is important that law communicate well.”¹⁴¹ While copynorms may not specifically discourage compliance with copyright law, they exist with almost complete disregard for the law’s restrictions. At the same time, copyright law fails to account for internet architecture and copynorms.¹⁴² Thus, architecture and copynorms tell consumers one thing while the law tells them something completely different. For example, under copyright law certain everyday internet uses such as caching and copying e-mail messages constitute per se infringement.¹⁴³ While these may be considered fair uses, as explained below, the doctrine is too esoteric and ad hoc to foster user reliance.¹⁴⁴ This copynorm-copyright contradiction is clearly illustrated by the screen shot below from flickr.com which invites the user to download a copyright owner’s picture while simultaneously posting a copyright notice. The site’s architecture specifically includes a mechanism permitting free download, while the legal notice communicates the opposite message forbidding copying.

¹⁴¹ Sunstein, *supra* note 136, at 2050.

¹⁴² Even speed limits are set by taking into account architectural factors such as “the design of the road (e.g., lane width, pavement type and condition, terrain, parking conditions), commercial and residential development, the number of driveways and intersecting streets, prevailing vehicle speeds, [and] traffic volumes.” Insurance Institute for Highway Safety, Q&As: Speed and Speed Limits, http://www.iihs.org/research/qanda/speed_limits.html (follow “How are speed limits established?” hyperlink) (last visited Nov. 13, 2006).

¹⁴³ *See* 17 U.S.C. § 501(a) (2000).

¹⁴⁴ This is particularly relevant for the average user who hasn’t been introduced to copyright law concepts like fair use.



[¶45] This divergence is problematic for at least two reasons. First, this gap undermines the underlying purpose of copyright to encourage the spread of information to aid in the progression of science.¹⁴⁵ Specifically the law contradicts instead of reinforcing copynorms encouraging sharing. “It is black letter law that copyright is justified by a quid pro quo, a tradeoff between granting a monopoly right to the copyright owner in exchange for providing society with a public good.”¹⁴⁶ “The Copyright Clause . . . seek[s] . . . the creation and *dissemination* of information.”¹⁴⁷ Thus, copyright law

¹⁴⁵ See U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”)

¹⁴⁶ Jensen, *supra* note 2 at 564-65.

¹⁴⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) (emphasis added).

should not ignore a copyright owner's desire to freely create and distribute their work. Further, as suggested above, "the law can strengthen a norm merely by 'expressing' normative principles and societal values."¹⁴⁸ Thus bridging the copynorm-copyright divide may bolster these positive sharing norms by utilizing the expressive power of the law which, by itself, carries a norm of voluntary compliance.

[¶46] Second, this divergence lessens a copyright owner's ability to generate reputational currency. A copyright owner bears the burden of overcoming the automatic rights reservation by expressing preferences capable of being recognized under the law (such as express licenses or DRM systems). Yet, these expressive mechanisms may not reflect a copyright owner's true preferences, or offer practical solutions.

[¶47] As discussed in Part V below, the solution to this disparity requires another mechanism within the law that accounts for the average copyright owner's preferences. It may be argued that this mechanism exists through the structure of copyright law as "a realm of private choice."¹⁴⁹ Specifically, a copyright owner does not *have to* enforce his or her rights.¹⁵⁰ However, the private choice mechanism fails to foster user reliance because it allows a copyright owner who gifts work under a copynorm to simultaneously enforce conflicting rights under the law. It may also be argued that fair use supplies a safety net for the user in this instance, but as described in the subsection below, the doctrine's ad hoc nature also fails to invite reliance.

b. Why Fair Use Fails to Bridge the Copynorm-Copyright Gap

¹⁴⁸ Sheila Vera Flynn, *A Complex Portrayal of Social Norms and the Expressive Function of Law*, 36 UWLA L. REV. 145, 173 (2005).

¹⁴⁹ Schultz, *supra* note 101, at 5.

¹⁵⁰ *Id.*

[¶48] As explained above, fair use is a defense to an action for infringement, and thereby protects certain uses by consumers.¹⁵¹ However, the doctrine fails to truly invite user reliance and ignores copyright owner preferences.

i. The Doctrine’s Ad Hoc Nature Fails to Support Normative Signals

[¶49] First, the doctrine’s fact-specific nature creates uncertainty with both copyright owners and users.¹⁵² “Having emanated from an intentionally vague statute and developed in various, occasionally contradictory cases, the fair use doctrine necessarily blurs the boundary between valid and invalid copyright claims.”¹⁵³ The resulting uncertainty harms producers, sellers, and even consumers.¹⁵⁴ Specifically, consumers “must borrow at their peril, consult experts on fair use, or, sadly forego . . . reuse altogether.”¹⁵⁵ Further, any uses permitted under the doctrine are removed from the content producer’s monopoly, thereby harming producers who are unable to predict the doctrine’s future reach.

