
PANEL I: INTELLECTUAL PROPERTY AND PUBLIC VALUES

THE PLACE OF THE USER IN COPYRIGHT LAW

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I. THREE CHARACTERS IN SEARCH OF THE USER

The past decade has witnessed an upsurge of interest, on the part of both copyright owners and copyright scholars, in users of copyrighted works. Copyright owners have sought to gain greater control of user behavior, particularly with regard to unauthorized copying of digital files, and to instantiate new norms about the limits of appropriate use. Copyright scholars, meanwhile, have debated the empirical and normative bases for these efforts, as well as the language employed to frame the discussion. In particular, much criticism has been leveled at the term “consumer,” which some scholars have charged has misleading and normatively inappropriate connotations about the ways that humans receive and interact with cultural goods.¹ Most of us now seem to have settled, though not without some awkwardness, on “users,” a term that manages simultaneously to connote both more active involvement in the processes of culture and a residual aura of addiction that may be entirely appropriate to the age of the iPod, the XBox, and the blogosphere.

Copyright doctrine, however, is characterized by the absence of the user. As copyright moves into the digital age, this absence has begun to matter profoundly. As I will show, the absence of the user has consequences that reach far beyond debates about the legality of private copying, or about the proper scope of user-oriented exemptions such as the fair use and first sale doctrines. The user’s absence produces a domino effect that ripples through

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1. See, e.g., Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 Fed. Comm. L.J. 561 (2000).

the structure of copyright law, shaping both its unquestioned rules and its thorniest dilemmas. The resulting imbalance—empty space where one cornerstone of a well-balanced copyright edifice should be—makes for bad theory, bad policy, and bad law.

In what follows, I do not intend to argue that copyright is, as some have asserted, “a law of users’ rights.”² I am happy to agree that copyright is first and foremost a law of authors’ rights, and that having some such law is, in general, a good idea. That statement, however, doesn’t end the discussion; it begins it. A theory of authors’ rights must be informed by a theory of the user as well. Specifically, it is commonly understood that users play two important roles within the copyright system: Users receive copyrighted works, and (some) users become authors. Both roles further the copyright system’s larger project to promote the progress of knowledge. But copyright law and policy have shown little interest in understanding the processes by which these roles are performed, nor in inquiring what users need to perform their roles in a way that optimizes the performance of the copyright system as a whole.

The models of the user offered by copyright scholars have not helped as much as they could in answering these questions. In broad brush, scholarly efforts to cast the user have produced three fully fledged candidates, each more unrealistic than the last: the economic user, who enters the market with a given set of tastes in search of the best deal;³ the “postmodern” user, who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative;⁴ and the romantic user, whose life is an endless cycle of sophisticated debates about current events, discerning quests for the most freedom-enhancing media technologies, and home production of high-quality music, movies, and open-source software.⁵

2. See L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (1991); see also Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. Copyright Soc’y U.S.A. 1 (1997).

3. See, e.g., Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (2d ed. 2003); 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 (1998); see also William W. Fisher III, *Property and Contract on the Internet*, 73 Chi.-Kent L. Rev. 1203 (1998). Each of these users is to some extent an oversimplification. As a general rule, however, oversimplification is what survives when the arguments of law review articles are distilled in a form suitable for the larger public debate about copyright policy, so I think this move is defensible.

4. See, e.g., James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996); Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (1998). As Coombe rightly notes, “postmodern” properly understood has both a broader and more specific definition than this formulation suggests. Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DePaul L. Rev. 1171, 1172 & n.1 (2003). Whether rightly or not, however, “postmodern” is the adjective that copyright scholars most commonly associate with this user, see, e.g., Ginsburg, *supra* note 2, at 7-8, so it is the term that best suits my purposes here.

5. See, e.g., Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004); Yochai Benkler, *Free as the Air*

As we will see, although some of these characters are better adapted to certain situations than to others, none of them provides a convincing model of how real users actually behave, and none furnishes a compelling account of how this behavior relates to copyright's collective goals. As a result (and unsurprisingly, since neither judges nor legislators are as unreflective as we sometimes like to believe), none has filled the gap in the law that results from the user's absence.

A few scholars, however, have offered tantalizing glimpses of a fourth candidate for the role of user. Building on those beginnings, this essay introduces a new character, the situated user. Unlike the economic and romantic users, who seek respectively to consume and to transform existing works, the situated user deserves copyright law's solicitude precisely because neither her tastes nor her talents are so well formed. Both her patterns of consumption and the extent and direction of her own authorship will be shaped and continually reshaped by the artifacts, conventions, and institutions that make up her cultural environment. Unlike the postmodern user, this imperfect being requires our attention because she must nevertheless become the vehicle by and through which copyright's collective project is advanced. The situated user engages cultural goods and artifacts found within the context of her culture through a variety of activities, ranging from consumption to creative play. The cumulative effect of these activities, and the unexpected cultural juxtapositions and interconnections that they both exploit and produce, yield what the copyright system names, and prizes, as "progress." This model of the situated user suggests that the success of a system of copyright depends on both the extent to which its rules permit individuals to engage in creative play and the extent to which they enable contextual play, or degrees of freedom, within the system of culture more generally.

II. "PRIVATE COPYING"

The debate about private copying is an instructive place to begin our search for the user in copyright law, since that debate is ostensibly user focused. The user is absent, both literally and conceptually, from every part of the private copying debate. That debate concerns user behavior as an aggregate phenomenon to be molded and disciplined; it does not reckon with users themselves, their reasons for copying, or the functions that private copying serves within the copyright system, in any meaningful way.

Within the U.S. copyright system, the public-private distinction that historically shielded many individual uses of copyrighted works from liability is fast disappearing. In some cases, legal exposure results from technical changes in the means of use. For works distributed in digital form, use requires reproduction in computer memory. In other cases,

to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354 (1999); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 Wm. & Mary L. Rev. 951 (2004).

copying that excited little enforcement interest in the era of analog reproduction excites intense interest now that the copies are digital. In the digital era, according to the Register of Copyrights, private uses shade “seamlessly” into acts of public distribution; from this formulation, it follows equally seamlessly that infringement liability is necessary to preserve the rights that copyright guarantees.⁶ In both cases, liability results from the same two basic principles: The rule defining infringement as any reproduction of a copy not excused by a fact-specific defense and the rule establishing strict liability for infringement.⁷ Notably, these principles operate without reference to users or to categories of use; they are triggered, instead, by the mere technical processes of copying or rendering digitally stored information.

In countries that have codified exemptions for private copying, the legal status of the user is slightly more complicated but no less marginal. This can be seen by examining a handful of recent cases in which European consumer advocacy groups asserted a legal right to engage in private copying of music CDs and argued that technological protection measures (“TPMs”) interfered with that right. A Belgian court concluded that Belgian law did not afford a right to copy, but only “a granted immunity against prosecution”; by definition, therefore, plaintiffs could not assert any interest that had been violated.⁸ This answer requires no theory of the user and leaves no room for one; any shelter for private copying in national law encompasses only whatever remains technologically copiable. The other two cases, in France, reached conflicting results. The Paris Appeals Court ruled that the use of TPMs to prevent copying was “incompatible with the private copy exception,”⁹ while the Versailles Appeals Court concluded that use of TPMs was a justifiable means of preventing piracy (although actionable under French consumer protection law regulating labeling of consumer goods).¹⁰ Both of these answers leave room for a theory of the user, but the contours of that theory are open to doubt pending resolution by France’s high court. Legal commentators in Europe, meanwhile, cannot agree whether private copying exemptions are intended to effectuate a general theory of the user or simply a pragmatic compromise between the entertainment and technology industries that is open to ongoing

6. Marybeth Peters, *Copyright Enters the Public Domain*, 51 J. Copyright Soc’y U.S.A. 701, 708 (2004); see also Goldstein, *supra* note 3, at 23-24, 144-46, 199-208 (arguing that, absent prohibitive transaction costs, copyright should extend broadly to cover most private uses of copyrighted works).

7. See 17 U.S.C. §§ 106(1), 501(a) (2000); see also *id.* § 101 (defining “copies”).

8. Tribunal de Première Instance de Bruxelles, May 25, 2004, No. 2004/46/A du rôle des référés (Belg.).

9. Cour d’appel [CA] [regional court of appeal] Paris, Apr. 22, 2005, No. RG:03/8500; see Lawrence J. Speer, *Security Features on DVDs Violate Private Copying Right, Says French Court*, BNA Elec. Comm. & L. Rep., Apr. 27, 2005, at 441.

