

Clarifying Uncertainty: Why We Need a Small Claims Copyright Court

John Zuercher

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CLARIFYING UNCERTAINTY: WHY WE NEED A SMALL CLAIMS COPYRIGHT COURT

JOHN ZUERCHER*

ABSTRACT

This article is concerned with the question of whether copyright law in the United States is currently equipped to achieve its original goal, set within the U.S. Constitution, to promote innovation and progress. This article suggests that copyright law is not equipped to achieve this goal because a paradox inherent in copyright law is hindering copyright litigation and causing uncertainty. The paradox is found in 17 U.S.C. § 106, which protects transformative works that are derivative, and 17 U.S.C. § 107, which protects transformative works as fair use. Ideally, the federal courts would solve this dilemma by interpreting the appropriate application of these competing protections through numerous case-by-case analyses. However, few cases are currently reaching the courts or are resulting in judicial opinions because the federal court system is ill-equipped for the task due to the expense, time, and damages involved in litigation. For effectiveness and to meet the goals of copyright, copyright litigation must become affordable, accessible, and timely, resulting in more judicial opinions and individual case analyses. To this end, I propose a two-fold plan including (1) reducing statutory damages in copyright cases throughout all levels of litigation, and (2) introducing a small claims copyright court.

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INTRODUCTION

Imagine for a moment that a woman, Anna, had a hobby she enjoyed doing in her free time. This hobby revolved around the creation of fan fiction online. Anna did not use any of the characters from the different works she wrote from, but instead would create new characters, with new stories of their own, within the same worlds. She received no compensation for these works, but over time she wrote several stories because she enjoyed being a part of a community that shared her interests and she could receive critiques on her writing, which she believed would help her to become a better writer. Then one day, Anna came across an odd letter in her mail. Opening it, she immediately saw in big, bold letters, “Cease and Desist.” Suddenly, a lot of terrifying phrases were coming at her: copyright infringement, damages up to \$150,000, and have your attorney contact us. Scared, Anna looked up a local attorney and scheduled a meeting. The lawyer told her that while it was possible her fan fiction might constitute copyright infringement on the author’s exclusive derivative rights, it may also constitute fair use—which is an affirmative defense against a claim of copyright infringement. However, he explained that proving fair use required defending her case in court. While he thought Anna had a good case, the lawyer did not know if she would win, as there has never been a fan fiction case like it heard before the federal courts. He also warned her that a trial could take up to two years, cost her several hundred thousand dollars in legal fees, and force her to pay double that number in damages should she lose. Those figures were more money than Anna would make in the next five years of working and she barely had any free time as it was—certainly not enough time to spend in court. Defeated, Anna headed home, took down all her materials, and resigned herself to never writing fan fiction again. All the while wondering, what if her works did constitute fair use?

Currently, copyright law and the ability of creators to successfully rely on the flexible fair use standard is hindered by uncertainty.¹ Looking at U.S. Const. art. I, § 8, cl. 8, describing the purpose of copyright, “[t]o promote the Progress of Science and useful Arts,” it seems like copyright would be a straightforward system.² The previous section explains the purpose and, directly following this phrase, there is a way to go about doing it: “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³ However, as copyright law has developed over the last century, the protections offered by it have expanded

1. John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201, 1216–17 (2005).

2. U.S. CONST. art. I, § 8, cl. 8.

3. *Id.*

from their simplistic origins of protecting solely against the direct reproduction of works.⁴ Currently, the promotion of progress is a balancing test that provides incentives and a shelter for creative works, but at the same time, limits these in both time and scope.⁵ The balancing test consists of weighing the exclusive rights of authors in their copyrighted works under 17 U.S.C. § 106 with the limitations on those exclusive rights under 17 U.S.C. § 107—or rather what § 107 is more commonly known as, the fair use factors.⁶ However, there is an inherent paradox in that balancing test.⁷ 17 U.S.C. § 106(2) provides protection to creators of derivative works, defining derivative as “any . . . form in which a work may be recast, *transformed*, or adapted.”⁸ This definition of derivative works became problematic in 1994, when the Supreme Court decided *Campbell v. Acuff-Rose Music, Inc.*, as 17 U.S.C. § 107(1) was expanded to include the degree that the work is transformative.⁹ The Court in *Campbell* stated