[¶50] Two fairly recent cases, addressing whether a search engine’s creation and display of thumbnail images constitutes fair use, illustrate the doctrine’s uncertain nature.¹⁵⁶ In *Kelly v. Arriba Soft Corp.* the Ninth Circuit held that the defendant search engine’s copying of the plaintiff’s images, generation of smaller, lower resolution thumbnails from the images, and display of the generated thumbnails constituted a fair

¹⁵¹ 4 NIMMER, *supra* note 12, § 13.05, at 13-155.

¹⁵² *See* Bell, *supra* note 21, at 586-87.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 587.

¹⁵⁵ *Id.*

¹⁵⁶ *See* *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), *vacated by* 487 F.3d 701 (9th Cir. 2007).

use.¹⁵⁷ However, on very similar facts, the United States District Court for the Central District of California in *Perfect 10 v. Google, Inc.* held that the plaintiff was “likely to succeed in proving that Google directly infringe[d] by creating and displaying thumbnail copies of [Perfect 10’s] photographs [on Google’s search engine].”¹⁵⁸ While it may be possible for a trained judge or lawyer to reconcile these cases based on subtle factual differences, the average copyright owner or user is probably unable to extract a guiding principle for use in analyzing their future actions.

[¶51] Thus, the doctrine’s ad hoc nature fails to foster either copyright owner or user reliance. Clearly Google could not completely rely on the principle that generating thumbnails for search purposes would be a fair use under the *Arriba Soft* case. Consequently, copyright owners cannot signal preferences with knowledge that copyright law will account for such preferences. Similarly, users cannot copy, modify, or distribute works with assurance that the copyright owner will not be able to enforce the law in violation of an applicable copynorm by suing the user for these activities.

ii. The Doctrine Ignores Copyright Owner Preferences

[¶52] Second, the test necessarily focuses on the use of the work while ignoring the copyright owner’s preferences.¹⁵⁹ By focusing on *use* rather than *intent*, the doctrine offers no mechanism to incorporate copyright owner preferences into the law. Where copyright owner preferences signal adherence to norms, failure to account for such preferences neglects the problematic copynorm-copyright divide.

¹⁵⁷ *Arriba Soft*, 336 F.3d at 815.

¹⁵⁸ *Perfect 10*, 416 F. Supp. 2d at 858-59. The fact that this decision was recently vacated by the Ninth Circuit further illustrates the confusion this ad hoc doctrine creates within the courts (not to mention the average content creator/consumer).

¹⁵⁹ See 17 U.S.C. § 107 (2000).

**c. Many Content Producers May Not be Capable of Implementing
Express Licenses**

[¶53] One consequence of the internet and digital media revolution is the creation of various cheap, new technologies serving as tools of production. “[W]e’re starting to shift from being passive consumers to active producers.”¹⁶⁰ From YouTube videos to blogs, evidence suggests that amateur producer-consumers may soon (if they don’t already) outnumber traditional “professional” musicians, authors, computer coders, and artists.¹⁶¹ It is unlikely that most of these “amateurs” have an extensive knowledge of existing copyright law or are capable of drafting a license. Until recently, a copyright owner in this position could either hire a lawyer at substantial personal cost or forego an express license altogether. Recently, Creative Commons human-readable licenses have offered another avenue.

[¶54] Creative Commons offers pre-written licenses based on copyright law.¹⁶² These “licenses are expressed in three different formats: the Commons Deed (human-readable code), the Legal Code (lawyer-readable code); and the metadata (machine readable code).”¹⁶³ The copyright owner simply chooses the pre-written license that best fits their preferences, and either copies the relevant html to their web page for online works or prints the named license on offline works.¹⁶⁴ While these licenses provide useful tools for copyright owners to express certain preferences without the need for a lawyer, the licenses still fail to adequately track owner intent.

¹⁶⁰ ANDERSON, *supra* note 7, at 63.

¹⁶¹ *See generally id.* at 65 (Given that “millions of ordinary people have the tools and the role models to become amateur producers,” it would not be “surpris[ing] if some of the most creative and influential work in the next few decades comes from this Pro-Am class of inspired hobbyists, not from the traditional sources in the commercial world.”).