10. Cour d’Appel [CA] [regional court of appeal] Versailles, Apr. 15, 2005, No. 03/07172; see Lawrence J. Speer, *EMI France May Use Digital Locks on CDs, but Court Orders Refunds for Gripping Users*, BNA Elec. Comm. & L. Rep., Apr. 27, 2005, at 442.

negotiation.¹¹ They also cannot agree whether article 5 of the European Union's 2001 copyright directive, which permits exemptions to copyright rights only in "special cases" that "do not conflict with a normal exploitation of the work" and "do not unreasonably prejudice the legitimate interests of the rightholder" forbids private copying exemptions in any event.¹²

At first blush, the U.S. story and most parts of the European story comport reasonably well with the narrative of the economic user. Within that narrative, it makes sense that private copying should be infringing, or should become so as new abilities to exploit markets develop. Clear rights for information providers keep prices low, and enable information providers to develop product offerings to satisfy users at different price points.¹³ The economic user's motivations for unauthorized copying are easy to understand—he is trying to get away with paying less than the market price for a particular cultural good—but thwarting them is untroubling for the same reason. It makes equal sense that exemptions should be narrowly limited, and should give way in the face of technological protection measures employed by copyright owners. The opposite situation would hinder effective price discrimination and cause prices to rise. Within the narrative of the economic user, it would make sense for the French high court to reverse the Paris decision and affirm the Versailles decision.

On closer inspection, though, the narrative of the economic user is too superficial to explain, or enable resolution of, the profound societal ambivalence about the strategies now being employed to shift user behavior. The entertainment and publishing industries have embarked on a coordinated set of rhetorical and legal initiatives to reeducate users about the death of copyright's public-private distinction. An economically inclined theorist might describe these initiatives as efforts to decrease user preferences for unauthorized copying, but that explanation seems incomplete. The industries' efforts are intended not only to change the cost-benefit calculus that users make about private copying, but also and more fundamentally to invest unauthorized private copying with moral significance. Monetizable cost and shame play coequal roles in cementing the new moral order. Nor can public and scholarly resistance to these efforts be interpreted simply in terms of resistance to transition costs. Widespread criticisms of both their substantive and their procedural aspects bespeak considerable doubt about where the highest social welfare really lies. While *homo economicus* may of course have moral preferences as

11. See, e.g., Kamiel J. Koelman, *The Levitation of Copyright: An Economic View of Digital Home Copying, Levies and DRM* (July 27, 2004) (unpublished manuscript, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682163. As Koelman discusses, in many countries a system of compensation via levies on recording equipment and blank media plays a role in this compromise. *Id.*

12. Parliament & Council Directive 2001/29/EC, art. 5(5), 2001 O.J. (L 167) 10; see Christophe Geiger, *Right to Copy v. Three-Step Test: The Future of the Private Copy Exception in the Digital Environment*, 6 *Computer L. Rev. Int'l* 7 (2005)

13. See, e.g., Bell, *supra* note 3, at 589-90; Fisher, *supra* note 3, at 1234-40.

well as monetary ones (and indeed the two types of preferences are often intertwined), markets are not the ultimate arbiters of moral choices. Responsible economic theorists recognize that defining a social utility function always requires a priori resolution of certain normative questions. In the case of private copying, the narrative of the economic user can't answer the normative questions because it presumes a particular utility function already in place. What is needed, and what the theory of the economic user cannot itself provide, is a theory about why users and user privacy should, or should not, matter enough to dictate a particular approach to copyright policy.

As another indication that the narrative of the economic user is incomplete, the copyright industries have proved curiously resistant to testing their claims about the clarity and innate justice of copyright's broad protections in open court. Instead, the ongoing litigation campaign against peer-to-peer file sharing funnels complaints against identified users to a private settlement service center that offers them a choice between a confidential, relatively small monetary settlement and public financial ruin.¹⁴ This strategy cleverly blunts the public disapproval that many argued would ensue if the industry chose to seek the maximum damage award from each user, and with it any call for broad-based reform of the copyright rules governing liability and damages. Less obvious but equally important, it denies courts the opportunity to craft equitable limitations on damage awards that might coalesce into a more general rule limiting liability in such cases. Courts have erected due process "speed bumps" to this process at the complaint filing and subpoena stages,¹⁵ but the judiciary is structurally unable to address the larger issues raised by cases that reappear within the system only as voluntary dismissals. The private copying cases have become the copyright system's dirty little secret, a site at which questions of due process are overlooked and the more difficult questions of liability and privacy evaded.

Neither of our remaining two characters can point the law toward a more satisfactory approach to the question of private copying. For the romantic user, this is so by choice. The romantic user's interests lie in the realm of

14. See Nick Mamatas, *Meet John Doe: The RIAA Runs Its Lawsuits as a Volume Business, and Sometimes Downloaders Just Gotta Settle*, Village Voice, Mar. 7, 2005, at 34, available at <http://www.villagevoice.com/music/0510,mamatas,61813,22.html>; Andrew Tran, *Woman Silenced by Music Mafia*, Daily Texan, Feb. 4, 2005, available at http://www.dailytexanonline.com/global_user_elements/printpage.cfm?storyid=852298.

15. See *Recording Indus. Assn. of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 125 S. Ct. 309 (2004) (ruling that § 512(h) of the Digital Millennium Copyright Act ("DMCA") does not authorize subpoenas to an internet service provider ("ISP") to identify users of peer-to-peer ("p2p") file-sharing systems, but only to identify users who store infringing material on the ISP's system); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (ruling that subpoenas to an ISP to identify users in the context of "John Doe" litigation must satisfy a five-part balancing test); *BMG Music v. Does 1-203*, No. 04-650, 2004 U.S. Dist. LEXIS 8457 (E.D. Pa. Apr. 2, 2004) (ruling that a separate "John Doe" complaint must be filed for each user whose identity is sought).

so-called transformative copying (of which more below); he has little to say about either the costs or the benefits that other sorts of private copying might generate. The postmodern user's problem is the reverse: She finds the law's treatment of private copying enormously troubling, but can't offer any explanation that would convince lawmakers to care. For the postmodern user, struggle against economic and cultural hegemony is a fact of life; exactly for this reason, though, she has difficulty articulating what the problem is with this particular alignment of legal, technical, and rhetorical power.

Copyright scholars, for the most part, have been complicit in the legal system's failure to engage the difficult questions that private copying raises. Most of us readily concede that private copying is and should be infringement in the first instance, unless excused as fair use.¹⁶ Most of us seem reasonably sure that it would be unfair to require individual file sharers (or their parents) to pay hundreds of thousands of dollars in penalties for their activities, but few have read this queasiness as an argument for a more general overhaul of the Copyright Act's remedial provisions. Even the authors of a proposal to facilitate direct disputes between copyright owners and individual users single out "extraordinary" users, because they do not know what to do with the ordinary ones.¹⁷ A user-centered theory of what copying is private (or why no copying is) would help enormously in resolving this question, but few have tried to articulate a theory of lawful private copying that could provide a sustainable answer. Instead, most copyright scholars have preferred to debate the intricacies of secondary liability for technology developers, whom they see as more closely linked to copyright's progress project. Yet, as we shall see next, that discussion also takes its shape from the user's absence.

III. TOOLS FOR USERS

The debate about secondary copyright infringement liability for technology developers is also, and necessarily, a debate about what tools will be available to users, under what conditions. Yet the conventional framing of the tests for liability, and of the underlying choices they require, elides the user. Legal battles over secondary liability are understood as zero-sum games between copyright owners and technology developers, in which the certain risk of widespread lawlessness is pitted against the uncertain benefits of unconstrained innovation. This framing has produced a legal climate that rewards technologies that more tightly constrain private use of copyrighted content and punishes those that do not. Closer attention to users, and willingness to envision a world in which not all users are

16. A notable exception is Jessica Litman. See Jessica Litman, *Digital Copyright* (2001); Jessica Litman, *Sharing and Stealing*, 27 *Hastings Comm. & Ent. L.J.* 1 (2004).

17. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 *Stan. L. Rev.* 1345, 1399-1401, 1413 (2004).

infringers, might produce a different framing and a correspondingly different set of ground rules.