“if [the original work] is . . . *transformed* in the creation of new information, new aesthetics, new insights, and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society . . . The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”¹⁰

Therefore, while 17 U.S.C. § 106(2) and 17 U.S.C. § 107(1) seek opposite goals, courts apply them to the same subject, which is transformative works.¹¹

The paradox above has been left to the federal courts to sort out amongst themselves.¹² Ideally, the courts would give the public a clear picture of their rights by hearing numerous copyright cases and gradually moving towards a workable balance of works classified as derivative and works that qualify for

4. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 24 (5th ed. 2010).

5. *Id.*

6. *Id.* at 25.

7. Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. U.L. REV. 383, 384 (2015).

8. 17 U.S.C. § 101 (1976) (defining a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”) (emphasis added).

9. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994).

10. *Id.* at 579 (emphasis added).

11. *Id.*

12. Mitch Stoltz, *Collateral Damages: Why Congress Needs to Fix Copyright Law's Civil Penalties*, ELECTRONIC FRONTIER FOUND. (July 24, 2014), <https://www.eff.org/wp/collateral-damages-why-congress-needs-fix-copyright-laws-civil-penalties> [<https://perma.cc/M7S2-U6FL>].

fair use treatment.¹³ By its nature, fair use is a flexible doctrine that is constantly developing through the interpretations of individual court cases.¹⁴ However, the federal courts are failing to hear cases to completion and issue judicial opinions, which would provide the type of meaningful discourse necessary to provide authoritative certainty to copyright owners and users in the United States.¹⁵ Without some amount of certainty, the majority of creators are incapable of bringing copyright infringement claims or are too afraid to attempt to declare fair use, as such a claim can only be brought up as an affirmative defense in court.¹⁶ This situation ultimately chills the creation of new works because, upon notice of copyright infringement, creators are unwilling to assert fair use and instead often engage in acts of self-censorship, unnecessarily obtaining and paying for licenses they may legally not require, or they stop creating new works altogether.¹⁷

Part I of this article will provide a brief background of the history and development of copyright law and fair use. Specifically, Part I will discuss the reasoning behind the original exclusive rights provided to creators and how they were gradually extended to include derivative rights and fair use.¹⁸ This section begins by focusing on the utilitarian approach to copyright, which derives its basis from classical economic theory and inspired the writers of the Constitution.¹⁹ The section then continues with the historical development of fair use and how the transformative use paradigm has become the defining standard.²⁰ Similar to the author's exclusive rights, fair use is a concept that has been developing over time.²¹ It is only in the last twenty or so years that fair use has come to overtly and directly conflict with exclusive rights of copyright holders.²² With a better understanding of the origins of an author's exclusive rights and fair use, we will hopefully proceed with a better understanding of how copyright law ended up in this paradoxical predicament.

Part II explains how the current plan, leaving the paradox up to the federal

13. *Id.*

14. *Id.*

15. *Id.*

16. Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31.5 CARDOZA L. REV. 1781, 1782–85 (2010).

17. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VIRGINIA L. REV. 1483, 1498 (2007).

18. Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1411 (2011).

19. Sara K. Stradler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 611 (2006).

20. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 719 (2011).