¹⁶² *See Creative Commons FAQ, supra* note 16.

¹⁶³ *Id.*

¹⁶⁴ *See id.*

[¶55] First, the actual license is not the human-readable code, but instead the legal code.¹⁶⁵ Thus, the copyright owner must impart some degree of trust in the Creative Commons license drafters, and the actual language may not reflect the copyright owner’s preferences. More importantly, even the act of choosing a proper human-readable license assumes some small degree of basic copyright knowledge. If the average copyright owner doesn’t know what rights they have, they cannot fully understand which rights they are giving away (and to what extent). Thus, even making a license human-readable may not compensate for the average copyright owner’s ignorance of the law.

[¶56] Second, these licenses are non-revocable¹⁶⁶, and therefore are incapable of changing with copyright owner preferences. While a licensor may “stop distributing [their] work under a Creative Commons license at any time . . . [,] this will not withdraw any copies . . . that already exist under a Creative Commons license from circulation.”¹⁶⁷ Thus, if a copyright owner’s preferences change, they cannot choose to revoke their license and take full advantage of their full exclusive rights under the law.¹⁶⁸

[¶57] Finally, a Creative Commons license applies to a *work*, and thus all *manifestations* of that work.¹⁶⁹ We live in the midst of various format wars where companies are offering content under different rights management protected formats that are often incompatible with each other.¹⁷⁰ In his environment, a copyright owner’s preferences may change depending on the applicable format. For example, a copyright owner may prefer to offer their work for free under one format and charge under another.

¹⁶⁵ See *id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See Captain, *supra* note 130, at C9.

[¶58] Thus, while Creative Commons licenses offer useful tools for the average copyright owner, they also contain various limitations hindering expression of certain preferences.

V. Toward a Technology-Based Implied License Regime

a. Argument

[¶59] As discussed above, the copynorm-copyright gap is not bridged by fair use, and many rights holders may not understand enough copyright law to adequately utilize express licenses. To find a solution which takes account of the average copyright owner's preferences, it is necessary to determine how the average rights holder *forms* preferences. If the average rights holder doesn't think in terms of rights that the law grants to them, what do they think about? It seems clear from the evolution of digital rights management, that the average content consumer (and by extension "amateur" producer-consumer)¹⁷¹ defines boundaries by architectural restraints. While the *law* has not restrained average users, widespread adoption of rights management architecture suggests it may succeed (at least to some extent) where the law has seemingly failed. If it is ridiculously easy to copy a file, it must be okay.¹⁷² Conversely, if the user has to jump through hoops to copy a file, it is probably not okay.¹⁷³ If the producer-consumer signals preferences and determines permitted use by determining the applicable technological boundaries, the law can bridge the copynorm-copyright gap by drawing an implied license along such lines. This type of implied license leaves room for norms by setting the legal standard below normative sharing requirements.

¹⁷¹ See ANDERSON, *supra* note 7, at 73 (describing how democratized tools of production have created a world where everyone is a producer).

¹⁷² See Levin, *supra* note 96, at 133-34.

¹⁷³ See *id.*

[¶60] Crafting this implied license requires three steps: (1) determining the applicable distribution media; (2) determining any architectural restraints (including DRM¹⁷⁴) on each medium at the time of distribution; and (3) drawing the scope of the implied license as limited by the applicable architectural restraints in the applicable medium. Thus, where users circumvent technological boundaries, the scope of the license is breached, and the copyright owner can sue for infringement. Of course this license would only apply where preferences are not already expressed through other written or oral restrictions, licenses, or notices. Similarly other facts may weigh on the intent determination. For example, where a copyright owner requires payment, but the architecture allows activity capable of undermining the rights holder's market, intent cannot be drawn along architectural lines. Further, this license could necessarily only apply to copying that involves literal or fragmented literal similarity. Infringement involving non-literal similarity is not limited by architectural restraints (beyond those of the human brain), and consequently objective intent for such use cannot be determined by a right holder's choice of architectural restraints.

[¶61] For example, Really Simple Syndication ("RSS") is an increasingly popular "family of Web feed formats used to publish frequently updated content such as blog entries, newsheadlines or podcasts."¹⁷⁵ Consumers of RSS content use special browsers called aggregators to watch for new content in dozens or even hundreds of web feeds.¹⁷⁶ The aggregators regularly search subscribed RSS feeds and update any new material.¹⁷⁷

¹⁷⁴ It is irrelevant that the applicable DRM may be circumvented by hackers, since the choice of a certain DRM system merely expresses the copyright owner's *intent*.