Consider, first, the split between the Seventh Circuit and the Ninth Circuit on the proper application of the “staple article of commerce” standard articulated in *Sony Corp. of America v. Universal City Studios* to peer-to-peer (“p2p”) file-sharing systems.¹⁸ In *In re Aimster Copyright Litigation*, the Seventh Circuit was concerned primarily with the proper allocation of responsibility to minimize lawlessness. That concern led the court to place the burden of justifying system design, and of showing quantitatively substantial lawful uses, on the defendant.¹⁹ In *A&M Records v. Napster, Inc.* and *Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, the Ninth Circuit took the opposite road, articulating a qualitative substantiality standard for lawful uses and refusing to explore the more persistent connections between architecture and conduct.²⁰ The court viewed this approach as mandated by *Sony*’s emphasis on the need to avoid granting right holders control of commercial activity unrelated to infringement.²¹

When asked to revisit *Sony* and resolve the tension between control of infringement and control of innovation, the Supreme Court tried to avoid the zero-sum game by choosing both sides. The *Grokster* Court reaffirmed *Sony*, citing the benefits to innovation, but declined to specify the precise content of the substantiality standard. Instead, it offered the copyright industries another tool for pursuing wrongdoers that purported to focus on intent rather than design.²² But the *Grokster* compromise likely will prove unstable, both because the copyright industries need not accept the Court’s implicit invitation to pursue an inducement-based litigation strategy to the exclusion of other strategies, and because the Court was unwilling to remove design entirely from the liability equation in inducement cases. Although a careful footnote stresses that design alone is not evidence of unlawful intent, the body of the Court’s opinion makes clear that design may be considered together with other evidence.²³ To the extent that this rule permits contributory infringement cases to become inducement cases, it simply shifts the zero-sum game to a new playing field.

Within all parts of this emerging framework the user is an afterthought. The *Napster* court rejected Napster’s efforts to assert fair use by p2p users as a substantial noninfringing use of the Napster system. Focusing on the

18. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”).

19. *In re Aimster Copyright Litig.*, 334 F.3d 643, 649-50, 653 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004).

20. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1162-66 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-22 (9th Cir. 2001).

21. *Napster*, 239 F.3d at 1020-21; *Grokster*, 380 F.3d at 1160-62.

22. *Grokster*, 125 S. Ct. at 2777-80.

23. *Id.* at 2781 & n.12.

market that could emerge if private consumptive copying were forbidden, the court ruled that use of the Napster system to share copyrighted works was a commercial use that harmed this nascent market.²⁴ It relied on the fair use portion of the *Sony* opinion principally to support its conclusion that market harm should be presumed from this commerciality, notwithstanding the fact that the Court has since disapproved such presumptions in fair use cases.²⁵ The *Napster* court read *Sony* as an opinion about when aggregate private copying should give way to markets, not an opinion about when individuals' private copying should remain private, and there is much in *Sony* to support such a reading. The *Aimster* court briefly speculated about the possibility that p2p systems might enable lawful "space-shifting" of music files, and expressed itself willing in principle to extend *Sony*'s fair use holding beyond *Sony*'s facts.²⁶ Ultimately, however, because the court read *Sony* narrowly on the question of contributory infringement, it didn't much matter. *Aimster* could not have shown that space-shifting alone was a quantitatively substantial use of its system, and even if it had so shown, it could never have shown that its system could not be modified to allow this use but not others. The *Grokster* appellate panel focused on the use of defendants' networks to facilitate authorized sharing and sharing of public domain works, neither of which requires a theory of the user to explain its legality.²⁷ This framing, in turn, produced the divergence between quantitative and qualitative substantiality that prompted the Court to grant review and then to articulate a standard for inducement that entangles intent with design. The Court's unanimous opinion envisions users in aggregate, as an installed base of would-be thieves to whose baser instincts the *Grokster* defendants deliberately appealed.²⁸

The *Aimster* court also declined the offer of a different point of entry from which to craft a theory of the user, this time based on the privacy value of encrypted communications. The court was willing to acknowledge that privacy is an important feature of an electronic communications system in the abstract, but unwilling to consider whether the importance of privacy should cause it to think differently about the private copying problem.²⁹ Across a broad range of legal topics, the tension between the interest in privacy and the interest in law enforcement creates extraordinarily difficult problems, and I do not seek to resolve those problems here. My point here is simply that the elision of the user from the debates about private copying and secondary liability weights the scales against the privacy argument as

24. *Napster*, 239 F.3d at 1015-17.

25. *Id.* at 1016 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

26. *In re Aimster Copyright Litig.*, 334 F.3d 643, 652-53 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004).

27. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161-62 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005); see also *Grokster*, 125 S. Ct. at 2787, 2789-90 (Breyer, J., concurring).

28. *Grokster*, 125 S. Ct. at 2772-73, 2781.

29. *Aimster*, 334 F.3d at 650-51.

well. If some private copying is lawful, then the perceived conflict between protecting privacy and preventing infringement is no longer so stark, and privacy cannot plausibly be described as coextensive with lawlessness.

The p2p controversy has exerted a powerful gravitational pull on the debate about secondary copyright infringement liability. In part because litigation strategies on both sides have given p2p technologies heightened salience for scholars, lawmakers, and the general public, it has become conventional to think of p2p as the “biggest” and most important part of this debate, and therefore to conclude that the most important doctrinal problem concerns the appropriate treatment of general purpose technologies that operate on a stand-alone or anonymous basis. Neither of these propositions is true. The words “stand-alone,” “anonymous,” and “p2p” do not describe the vast majority of networked digital media technologies now available to users, many of which incorporate elements of ongoing networked control for technical and business reasons that have little or nothing to do with copyright law. As to these technologies, the Ninth and Seventh Circuits are in general agreement that if ongoing networked control allows knowledge of specific acts of infringement and enables the technology developer to prevent them, and the developer fails or refuses to do so, liability will arise under one or both of the two leading theories.³⁰ This rule about specific knowledge creates enormous potential liability that the *Sony* rule, which concerns constructive knowledge, cannot neutralize. The rule that ongoing control creates ongoing obligations to police does not consider whether users might have legitimate interests of their own to assert against such policing.

If we consider instead the market for digital video recorders as it existed at the time of the ReplayTV litigation, the inadequacies of the legal debate about secondary copyright infringement become more apparent. The ReplayTV device was neither a p2p file-sharing tool nor a stand-alone product, but rather a networked digital video recorder that included two unprecedented features. One enabled users to skip commercials automatically when playing back television programming, and the other gave users the ability to exchange recorded files via the Internet with other ReplayTV users. A group of movie and television studios sued the manufacturer, SonicBlue, for enabling infringement of their copyrights, and requested that SonicBlue produce a complete listing of the television programming downloaded by each ReplayTV user.³¹ When SonicBlue refused, the studios moved to compel production, and convinced a

30. See *Grokster*, 380 F.3d at 1162-66 (indicating that, per *Napster*, specific knowledge plus control would establish liability under both theories); *Aimster*, 334 F.3d at 649, 653 (indicating that specific knowledge alone would not be enough to establish liability for contributory infringement, but that knowledge plus failure to engage in cost-effective redesign would be); see also Randal C. Picker, *Rewinding Sony: The Evolving Product, Phoning Home and the Duty of Ongoing Design*, 55 Case W. Res. L. Rev. (forthcoming 2005) (arguing that this rule is economically sound).

31. *Paramount Pictures Corp., v. ReplayTV*, No. CV 01-9358, 2002 WL 1315811 (C.D. Cal. Apr. 29, 2002).

magistrate judge to grant their request. This order generated considerable publicity, and a number of civil liberties and consumer organizations filed an amicus brief supporting SonicBlue's request that the district court overturn it. The district court granted SonicBlue's request, but not on any of the privacy-related grounds urged by these amici; rather, it ruled that since SonicBlue did not currently collect the requested information, it was under no duty to rewrite its software to do so.