21. Sag, *supra* note 18, at 1391.

22. Netanel, *supra* note 20, at 734; Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 647 (2012).

courts to sort out, is delaying any meaningful discourse on how anyone should interpret 17 U.S.C. § 106(2) and § 107(1) together.²³ Specifically, this section will explain that the problem derives from federal courts being the one and only option in regards to the venue for copyright cases and that the majority of filed copyright cases are either not pursued or not litigated to completion.²⁴ When people do not continue to litigate cases to their natural end, the courts are not creating any judicial policy, a necessity in developing the flexible fair use standard, leaving a chilling effect on the copyright environment.²⁵ While there are several factors causing the failure of the public to litigate their claims, the issue is mainly that the courts are not a practical option for most parties.²⁶ The federal courts require both an exorbitant amount of money and time to bring or defend claims.²⁷ Additionally, federal judges often lack the specialized knowledge necessary to handle complex copyright claims, and the availability of statutory damages discourages people from pursuing defenses in court.²⁸ The combination of all of these factors has created an environment of fear coercing users into unnecessary licenses or settlements, effectively prohibiting certain uses without allowing the chance for fair use defenses to be made.²⁹

Part III proposes two hypotheses that Part IV will be reliant upon moving forward to a solution. These hypotheses include: (1) If statutory damages decrease, the incentive to file cases with the federal court will also decrease; and (2) if the cost/benefit of pursuing a case in federal court is too high, copyright owners will seek out alternative methods of enforcement.

Finally, Part IV proposes a solution allowing for more fair use cases to result in a published judicial opinion, clarifying the paradox present in the current copyright statute and interpretation. This solution will consist of a two-fold plan including: (1) reducing statutory damages in copyright cases that do not involve direct reproduction; and (2) creating a specialty court for small

23. Stoltz, *supra* note 12, at 8.

24. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *Federal Judicial Caseload Statistics*, tbl. C-4 (Mar. 31, 2015) http://www.uscourts.gov/sites/default/files/c04mar15_0.pdf [<https://perma.cc/QD6V-72RD>].

25. Steven Callander & Tom S. Clark, *Precedent and Doctrine in a Complicated World*, PUBLIC CHOICE SOC., 25–26 (2015), https://people.stanford.edu/sjc/sites/default/files/doctrine_marc_h2015_tc.pdf [<https://perma.cc/NX5E-ZMTZ>].

26. *Id.*

27. Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1001–02 (2008).

28. Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 854–55 (2012); Pamela Samuelson & Tara Wheatland, *Boundaries of Intellectual Property Symposium: Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480 (2009).

29. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L. J. 882, 887–895 (2007).

claims copyright cases.

Reducing statutory damages should likely decrease incentives for taking many cases to federal court, especially those with minimal or hard to determine actual damages.³⁰ While this immediately seems counter to the goal of getting more fair use cases heard, the majority of the cases filed in federal court never end in a judicial opinion, causing continued uncertainty as discussed in part II.³¹ Without cases resulting in judicial opinions, the federal courts are unable to assist in defining which transformative works qualify for protection and which transformative works should be allowed under the flexible standard that is fair use.³²

A new court offering a voluntary, simplified, less costly, and more expedient alternative to federal court would also attract more copyright cases. These new filings would include participation from both the wealthy, but newly dis-incentivized copyright owners, who no longer have a positive cost/benefit solution offered by the federal courts and amateur individuals/small enterprise creators who have never been able to practically afford to pursue the federal courts in the first place.³³ Additionally, due to the lowered time and monetary investments necessary to pursue this court, it is much more likely that claims will continue to completion.³⁴ While these judgments would not initially be binding on the federal courts, it would create judicial policy to be used as persuasive authority in the federal courts, similar to other specialty courts in the U.S., such as the U.S. Tax Court.³⁵

I. DEVELOPMENT OF COPYRIGHT

A. Origins of Copyright and the Economic Incentive Theory

Even if copyright may just now be becoming an issue that concerns the majority of the public realm, it is itself not a new concept.³⁶ Copyright law in the United States began back with the creation of the first U.S. Copyright Act of 1790, taken from Britain's Copyright Act of 1709, the Statute of Anne.³⁷ In these acts, authors are given the exclusive rights to print, reprint, publish, and

30. See discussion *infra* Part III (B).

31. See discussion *infra* Part II (A).

32. Stoltz, *supra* note 12, at 8.

33. Ciolli, *supra* note 27, at 1030–31.

34. *Id.*

35. Stoltz, *supra* note 12, at 8; Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U. J. TAX L. 1, 74 (1991).

36. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 308 (1996).