¹⁷⁵ RSS - Wikipedia, <http://en.wikipedia.org/wiki/RSS> (last visited Nov. 5, 2007, 10:29 PST).

¹⁷⁶ *Id.*

¹⁷⁷ RSS 2.0 at Harvard Law, How to Support Enclosures in Aggregators, <http://blogs.harvard.edu/tech/enclosuresAggregators> (last visited Nov. 4, 2007).

Under copyright law “the creator of the RSS feed retains, automatically, all copyrights in the content in the feed and retains all rights in its republication, use as a derivative work, and so forth.”¹⁷⁸ Yet, users are copying these feeds and including them on their own web sites.¹⁷⁹ This has naturally raised an infringement issue with experts arguing for and against finding infringement.¹⁸⁰ In addition, the RSS “community is speaking, to large extent, by creating a norm around syndication and aggregation which is very important.”¹⁸¹ Here the applicable distribution medium architecturally permits other sites to publish RSS feeds. Thus a technology based license would allow such uses unless and until the copyright owner either expressly reserves their rights or revokes such a license.

[¶62] Microsoft’s new Zune music player provides another example. The player allows wireless file sharing with nearby Zune users.¹⁸² However, the shared files only last for three days or three plays (whichever comes first).¹⁸³ Further, artists selling tracks through Microsoft’s Zune marketplace are able to opt-out of this sharing functionality.¹⁸⁴ Under the “all rights automatically reserved” regime this limited file sharing would constitute infringement. While the use would *probably* be considered fair, a technologically based licensing regime would provide a clear-cut rule permitting such use.

¹⁷⁸ Posting to John Palfrey, Berkman Center at Harvard Law School blog, *RSS and Copyright*, circa 2006, <http://blogs.harvard.edu/palfrey/2006/01/17> (Jan. 17, 2006, 05:52 EST) [hereinafter *RSS and Copyright*].

¹⁷⁹ *Id.*; Michelle Manafy, *RSS: Use, Lose, or Abuse?*, ECONTENTMAG.COM, Sept. 19, 2006, <http://www.econtentmag.com/?ArticleID=18140>. For example, “[s]ome corporate sites have gotten on board by including right on their homepages the headlines related to their offerings.” *Id.* One “aggregator” site, called Top10 Sources, finds and publishes (in a constantly updating list) the top ten RSS feeds that cover any given topic. See *RSS and Copyright*, *supra* note 178.

¹⁸⁰ See Manafy, *supra* note 179; *RSS and Copyright*, *supra* note 178.

¹⁸¹ *RSS and Copyright*, *supra* note 178.

¹⁸² Microsoft Corp., Zune 30 GB Fact Sheet, <http://www.zune.net/en-US/press> (follow “Zune 30GB” hyperlink) (last visited Nov. 4, 2007) [hereinafter *Zune Fact Sheet*].

¹⁸³ *Id.*

¹⁸⁴ Microsoft unwraps Zune for holiday season (2006), <http://www.zunehomes.com/microsoft-unwraps-zune-for-holiday-season/>.

[¶63] In comparison, social networking site MySpace, has announced that it “will enable its participants to sell music online” using “MP3s without DRM.”¹⁸⁵ While few architectural constraints exist to prohibit users from copying or distributing MP3 files, common sense suggests that a content provider *selling* their content probably doesn’t intend to allow free copying and distribution. In this situation, lack of a discernible objective intent would prohibit finding an architecturally-based implied license.

[¶64] Thus, by drawing the scope of an implied license along architectural boundaries, the law aligns with user expectations and thereby bridges the copynorm-copyright gap. Norm violations can continue to be punished through usual normative sanctions (i.e. shunning individuals who violate community standards), and copyright owners can invite user reliance through clear sharing signals, thereby generating reputational currency. Further, if a copyright owner changes their preferences they are able to revoke the non-exclusive license and take full advantage of their rights under the law.¹⁸⁶

b. Criticism

[¶65] It may be argued that such a license could not realistically be revoked where so many users may be involved in copying or distributing the copyright owner’s work. However, this criticism ignores copyright enforcement’s private choice element.¹⁸⁷ Specifically, a copyright owner will probably only enforce their rights against a party deriving monetary value from the owner’s work. The owner can then use the threat of

¹⁸⁵ Bill Rosenblatt, *MySpace Enables Sales of Music Tracks*, DRM WATCH, Sept. 7, 2006, <http://www.drmwatch.com/ocr/print.php/3630826>.