Shortly after the denial of the studios' motion to compel discovery of user download information, five ReplayTV users filed a declaratory judgment action against the studios, seeking to force the court to focus more carefully on the fair use issues raised by the dispute with SonicBlue. The studios moved to dismiss this lawsuit, asserting that they had never demonstrated any intent to sue individual ReplayTV users. The court ruled that in light of the ongoing litigation against SonicBlue, predicated on direct infringement by users, a justiciable controversy existed.³² At the individual plaintiffs' request, the court consolidated their lawsuit with the underlying infringement lawsuit. Nine months later, however, SonicBlue filed for bankruptcy and sold its ReplayTV business to a subsidiary of a major Japanese consumer electronics company, which agreed to remove the features that had motivated the original lawsuit.³³ After that lawsuit had settled, the studios won dismissal of the user lawsuit by agreeing not to sue any of the five individual plaintiffs for infringement.³⁴

Within the legal landscape of secondary copyright infringement liability, the ReplayTV litigation is the functional equivalent of Conan Doyle's dog that did not bark in the night; it is worth considering closely as much for what did not happen as for what did. First, the case was not litigated to a ruling on the merits, and this is important for two reasons. The outcome—financial ruin for the defendant and modification for the technology—was more favorable to the studios than a litigated victory on the merits would have been, and the studios clearly knew this. Successfully concluded litigation culminating in citable precedent is both more expensive and less generalizable to other potential defendants. And to the extent that some uses of the ReplayTV corresponded much more closely to those ruled fair in *Sony*, a complete victory on the merits was by no means certain. From the studios' perspective, then, the case made a much less desirable vehicle for framing both public and judicial debates about the secondary liability of technology providers. The contested discovery request likely served multiple purposes. It was intended to plug what the Supreme Court had characterized as an evidentiary hole in *Sony*,³⁵ but it probably was also intended to be burdensome whether SonicBlue resisted or complied.

32. *Newmark v. Turner Broad. Network*, 226 F. Supp. 2d 1215, 1220 (C.D. Cal. 2002).

33. See Eric A. Taub, *ReplayTV's New Owners Drop Features that Riled Hollywood*, N.Y. Times, July 21, 2003, at C3.

34. See *Paramount Pictures Corp. v. ReplayTV*, 298 F. Supp. 2d 921, 923-24 (C.D. Cal. 2004).

35. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-56 (1984).

Second, although the district court ruled that SonicBlue need not generate new information about ReplayTV users, it did not rule that the requested information was irrelevant or privileged. The court's order therefore cannot be read as establishing a general rule protecting information about private uses of digital media technologies from discovery. To the contrary, it seems clear that if the information had existed in some readily extractable form, the court would have ordered SonicBlue to produce it. This fact is significant because the legal framework that has emerged from the more high-profile p2p file-sharing cases makes it more, not less, likely that technology developers will configure their systems to produce such information in the future, or will simply design systems that give users less flexibility to begin with. After *Aimster* and *Grokster*, both deliberate engineering to avoid collecting user information and deliberate engineering to preclude ongoing control over user activities may be judged culpable. It is unsurprising that the leader in the digital video recorder market, TiVo, has begun negotiating with the entertainment industries and modifying its product to comply with their requests.³⁶

Finally, notwithstanding their request for user download records, the studios did not really want to know much about actual users and their activities, nor did they wish to have a court examine those activities too closely. The discovery request played a key tactical role in the studios' own lawsuit, from which actual users were literally absent. In the user-initiated lawsuit, the industry plaintiffs' primary goal was to avoid a merits ruling by any means possible.³⁷ Doctrinally, closer attention to users and their activities might serve to counteract the debilitating indeterminacy about the appropriate standard of liability to which technology developers are now subject. The ReplayTV episode shows that in the high-stakes world of the high-technology startup venture, the successful litigation campaign against p2p developers has increased the likelihood that defendants offering other types of technologies will either fail or fold, making closer attention to users and their activities increasingly less likely.³⁸

This dynamic—elision of the user followed by seemingly inexorable drift toward a highly constrained digital media environment—also characterizes disputes about the scope of the Digital Millennium Copyright Act's ("DMCA") prohibitions on trafficking in circumvention tools. Legally speaking, DMCA liability is formally distinct from copyright infringement liability. But as more and more digital content is distributed subject to

36. See Gina Piccalo, *TiVo Will No Longer Skip Past Advertisers*, L.A. Times, Nov. 17, 2004, at A1.

37. See Reporter's Transcript of Proceedings at 14-17, 24-37, *Newmark v. Turner Broad. Sys., Inc.*, 226 F. Supp. 2d 1215 (C.D. Cal. 2002) (No. CV 02-4445), available at https://www.eff.org/IP/Video/Newmark_v_Turner/20020812_newmark_transcript.pdf.

38. In all of the ways just discussed, secondary copyright infringement litigation follows the general dynamic identified by Marc Galanter. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

TPMs, from the perspective of both technology developers and users, the distinction between digital media technologies and technical protection measures is increasingly artificial.³⁹ For technology developers at risk of secondary liability, the same conduct can trigger both sorts of claims. For users, both sorts of claims (or threats) shape the range of tools available for experiencing and manipulating digital content.

Like the Supreme Court in *Grokster*, Congress seems to have believed that in the DMCA it successfully split the difference between the competing imperatives of enforcement and innovation. The vehicle for this synthesis, Congress thought, was the statute's bifurcated structure, which distinguishes between TPMs that function as access controls and those that protect against violation of the exclusive rights of copyright owners.⁴⁰ Because Congress thought that the major copyright industries had shown a need for additional protection against widespread unauthorized copying, the DMCA bans the manufacture and distribution of tools for circumventing both types of TPM.⁴¹ With respect to individual acts of circumvention, however, it prohibits only those acts directed at access controls, not acts directed at rights controls. Congress thought a ban on the circumvention of access controls appropriate and fair, because otherwise users could circumvent to avoid payment.⁴² Legislative forbearance as to rights controls, Congress believed, would ensure that users remained free to devise means of their own choosing to circumvent rights controls as necessary to exercise the privileges afforded them under copyright law.⁴³

In fact, the statutory distinction between access controls and rights controls has effectively neutralized not only the intended shelter for users, but also any shelter for tools designed for well-intentioned, paying users to employ toward legitimate ends. Consider a TPM that allows the user to play a music or video file but prevents copying. According to the legislative rationale for the DMCA's bifurcated structure, this TPM is a rights control. Yet in litigation over circumvention of the Content Scrambling System ("CSS") algorithm, which encrypts DVD movies to allow playback but not copying, courts acquiesced without question in the entertainment industries' classification of CSS as an access control.⁴⁴ This

39. Cf. Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 Case W. Res. L. Rev. (forthcoming 2006) (arguing that the boundaries of things are legally constructed).

40. See 17 U.S.C. § 1201(a)-(b) (2000).

41. See H.R. Rep. No. 105-551, pt. 1, at 18-19 (1998), reprinted in Melville B. Nimmer & David Nimmer, *Nimmer on Copyright: Congressional Committee Reports on the Digital Millennium Copyright Act and Concurrent Amendments 5-1, 5-24 to -26* (2000); S. Rep. No. 105-190, at 28-30 (1998), reprinted in Nimmer & Nimmer, *supra*, at 4-1, 4-33 to -35.

42. See H.R. Rep. No. 105-551, pt. 1, at 17-18.

43. See *id.* at 18; S. Rep. No. 105-190, at 28-29.

44. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), amended as 111 F. Supp. 2d 346, 347, *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440-42 (2d Cir. 2001); *Paramount Pictures Corp. v. 321 Studios*, No. 03-CV8970, 2004 WL 402756 (S.D.N.Y. Mar. 3, 2004); *321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004).

construction ensures that only authorized DVD *players*—as opposed to authorized *users*—may access the encrypted content.⁴⁵ But if only authorized *players* can make authorized access, then two further conclusions follow. First, as others have remarked, if every act of rendering protected content is an act of accessing the content and the statute prohibits individual circumvention of access controls, then the individual privilege to circumvent rights controls exists only in theory.⁴⁶ The judicially driven elision of the user thus fundamentally changes the intended effect of the statute. The implications of this result for the fair use privilege are the subject of Part IV.

For purposes of this part, the more pertinent result of construing “access” to refer to devices and not to people is that the development of unauthorized media players violates the ban on tools for circumventing access controls. This rule grants the entertainment industries the control over innovation in technology markets that *Sony* withheld.⁴⁷ It constrains technology developers who seek to offer rival platforms for digital content, and it constrains the users who experience its consequences. Since PC-based media players are also computer programs, in theory the DMCA’s exception for reverse engineering should prohibit this result. That exception permits circumvention “to achieve interoperability of an independently created computer program with other programs,” and was intended to preserve competition in the software industry.⁴⁸ Courts have found a variety of ways to avoid reaching this conclusion, however, and it would be hard to square with their conclusion that the statute’s tool prohibitions target precisely this conduct.⁴⁹

45. See, e.g., *Corley*, 273 F.3d at 444 (rejecting the argument that “an individual who buys a DVD has the ‘authority of the copyright owner’ to view the DVD” and holding that § 1201(a) “exempts from liability those who would ‘decrypt’ an encrypted DVD with the authority of a copyright owner, not those who would ‘view’ a DVD with the authority of a copyright owner”).