37. *Id.*

distribute the works that they had created.³⁸ These acts provide these protections because the founders and most people over the last several centuries believed in a utilitarian approach to the progress sought by U.S. CONST. art. I, § 8, cl. 8.³⁹ In particular, those who created these acts believed that the most effective way to accomplish progress was to give copyright owners protected economic incentives to create through the establishment of a limited monopoly over their works.⁴⁰

The utilitarian approach to copyright law derives from the classic economic idea that creators are assumed to be utility maximizers.⁴¹ In sum, this argument asserts that creators are rational actors and they can only be convinced to create if they can recoup the full economic value of their receipts, or rather their costs to create.⁴² Think of a song: If 10,000 people are willing to pay an artist an optimal price of \$1 for a song (optimal representing the meeting point of the highest amount an individual is willing to pay and the lowest the creator is willing to sell), then the song has a value of \$10,000. The argument then is that the creator will not make a song unless it can be produced at a cost less than \$10,000.

This theory develops from the same rationale as the free market theory.⁴³ In a free market, production of materials stems from the interaction of the maximum price buyers are willing to pay and the minimum price producers will sell.⁴⁴ Simply, buyers must be willing to pay more for a good than it costs the seller to make the good.⁴⁵ Take for example, a bike: If a bike costs \$100 to make, based on both the materials and the cost of the labor and skill, and no one is willing to pay more than \$50 for the bike, then a rational seller will not make the bike.⁴⁶ However, the key difference here is tangible goods, like a bike, are often excludable and rivalrous,⁴⁷ excludable meaning that a person can easily prevent others who have not paid for the good from being able to enjoy it, and rivalrous meaning that only one person at a time can use the good.⁴⁸ Thus, free market theory immediately poses a large problem for most

38. *Copyright Act of 1790*, *ENCYCLOPEDIA BRITANNICA* (15th ed. 2010).

39. Stadler, *supra* note 19, at 611.

40. Fred Rowley, Jr., *Dynamic Copyright Law: Its Problems and a Possible Solution*, 11 HARV. J. L. & TEC. 481, 485 (1998).

41. Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009).

42. Rowley, *supra* note 40, at 485; Johnson, *supra* note 22, at 632.

43. Johnson, *supra* note 22, at 631.

44. *Id.* at 630.

45. *Id.*

46. *Id.*

47. *Id.* at 632.

48. *Id.* at 628.

copyrightable works because, as intangible goods, most copyright works are non-excludable and non-rivalrous.⁴⁹ To use songs again as an example, this means that people can easily copy songs at a lower or sometimes nonexistent cost, and free-riders can listen to and enjoy the song at the same time as the buyer without ever needing to pay for it.⁵⁰ Further, absent the implementation of outside consequences, it is almost impossible to stop people from doing so.⁵¹ Therefore, without outside control, a creator could quite possibly only receive the optimal price—the \$1 an individual is willing to pay for the song from the first person that buys it.⁵² The singular purchase results from the fact that a person can easily share the song, incurring no further cost, while still enjoying it themselves, and so others need not pay for the song themselves.⁵³ When a good is copyable, with no repercussions, supply is not under the direct control of the creator, and reproduction of the good will drive the price people are willing to pay to zero, as there is an infinite supply of the good, thereby always exceeding demand.⁵⁴ If people cannot recoup the value of their works, they will simply not create the works.⁵⁵

Understandably the economics are confusing, but the sum principle of the utilitarian argument often falls back to its seemingly self-explanatory nature.⁵⁶ Specifically, why would someone spend time and effort creating something of value if everyone can enjoy that value without giving anything for it in return, or as Samuel Johnson once eloquently put it, “No man but a blockhead ever wrote except for money.”⁵⁷ Therefore, to correct for the non-excludable, non-rivalrous nature of intangible works, copyright laws and protections are put into place to create a de facto excludable and rivalrous nature to the goods.⁵⁸ The utilitarian argument then asserts that the more of these laws and protections that are in place, the better the chances a creator will be able to recover their costs.⁵⁹ The easier it is for creators to recover their costs, the more incentive they will

49. David W. Barnes, *Congestible Intellectual Property and Impure Public Goods*, 9 NW. J. TECH. & INTELL. PROP. 533, 533–4 (2011); Jeanne Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 554 (2015).