¹⁸⁶ 3 NIMMER, *supra* note 12, § 10.02[B][5], at 10-28.1.

¹⁸⁷ *See* Schultz, *supra* note 101, at 5.

suit to sublicense or otherwise share in any future derived profit. It is thus not necessary to find and give notice to *all* users.¹⁸⁸

[¶66] It may also be argued that a DRM system can be circumvented and the transformed file distributed in a format other than that intended by the copyright owner. In this hypothetical situation a user may mistakenly rely on the lack of architectural restraints, which, in fact do not reflect the intent of the copyright owner. For example, various tools are currently available allowing users the ability to download streaming YouTube videos.¹⁸⁹ A license would *not* exist under the new format because the copyright owner's intent would not extend beyond the original medium of distribution. While this argument presents a valid concern, it ignores the process by which most content is acquired and consumed.

[¶67] Currently, most users looking for content go to specific sites that are known for their large volume of the desired content.¹⁹⁰ For example, users looking for “amateur” video or music would probably visit YouTube, MySpace or a similar site. A hacker who downloads content from one of these sites and transforms the content into another format would probably not re-post the video on the same site (where it would be turned back into the original format – i.e. streaming flash video on YouTube). Instead, the hacker would probably offer the video on their personal web site or through a file sharing service. Further, it is unlikely that many users would locate the transformed

¹⁸⁸ In the civil litigation setting, where a large group of parties are involved, the courts have developed a reasonableness standard governing notice. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20 (1950). While beyond the scope of this note, this suggests that perhaps a similar standard could apply to notice of the applicable license revocation.

¹⁸⁹ One site offering such tool is VideoDL.org. VideoDL.org - Download Online Video, <http://www.videodl.org/> (last visited Nov. 4, 2007).

¹⁹⁰ For example, as of August 2006, MySpace.com reportedly boasted approximately one hundred million users. Saul Hansell, *Google Deal Will Give News Corp. Huge Payoff*, N.Y. TIMES, Aug. 8, 2006 at C1, available at <http://www.nytimes.com/2006/08/08/technology/08google.html>.

content on these other channels of distribution. This is because users navigate file sharing services and the web in general by searching for files under their file name or by using keywords. A user would not typically know the name (or relevant keywords) of the posted file without having visited the original site (MySpace, YouTube, etc.) where such content is introduced and made popular through ratings and Top 10 lists. Thus, a user searching a file name through a different channel probably knows of the original distribution medium and the architectural constraints on such medium. The pragmatic reality in the current content-overloaded web is that unless content is introduced to users through a popular medium (site, channel, etc.), users will probably never know that such content exists. Thus, in the typical scenario, hacked content will not cause a fatal problem.

VI. Conclusion

[¶68] This paper does not advocate the adoption of a legal “trap” through which an unwary content provider may, through one wrong move, lose all rights to their content. To the contrary, the proposed interpretation merely seeks a mechanism to align the law with copyright owner intent, and ultimately allow the owner to fully profit from offering their work under beneficial copynorms.

[¶69] The rights under copyright law are automatically granted and protected unless explicitly waived.¹⁹¹ Further, anyone who violates any of the copyright owner’s exclusive rights is strictly liable as an infringer.¹⁹² However, the open architecture of the internet coupled with almost costless copying and distribution has resulted in the creation

¹⁹¹ 17 U.S.C. § 102(a) (2000).

¹⁹² 17 U.S.C. § 501(a) (2000).

of a reputation economy and content sharing norms.¹⁹³ These norms and the law send contradictory messages to content users contradictory messages.

[¶70] The existing mechanisms within the law fail to bridge this copynorm-copyright gap by inadequately accounting for rights holder preferences. Specifically, rights management systems allow certain copyright owners to express preferences, but those that prefer not to implement such systems automatically reserve all rights. Further, fair use is too ad hoc to invite user or producer reliance, and focuses on use rather than intent. In addition, express licensing typically requires a working knowledge of copyright law which most producer-consumers don't possess. While Creative Commons licenses offer useful tools for such producer-consumers, these ready-made licenses also contain limitations which may not correctly reflect copyright owner preferences.

[¶71] The implied license doctrine presents a mechanism capable of narrowing the problematic gap. Specifically, the scope of the implied license can be defined by the technological (architectural) restraints on the medium through which the copyright owner offers their content. This allows the law to set boundaries below normative requirements, thereby leaving room for copynorms (and free dissemination) to flourish.

¹⁹³ See Opderbeck, *supra* note 6, at 1696-99; *see also* ANDERSON, *supra* note 7, at 73-75.