46. See, e.g., Jacqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability*, 62 Wash. & Lee L. Rev. 487, 494-95 (2005); R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 Berkeley Tech. L.J. 619, 650-51 (2003); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 543 (1999).

47. One decision that rejects this approach is *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 1669 (2005). The court ruled that a provider of universal garage door openers did not violate the DMCA when it made its product compatible with a garage door system protected by a rolling code mechanism because the system’s manufacturer had necessarily granted users permission to access the system in order to open their garages. *Id.* at 1204. The *Chamberlain* decision, however, implicitly permits a right holder to develop mass-market licensing policies that withdraw the privilege of access.

48. 17 U.S.C. § 1201(f) (2000); see Comm. on the Judiciary House of Representatives, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, Comm. Print 105-6, 105th Cong., 2d Sess. 14, *reprinted in* Nimmer & Nimmer, *supra* note 41, at 7-1, 7-19 to -20.

49. See, e.g., *Davidson & Assoc. v. Jung*, No. 04-3654, 2005 WL 2095970, at *8 (8th Cir. Sept. 1, 2005) (holding § 1201(f) inapplicable because circumvention of the “secret

Once again, none of our three users is well placed to help litigators and courts consider whether and why users and their motivations should play a more central role in these disputes. As in the case of private copying, the choice to minimize lawlessness is superficially consistent with the narrative of the economic user, as is the evolution of an incentive structure that informally discourages developers from offering tools and platforms that lack built-in controls. More specifically, the controversy surrounding the p2p cases has produced a narrative of the economic user that is constructed at the intersection of economics and geography: “Users” are local; users who seek to share files via digital networks are no longer users, but rather “pirates.” The equation of p2p file sharing with piracy in turn reinforces the prevailing judicial interpretation of the applicable legal rules and deepens its shadow. But the ReplayTV and DeCSS problems disrupt this new narrative of the economic user in two ways. At least some ReplayTV users simply wished to assert greater control over their viewing experiences in the (local) privacy of their own homes, and at least some of the globally distributed downloaders of DeCSS really did want only to watch DVDs on computers running Linux. Once again, the economic user can’t answer the questions about overall utility (of privacy and of technological “openness”) that these problems raise.⁵⁰

The romantic and postmodern users are, respectively, unable and unwilling to help frame the problem differently. The romantic user is handicapped, once again, by the fact that most use of these technologies is purely consumptive. Although the romantic user benefits enormously from new technologies for manipulating and publishing digital content (a problem that Part IV takes up in more detail), the facts of the paradigm case don’t match the romantic user’s profile. The postmodern user responds to the problems of secondary liability and DMCA liability largely by asserting their irrelevance to her own conduct. The more sophisticated versions of this argument invoke the famed “darknet hypothesis,” which asserts that the copyright industries cannot prevent the truly determined user from gaining access to unprotected content and manipulating it with the tools of her choice.⁵¹ The postmodern user seeks out and celebrates darknets, and her

handshake” procedure for accessing video games’ multi-player mode enabled unauthorized copies of games to be played in multi-player mode, thereby causing infringement); *Reimerdes*, 111 F. Supp. 2d at 347 (holding § 1201(f) inapplicable because defendants did not themselves do any reverse engineering, because they disseminated the DeCSS program too widely, and because DeCSS, an intermediate artifact of the open source process, was a Windows utility and thus did not serve the “sole” purpose of enabling DVD interoperability with Linux).

50. It may be that we would conclude that the costs of accommodating these users’ preferences should weigh more heavily than the benefits of doing so. My only point here is that the economic user is definitionally incapable of performing the necessary inquiry.

51. See Peter Biddle et al., *The Darknet and the Future of Content Distribution*, in Proceedings of the 2002 ACM Workshop on Digital Rights Management (2002), <http://crypto.stanford.edu/DRM2002/darknet5.doc>; see, e.g., Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 Loy. L.A. Ent. L. Rev. 635 (2004).

romanticization of *samizdat* renders her both less capable of offering a coherent thesis about how the law should regulate technology and less sympathetic when she tries to do so. It is hard to celebrate legal marginality and assert the law's responsibility at the same time.

For the most part, academic discussions of the contributory liability problem or of the DMCA's device ban have not focused on either the need for a theory of the user or the inability of our existing cast of characters to satisfy that need. Such discussions have largely bought into the framing of the problem as a game played between entertainment and technology interests. In light of the profound effect that the user's absence exerts on both law and practice, this failure to attend to the user is singularly ill-advised. A theory of the user is essential to defining the appropriate relationship between design and liability in the networked digital age.

IV. TRANSFORMATIVE USERS

In debates over modern copyright policy, transformative uses lie at the opposite pole from private consumptive copying; their value is well understood and widely acknowledged. In fact, transformative uses have more in common with private copying than is widely appreciated. Just as in the case of private copying, the user's conduct is central to the problem that the law seeks to solve, but users themselves are absent from the analysis. There is broad consensus on the social value of transformative *uses*, but our understanding of the *users* who make them is hazy. And just as in the case of secondary liability, the user's absence shapes the law in powerful and largely unexamined ways. The effect is especially pronounced as the prospects for transformative use become more closely linked to the availability of tools for manipulating digital content.

In most fair use cases, the identity of the user is known, the use has already been made, and the only question is whether or not it passes muster. Perhaps for these reasons, courts and commentators evaluating fair use cases tend to talk about uses as *faits accomplis*. Although the fair use analysis requires nods to abstract and general qualities such as "commerciality," the question of lawfulness is rarely related in any systematic way to the process that led to the use.

The consistent exceptions to this rule are the cases discussing whether the fair use doctrine shields decompilation of computer software for purposes of reverse engineering the software's unprotected functional requirements. As a practical matter, reverse engineering generally cannot be done without decompilation, a fact that forces attention to follow-on creation as a process in which the user is constrained by what has gone before. In this context, courts and most commentators have concluded that the copying required to perform that process is fair.⁵² Because of their specialized subject matter,

52. Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000); Bateman v. Mnemonics, Inc., 79 F.3d 1532 (11th Cir. 1996); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Pamela Samuelson & Suzanne Scotchmer, *The Law and*

the software reverse engineering decisions tend to be understood as *sui generis*. If one reads these decisions together with those examining more closely the scope of copyright in computer microcode, that conclusion no longer seems quite so straightforward. Those decisions hold that the copyright in a program does not protect functional principles embodied in the program, but the functionality principle that they articulate is only partly literal. The courts' approach to functionality is also partly, and importantly, metaphoric. Not all of the copying permitted by courts meets a strict necessity criterion, which is to say that not all features deemed unprotected are necessary for the software to function. For many features, uncopyrightability follows from industry standard practice or customer expectation.⁵³ The software copyright decisions thus reflect a view of copyrightability, and by extension of fair use, that is broadly user-centered. Programmers may write programs that communicate with each other and with users on the terms that the market has come to expect.

A fair use doctrine more attentive to the ways in which context shapes creative practice might conclude, by analogy to the metaphoric functionality principle that emerges from the software copyright cases, that a broader range of uses undertaken by users for purposes of interoperating with their own culture should be permissible.⁵⁴ Because the fair use analysis focuses on uses rather than on users, and on fair use as *fait accompli* rather than fair use as process, most courts have steadfastly resisted developing such principles of "cultural interoperability" to apply in non-software cases. Accordingly, they have rejected fair use arguments asserted by creators of such things as trivia guides to popular television shows⁵⁵ and a satiric treatment of the O.J. Simpson trial that also targeted the breathlessly juvenile quality of its coverage in the mass media.⁵⁶ Both of these

Economics of Reverse Engineering, 111 Yale L.J. 1575, 1612 (2002) (summarizing legal commentary on the fair use question).

53. See *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1556-57 (11th Cir. 1996); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 817-18 (1st Cir. 1995), *aff'd without opinion*, 516 U.S. 233 (1996); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 714-15 (2d Cir. 1992); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1474-75 (9th Cir. 1992). *But see Dun & Bradstreet Software Svcs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197 (3d Cir. 2002) (holding that industry standard status must be assessed from the copyright owner's perspective, not the alleged infringer's perspective).