50. Barnes, *supra* note 49, at 533–4.

51. *Id.*

52. Johnson, *supra* note 22, at 633.

53. *Id.*

54. Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U. L. REV. 1935, 1941 (2014).

55. Rowley, *supra* note 40, at 485.

56. Johnson, *Intellectual Property and the Incentive Fallacy*, *supra* note 22, at 629.

57. *Id.*; JAMES BOSWELL, LIFE OF JOHNSON Vol. 6 (of 6): George Birbeck Hill, ed., 2004).

58. Johnson, *supra* note 54, at 1940.

59. Johnson, *supra* note 22, at 633–34.

have to create new works.⁶⁰

To promote these utilitarian goals and to provide greater economic incentives of creators, copyright was continually expanded from its original form—protecting only against direct reproduction—to also including other exclusive rights, such as the Copyright Act of 1906 additions—protecting “other versions and adaptations the work might take.”⁶¹ While the actual inclusion of the general phrase, “derivative works” was not added until 1976 as a part of 17 U.S.C. § 106(2), the addition of the 1906 protections are commonly thought of as the precursor to the derivative right.⁶² Regardless, the protection of derivative works now entails protection of

A work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’⁶³

While this definition of the derivative work right is largely uncontroversial in cases involving the nine examples of derivatives listed within the definition, it has proved highly problematic in cases where the court is required to decide where the definition ends.⁶⁴ Uncertainty occurs because some courts and commentators have interpreted “any other form in which the work is recast, transformed, or adapted” to mean that copyright owners are entitled to control

60. *Id.*

61. Act of 1909, ch. 320, 35 Stat. 1075, 1080 (1909) (repealed 1976); Fromer, *supra* note 49, at 554; *See generally* 122 Cong. Rec. 2834 (daily ed. Feb. 6, 1976) (statement of Sen. McClellan discussing the necessity of expanded protections of the 1976 Copyright Act as “applying the standard of what best promotes the constitutional mandate to encourage and reward authorship”); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (quoting *Mazer v. Stein*, 347 U.S. 201, 209 (1954) (describing the framers intent and the continued economic philosophy behind Copyright: “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “science and useful Arts.”)); *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. of the Judiciary*, 104th Cong. 2 (1995) (statement by Rep. Moorhead, subcomm. Chairman summarizing the main justifications for expanding the protections of Copyright are “fairness and economics”); *Eldred v. Ashcroft*, 537 U.S. 186, 186 (2003) (providing greater economic incentives for authors established a rational basis for enacting the CTEA).

62. Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH L. 785, 793 (2013).

63. 17 U.S.C. §101 (1976) (describing the definition of derivative works).

64. Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L. J. 1505, 1509 (2013).

all markets into which any perceptible piece of their work might appear.⁶⁵ In the current day, such an interpretation leads directly to a paradox when making a claim of fair use, as will be illustrated below in Part B.⁶⁶

B. Development of Fair Use

Fair use did not appear in codified statute until the Copyright Act of 1976, but it can date its entry into the legal realm much further back than most would assume.⁶⁷ Fair use in copyright began as common law policy, whose basic precepts can be traced back to English common law judges attempting to parse out the extent of protection that was to be offered by the Copyright Act of 1710, the Statute of Anne.⁶⁸ In the years that followed the statute's inception, judges began to allow many of the quintessential fair uses we recognize today, such as quotes and critiques.⁶⁹ These exceptions find their basis in the reasoning summarized best by Lord Ellenborough in *Cary v. Kearsley*, 4 Esp. 168 (1803).