54. For examples of decisions that move the law closer to such an approach, see *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (distinguishing complementary and substitutional uses of copyrighted content), *cert. denied*, 537 U.S. 1110 (2003), and *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (holding that a novelist's use of Margaret Mitchell's *Gone With the Wind* as a vehicle for expressing her own views on slavery and Reconstruction was permissible). Although framed in very different terms, both approaches are rooted in a rejection of strict necessity as the criterion for transformative copying. See also *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 802 (9th Cir. 2003) (observing, in the context of a more traditional parody case, that fair use protects parody even though "one could make similar statements through other means").

55. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998); *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

56. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

examples involve users in the process of communicating about their culture using widely accepted cultural vocabularies. A fair use doctrine more attentive to the ways in which context shapes creative practice would be more inclined to approve them. In these cases and others like them, the elision of the user affects both the range of uses determined to be fair and the range of uses likely to be made in the future.

Failure to connect fair uses to fair users and to the creative process also shapes litigation under the DMCA's provisions banning circumvention tools. As discussed in Part III, the prevailing judicial interpretation of those provisions renders the limited privilege for individual acts of circumvention a nullity, and the provisions on their face place circumvention tools beyond most individuals' reach in any event. In case after case, courts have been asked to rule that the tool bans are therefore constitutionally infirm. Litigants have argued that a fair use exception to copyright is constitutionally required, and that the absence of a meaningful circumvention privilege frustrates this requirement because it effectively precludes most users from making fair uses, including transformative uses, of technologically protected digital content. Courts uniformly have rejected the latter argument, reasoning that the DMCA simply forecloses certain methods of use, and that the fair use doctrine does not guarantee access to any particular method.⁵⁷ If fair uses are understood as an abstract, undifferentiated set of end products, this conclusion seems perfectly reasonable. Opponents of the DMCA have not shown why this understanding is inadequate.

The argument crafted by opponents of the DMCA requires meticulous attention to the causal connections that link diminished ability to manipulate digital content with diminished prospects for fair use more generally. Opponents must show: that an important category of uses requires *direct copying*; that individuals will not have a meaningful ability to circumvent TPMs if they cannot get *tools* from others; that many works will not be meaningfully available in other *formats*; and that other *methods* of copying technologically protected content will not be meaningfully sufficient. None of these propositions is straightforward. Establishing them requires understanding fair use as a process that emerges from "ordinary" use and is shaped by environmental, motivational, and resource constraints. Consider first the simplest possible argument that an opponent of the DMCA might make: By analogy to cases discussing the importance of literary quotations for purposes of biography and criticism, the ability to copy sounds and images is essential for effective fair use commentary on audiovisual works.⁵⁸ This argument does not appear to depend on process

57. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 346-47 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1101-02 (N.D. Cal. 2004); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002).

58. *See, e.g., Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260-65 (2d Cir. 1986); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966);

considerations—it presumes both access to the underlying work and a fully formed intention to comment on it—but if one accepts it, such considerations are nonetheless important to establish the remaining propositions. What does the fact that a work is available in analog format in the Library of Congress mean for a would-be fair user in New Mexico? Are patterns of copying determined by paths of least resistance, so that if copying is expensive and inconvenient, or requires additional equipment to exploit the “analog hole,” many users will not bother? Attention to context also raises the question whether the initial, simple argument for direct copying is too narrow. If context shapes creative practice, might direct copying be an enabler of important uses even when the end product does not itself require direct copying? If fair use emerges unpredictably from ordinary use, might the prospects for fair use of works predominantly disseminated in digital form correlate positively with leakier protection? The prevailing mode of analysis in fair use cases is so abstract that these questions and others like them are easily overlooked.

Here again, the entertainment industries have adopted a litigation strategy intended to prevent courts from considering claims that might enable litigants to craft a less abstract, more user-centered model of fair use. The most important prong in this strategy is a hands-off approach to academic computer scientists, whose work makes transparent the importance of open-ended tinkering with digital content and digital tools. This approach dates to 2001, when the Recording Industry Association of America (“RIAA”) convinced a court that it need not entertain Princeton computer science professor Edward Felten’s declaratory judgment challenge to the DMCA because he faced no reasonable risk of suit, even though the initial threat of suit had come from the RIAA itself.⁵⁹ The threat was not meritless; arguably, Felten’s research violated the literal text of the statute. To avoid that result, a court would need to construe the statute to place academic research papers and any code they might contain outside the scope of the statute’s broad description of covered circumvention technologies.⁶⁰ The RIAA was and remains unwilling to take that risk. Two years later, when one of Felten’s graduate students cracked the just-released MediaMax digital rights management system for recorded music, the RIAA’s initial posturing rapidly gave way to studied indifference.⁶¹ In lawsuits against for-profit technology companies, avoiding user-driven claims entirely has

Wojnarowicz v. Am. Family Ass’n, 745 F. Supp. 130, 142-47 (S.D.N.Y. 1990); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

59. See Transcript of Motions, Felten v. Recording Indus. Ass’n of Am., No. 01 CV 2669 (D.N.J. Nov. 28, 2001).

60. See 17 U.S.C. § 1201(a)(2) (2000).

61. See Fred “Zamboni” Locklear, *Press “Shift” to Initiate Lawsuit*, Ars Technica, Oct. 9, 2003, <http://arstechnica.com/news/posts/1065755223.html>; Fred “Zamboni” Locklear, *SunnComm Shifts Stance, Backs Away from Lawsuit*, Ars Technica, Oct. 10, 2003, <http://arstechnica.com/news.ars/post/20031010-2961.html>.

proved more difficult, but the same tactics employed in the ReplayTV litigation reduce the likelihood that such claims will proceed to judgment.⁶²

If a court were to consider such a user-driven claim, the prevailing models of the user do not lend themselves to the development of a more user-centered, process-based understanding of fair use. Transformative use is the domain of the romantic user, but scholarly accounts of the romantic user are more concerned with ends than with means. They portray the romantic user as a superior being who knows exactly which works he wants to use and what message he wants to convey. The romantic user therefore is poorly positioned to explain the processes by which access and use become transformation. In addition, because scholarly accounts of the romantic user tend to be insufficiently sensitive to process considerations, romantically motivated critiques of the DMCA too often regress automatically to the paradigmatic fair use cases of parody and print-based criticism. Since neither activity requires direct copying of the targeted work, this argument is self-defeating.

The economic user's approach to the problem of transformative use is equally unsatisfying. It is widely acknowledged that some fair uses, including many transformative uses, create positive externalities from which society as a whole benefits greatly, and that many such uses would not be made if the users who make them were required to internalize all of the costs. This insight justifies having a fair use doctrine, but it does not tell us how to decide particular cases. Because of this clear mismatch between individual and social utility, economically inclined judges and scholars have repeatedly stumbled in their efforts to theorize an economic basis for identifying those uses that are worth privileging. Closer attention to the economic *user* does not help matters. The path from access to manipulation to transformation depends in part on considerations that the model of the economic user does not encompass. It is worth noting here that pervasive distrust of the economic user among fair use advocates also has costs, because the model of economic user may help to explain aspects of the transformative use problem that the model of romantic user does not. In particular, more careful attention to the economic user's internal cost-benefit calculus might help to support an argument that direct digital manipulation is a constitutionally significant guarantor of fair use precisely because it is the most convenient. Ultimately, however, the economic user is destined to remain an incomplete vehicle for explaining the incidence of transformative uses.

To a far greater degree than our other two characters, the postmodern user appreciates both the concept of cultural interoperability and the

62. *See, e.g.*, *Macrovision Corp. v. 321 Studios*, No. 04 Civ. 00080, 2005 WL 678851, at *1 (S.D.N.Y. Mar. 23, 2005) (granting 321's motion to withdraw its answer and be placed in default on the ground that it "has ceased operations, laid off all of its employees, auctioned off its few assets, and is subject to both IRS liens and default judgments in other actions"); *321 Studios*, 307 F. Supp. 2d at 1107 (approving joinder of user's declaratory judgment claim).

importance of a process-based understanding of fair use. But the postmodern user's perspective is not one that appeals to the sensibilities of judges and policymakers. She rejects the ideal of transformative use, and the linked notion of authorial creation, precisely on the ground that they privilege romanticism. That is all very well as a matter of literary theory, but it does not comport with the persistent and widely held belief that some uses of copyrighted works are different than others in ways that should matter both for copyright law and for the future of copyright's progress project. Once again, then, perversity exacts its price. The postmodern user cannot command the law's sympathy long enough for her insights to matter.

All of this is to suggest that academic investigations of the fair use problem should be proceeding by a radically different route. Enormous effort has been spent, and continues to be spent, in defending the social importance of transformative uses and fair uses more generally, but that question is not in serious doubt. Judges who reject fair use arguments do not do so because they think the fair use doctrine itself should be eliminated. Even plaintiffs in parody cases do not argue that transformative uses as a category are unimportant. The contested questions concern how much use is fair, what sorts of use qualify, and whether fair uses do or do not require certain background technological conditions. These questions require context-based determinations that cannot be made without careful attention to users and the processes by which they participate in their own culture.

V. USERS AND THE PUBLIC DOMAIN

The abstract, decontextualized understanding of "use" that predominates in fair use jurisprudence also shapes copyright's model of the public domain. As I have argued at length elsewhere, the designation "public domain" creates a misleading impression of geographic discreteness that muddies thinking about the practical accessibility of the common elements in culture.⁶³ This metaphoric compartmentalization derives much of its staying power from the fact that the legal construction of the public domain systematically overlooks the user.

The standard doctrinal account of the public domain holds that it encompasses works never subject to copyright, works no longer subject to copyright, and unprotected elements of still-copyrighted works. From this common descriptive baseline, understandings of the public domain's purpose diverge radically. One approach, which I have called the "cultural stewardship" model, sees the public domain as a repository of old and archetypal content, and understands passage into the public domain as

63. Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *The Future of the Public Domain* (P.B. Hugenholtz & L. Guibault eds., forthcoming 2006).

marking the end of a cultural good's productive life.⁶⁴ The other, the "conservancy" model, sees the public domain as encompassing a rich and varied assortment of intellectual and cultural building blocks, and holds that resources in the public domain serve as important catalysts for creative ferment.⁶⁵ The choice between these theories has important implications for the structure of copyright law. That choice is complicated by the geographic entailments of the public domain metaphor, which leads to a particular way of thinking about the nature and accessibility of the resources that are public.

As used in copyright cases, the metaphoric model of the "public domain" both relies on and encourages a sort of magical thinking in which users play no part. The space that is the "public domain" has the Heisenbergian property of being both discretely constituted and instantly accessible to all users everywhere. Such thinking underlies the copyright doctrines that define "substantial similarity" broadly and grant equally broad control over derivative uses, and it enables courts and many commentators to ignore the practical consequences of these doctrines. If everyone always has access to the "public domain," then broad exclusive rights for copyright owners threaten neither access to the common elements of culture nor use of those elements as the substrate for future creation. A user-centered approach to these doctrines, in contrast, would understand "publicness" as hinging importantly on a resource's practical accessibility, and would observe that copyrighted cultural goods, and especially mass commercial culture, comprise an increasingly large fraction of the public experience of culture. These considerations raise important questions about whether the rules governing both publicness and infringement should be calibrated differently.

As in the case of fair use, the user's absence from the legal construction of the public domain also structures the emerging set of rules that governs the availability of tools for accessing public domain cultural resources. In the *Grokster* litigation, both the Ninth Circuit's opinion and Justice Breyer's concurrence supported their argument for a qualitative interpretation of the *Sony* standard with evidence about the use of p2p networks for distributing public domain files maintained by organizations

64. *Id.* at 14-17; *see, e.g.*, William M. Landes & Richard Posner, *The Economic Structure of Intellectual Property Law* 210-53 (2003); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471 (2003).

65. Cohen, *supra* note 63, at 14-17; *see, e.g.*, Benkler, *supra* note 5; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 173; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 33; David Lange, *Recognizing the Public Domain*, *Law & Contemp. Probs.*, Autumn 1981, at 147; Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965 (1990).

such as the Prelinger Archive.⁶⁶ Both discussions partook heavily of romance, but their shared protagonist was the romantic public domain, not the romantic user or any other kind of user.⁶⁷ Users figured in these discussions only as unremarked and passive vehicles through which public domain content is transmitted, and the goals of the romantic public domain thereby advanced. But if that is true, then the logic of the romantic public domain justifies the results in *Napster* and *Aimster* as much as it does the Ninth Circuit's holding in *Grokster*. If users are mere passive recipients of content, it is unclear why preventing unauthorized transmissions should threaten authorized transmissions, which can be made using many different technologies. The same logic underlies judicial rejection of claims that the DMCA's tool bans threaten access to the public domain. As in the case of fair use, inattention to process leads fairly easily to the conclusion that the imaginary space that is the "public domain" is not rendered inaccessible simply because a right holder has used TPMs to restrict access to and use of specific files.

Our three candidates for the role of user largely contribute to the reigning confusion about the public domain's location and ontological significance in the ongoing process of culture formation. Because the romantic user gives little thought to practical constraints on access to creative resources, he is generally content to assume, along with courts, that content "in the public domain" is readily available for reworking. When troubled by the outcome of a particular infringement dispute or by the implications of technologically mediated access, his first and often only impulse is to point to the end product that a different set of rules would allow him to create. The economic user is differently insensitive to the ways in which environment and technology structure the creative process. Like the romantic user, he assumes that creative individuals know in advance what inputs they will need. Unlike the romantic user, he therefore assumes that individuals who desire access to technologically protected content can easily determine whether the benefits of purchasing access outweigh the costs. The postmodern user's problem, meanwhile, is the same as it was before: If authorship as such doesn't exist, the postmodern user can neither envision herself as an author nor explain how the public domain enriches the creative process in ways relevant to copyright's progress project.

A user-centered approach to the questions surrounding the appropriate legal characterization of the public domain would have important implications across a broad range of copyright doctrine. It would affect not only the way that the public domain is currently constituted, but also the definition of a copyright owner's rights. By forcing attention to the experiential determinants of publicness, such an approach also would

66. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161-62 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005); *Grokster*, 125 S. Ct. at 2787, 2789-90 (Breyer, J., concurring).

67. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal. L. Rev. 1331 (2004).

encourage closer scrutiny of the technologies that mediate access to the common elements of culture. To be tenable, however, a user-centered approach to the public domain requires a more robust theory of the user, and of the user's role in furthering copyright's progress project.

VI. THE SITUATED USER

Within the past decade, a few scholars have sought to develop a more precise understanding of the user's role within the copyright system. In different ways, each of these efforts seeks to remedy some deficiency in existing models of the user. Together, they supply the foundation for a fourth character, whom I will call the situated user. The situated user appropriates cultural goods found within her immediate environment for four primary purposes: consumption, communication, self-development, and creative play. The cumulative result of this behavior by situated users, and of both planned and fortuitous interactions among them, produces what the copyright system names, and values, as "progress."

First, and importantly, the situated user consumes cultural goods available to her within her own culture, and those that are accessible to her from other cultures. What differentiates the situated user from the economic user is that it is not the fact of consumption that is of primary importance, but rather the pathways to consumption. Some consumption of cultural goods results from directed effort by the user, or from advertiser-supported content directed at the user, but much other consumption does not follow either of these pathways. Some occurs fortuitously, as a result of following links created by physical or virtual juxtaposition. Still other consumption occurs as a result of the user's situatedness within a larger network of family, friends, colleagues, teachers, students, and acquaintances, any of whom may share, recommend, or mention any number of things for any number of reasons. A well-tailored copyright law cannot focus only on some of these pathways, but must consider them all.

Second, the situated user copies cultural goods for purposes of communicating with other situated users. In general, copyright law recognizes only some copying—the transformative kind—as communicative, and therefore concludes that only the romantic user can assert a claim to expressive privilege. Two provocative essays by Joseph Liu and Rebecca Tushnet expose the narrowness of this approach, ably articulating the expressive values that copying serves wholly separate from any connection to transformative use.⁶⁸ Liu's inquiry is internal to the

68. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. Rev. 397 (2003); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535 (2004); see also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1 (2004) (characterizing freedom of speech as inherently appropriative); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215 (1996) (arguing that copying and use of creative works enable processes of social meaning-making).

copyright system, while Tushnet's focuses on the nexus between copyright and the First Amendment, yet they offer similar conclusions. Both remind us that the range of practices subsumed under the label "copying"—including but not limited to duplication, imitation, performance, and allusion—are critically important means of expressing one's beliefs, values, and affiliations.

Third, the situated user appropriates preexisting cultural goods as an inevitable part of the process of self-development. According to Liu, the ability to manipulate copies of copyrighted works, and to enjoy repeated access to such works, furthers intellectual development because it enables "richer and more complex" interactions with cultural goods.⁶⁹ In my own work on the intersection between copyright and privacy, I have linked this notion of autonomy in intellectual consumption with an interest in intellectual privacy that has both informational and spatial aspects.⁷⁰ Although invocation of self-development once again suggests the romantic user, within both of these arguments the point is broader than the model of the romantic user typically allows. Autonomy and privacy in intellectual consumption further self-development even when they do not lead directly to the expressive activities with which the romantic user is concerned.

Finally, the situated user engages in creative play, with which "copying" in all the ways listed above is inextricably linked. Both David Lange and Eben Moglen have written eloquently about the centrality of play to human creative activity.⁷¹ Moglen's use of the term *homo ludens* is, presumably, an allusion to Huizinga's classic work on the cultural primacy of play.⁷² Huizinga, however, links play tightly to both contest and mimesis, and therefore concludes that the performing arts (music, dance, and also poetry) are much more closely linked to play than are either prose writing or the visual arts. Moglen and Lange understand play more broadly to include working and reworking of all sorts. Lange's emphasis on play in interpretation and reworking evokes to some extent the postmodern user, but with an important twist: To play is human, and therefore neither marginality nor powerlessness is required. For Lange, play is a potent source of cultural power.

69. Liu, *supra* note 68, at 407; *see also* Balkin, *supra* note 68 (discussing the mutually constitutive relationship between "self" and "culture"); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 Wm. & Mary L. Rev. 1245 (2001) (arguing that autonomy in intellectual consumption is rooted in part in principles of physical property ownership).

70. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 Conn. L. Rev. 981 (1996); Julie E. Cohen, *DRM and Privacy*, 18 Berkeley Tech. L.J. 575 (2003).

71. David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, Law & Contemp. Probs., Spring 1992, at 139; Lange, *supra* note 65; David Lange, *Reimagining the Public Domain*, Law & Contemp. Probs., Winter/Spring 2003, at 463; Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, in *The Commodification of Information* 107 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

72. Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (1950).

Together, these four activities—consumption, communication, self-development, and creative play—define the range of human use of cultural goods. A model of the user predicated on all four practices stands a better chance of avoiding the artificiality and one-dimensionality that characterizes the three leading models of the user. Unlike the economic user, the situated user is more than a narrow, self-interested consumer; unlike the romantic user, however, she knows when to sit back, have a beer, and fire up the TiVo. Unlike the postmodern user, the situated user has the capacity and the will to link her own creative projects aspirationally to larger dreams of artistic and personal progress.

A focus on the situated user also puts us on the road to overcoming the second major deficiency in existing theories of the user: the lack of a clear connection between the behavior of the individual user and copyright's overarching goal of fostering collective "progress." As a result of excellent work by a number of scholars, it is increasingly clear that the reigning modernist formulation of this project is insufficient, and that any serious formulation must take into account the mutually constitutive relationships between and among the self, community, and culture. The model of the situated user satisfies this criterion, since it underscores the reflexivity of culture. How, though, do the individual (and group) behaviors of consumption, communication, self-development, and creative play translate into collective artistic and cultural development?

The key to making this connection lies, I think, in a twofold appreciation of the process of play. Moglen and Lange speak of play as intentional activity by individuals. But there is another sense of "play" that is equally important here, to which the first sense relates. This is the sense described by Gadamer as the "to-and-fro" within the system of culture.⁷³ Play is the "flex" in cultural practices of representation; call this the "play of culture," as distinct from the "play within culture" engaged in by situated users. As I have written elsewhere, cultural change moves in a relational network of actors and artifacts.⁷⁴ The "play of culture" describes degrees of freedom within this network; it is the process by which culture bends and folds unpredictably, bringing new groups, artifacts, and practices into unexpected juxtaposition.

This phenomenological description of the play of culture moves us inexorably back to the situated user, through whose actions the play of culture is performed. Although the play of culture is not an individual phenomenon, it is nonetheless partially dependent on the extent of individual ability to exploit both known resources and instances of fortuitous access and interconnection. Yet because it is not an individual phenomenon, the play of culture does not depend only on creative play;

73. Hans-Georg Gadamer, *Truth and Method* 102-10 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004).

74. Cohen, *supra* note 63, at 28-36; see also Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *Wm. & Mary L. Rev.* 1525, 1682-86 (2004) (describing an "emergentist" approach to creativity that treats culture as a complex system).

instead, it emerges from the full spectrum of behavior by situated users. Consumption, communication, self-development, and creative play merge and blur into one another, and the play of culture is the result. This has, it seems to me, enormous importance for the way copyright's project is understood. Scholars and judges confidently speak of inducing creativity and discouraging slavish imitation, as if the two could be neatly separated. But if these practices are understood not only as related but as together comprising the very stuff of "progress," it becomes harder to envision the former without the latter.

Operationally, then—and here is the nub of the problem for copyright—both the play of culture and play within culture require doctrinal accommodation. The situated user flourishes, and copyright's progress project also flourishes, to the extent that law and practice enable a flexible combination of targeted access, fortuitous exposure, autonomous consumption, and open-ended play. The situated user requires a degree of autonomy to seek out new cultural experiences and to manipulate the cultural objects she encounters, but benefits also from a degree of unpredictability in context-driven access to cultural objects. A well-designed copyright system should facilitate all parts of this process, and that is no easy task.

VII. A NOT-SO-MODEST PROPOSAL

If I am right about the relevance of the situated user for copyright law and policy, then the questions that copyright scholars and lawmakers need to consider are far-reaching. As I have tried to show, the user's absence from copyright doctrine is a self-perpetuating phenomenon. Systemic failure to consider the user both legitimates judicially driven elision and encourages right holders and technology developers to ignore the user as a matter of practice. In many of the cases discussed in Parts II-V, one could reasonably conclude that the courts were bound by the language or by precedent to do exactly as they did, but that does not make the resulting rules defensible. To the extent that the copyright system relies on the situated user to advance its goals, copyright law should acknowledge and comprehensively adjust for the situated user's importance.

What sort of accommodation does the situated user require? A system of copyright, like any other system of law, must begin with generally applicable rules. I do not intend to suggest, and do not believe, that each user's needs should be evaluated on a case-specific basis. Nor am I suggesting simply that copyright law should recognize conduct falling within certain social patterns of information use as fair use.⁷⁵ Although I think that copyright law should accord established social patterns of information use much greater respect than it now does, I do not think that a legal regime concerned with fostering intellectual and creative progress

75. See Madison, *supra* note 74.

should reserve its solicitude only for established patterns. I have argued that copyright law should direct its attention instead to a much more general pattern embodied in the dialectic between the two senses of “play.”

What I want to suggest, then, is at once more conservative and more radical than either of the above alternatives: Copyright should recognize the situated, context-dependent character of both consumption and creativity, and the complex interrelationships between creative play, the play of culture, and progress, and should adjust its baseline rules—not simply its exceptions—accordingly. Scholars and policy makers should ask how much latitude the situated user needs to perform her functions most effectively, and how the entitlement structure of copyright law might change to accommodate that need. In particular, they should be prepared to ask whether the situated user is well served by the current copyright system of broad rights and narrow, limited exemptions, or whether she would be better served by a system that limits the rights of copyright owners more narrowly in the first instance.⁷⁶ This is not, to use Michael Madison’s terminology, a choice to emphasize the “primacy of the actor” over the “primacy of the pattern.”⁷⁷ The choice is not either/or, but both/and; it is actors within contexts who produce “progress.”

Striking the right balance between owners and users—between the convenience of clear, broad entitlements and the importance of play in both senses described above—is likely to require some difficult tradeoffs. The matter is further complicated by the fact that the category of “users” is highly heterogeneous,⁷⁸ and by the fact that individual users themselves will often have conflicting interests. All of these questions remain to be addressed, and will require sustained, collaborative attention. But the tradeoffs are no more difficult than those that the current system of copyright imposes, unacknowledged, on users and on creative practice more generally. In undertaking this process, it will perhaps be helpful to remember that copyright is a system of legal regulation overlaid on processes of human learning and creativity that have existed for millennia. Those processes are still quite poorly understood, and much work remains to be done in understanding the pathways by which exposure, consumption and copying lead into creative play, and by which private creative play becomes more public contribution to the creative fabric of a common culture. Under the circumstances, our guiding principle should be the one often attributed to Hippocrates: First, do no harm.

76. For a more detailed discussion of this point, see Cohen, *supra* note 63, at 42-47.

77. Madison, *supra* note 74, at 1639-40.

78. In addition, as Rebecca Tushnet reminds us, many users of copyrighted works are not individuals. Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World* (2005) (unpublished manuscript, on file with author). A fuller model of the situated user must say something about these other users as well.