That part of a work of one author is found in another, is not itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public . . . While I shall think myself bound to secure in every man the enjoyment of his copyright, one must not put manacles on science.⁷⁰

However, even back then, the courts realized that these types of decisions could not be made with bright line rules, but simply through gradual interpretation on a case-by-case analysis.⁷¹

65. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 5.3.1 (3d ed. 2005); Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 505 (1945) ("The essential principle is the author's right to control all the channels through which his work or any fragments of his work reach the market."); see e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 140 (2d Cir. 1998).

66. Sag, *supra* note 18, at 1411.

67. *Id.* at 1390; Netanel, *Making Sense of Fair Use*, *supra* note 20, at 719.

68. Sag, *supra* note 18, at 1391.

69. *Id.*

70. BRIAN FITZGERALD & JOHN GILCHRIST, COPYRIGHT PERSPECTIVES: PAST PRESENT AND PROSPECT 132 (2015) (quoting *Cary v. Kearsley*, 4 Esp. 168, 169 (1803)).

71. Sag, *supra* note 18, at 1393.

Eventually, in *Folsom v. Marsh*, the Court acknowledged the importance of being able to make use of another's labours and set out the opinion that

we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.⁷²

While it did then operate as common law, this opinion and these factors were put into the Copyright Act of 1976, 17 U.S.C. § 107.⁷³

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
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁴

Upon its introduction into 17 U.S.C. § 107, and for the next several decades after, the courts in practice used fair use much differently than it is used today.⁷⁵ Still believing strongly in the strength of economic incentives, fair use was applied most often through the lens of the market-centered paradigm.⁷⁶ The market-centered paradigm posited that of the four factors, the fourth factor, “effect of the use on the potential market or value of the copyrighted work[.]” was the most important factor.⁷⁷ Barton Beebe conducted an empirical study of fair use cases between 1978 and 2005 to study this effect and found that, of the 141 opinions that found the fourth factor disfavored fair use, all but one opinion found no fair use.⁷⁸

72. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–6 (1990) (quoting *Folsom v. Marsh*, 9 F. CAS. 342, 348 (C.C.D. Mass. 1841)).

73. Yafit Lev-Aretz, *Subtle Incentive Theory of Copyright Licensing*, 80 BROOK. L. REV. 1357, 1390 (2015).

74. 17 U.S.C. §107 (1976).

75. Yafit Lev-Aretz, *supra* note 73, at 1392.

76. Netanel, *supra* note 20, at 734.

77. *Id.*; See e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558–59 (1985).

78. Netanel, *supra* note 20, at 724.

However, over the last ten years, the idea that copyright should be majorly concerned with allowing creators to protect their economic incentives is being heavily questioned.⁷⁹ Many scholars now assert that copyright was never meant to be about protecting the creator first.⁸⁰ Diane Zimmerman summarized this point in a recent article, stating “the idea that for copyright to be any kind of useful incentive, it must offer the prospect of a larger and larger pot of gold through more control spread out over longer and longer times seems simply disconnected from what is really going on in the creative sphere.”⁸¹ The sole goal of copyright is to stimulate activity.⁸² Providing economic incentives to creators was just the means to an end, not the goal, and we should be adjusting our process as new and better ways of stimulating activity are found.⁸³

Indeed, as the digital economy has advanced, and the costs of participation in creativity have lowered, a new trend has become increasingly clear.⁸⁴ Creators are no longer just people wishing to make money, but can also be people who are intrinsically motivated and who often want to create and participate in current culture without thought of monetary reward.⁸⁵ Instead of economic rewards, these creators find motivation in positive feedback, gratitude, and critiques about their contributions.⁸⁶ Fan fiction writers are the perfect example of the type of people who create solely from these intrinsic motivations.⁸⁷ Despite having no readily accessible ability to derive income from creating a work of fan fiction, thousands of amateur authors spend their time and efforts creating these works every day.⁸⁸ Further, research has now supported that economic incentives can sometimes be detrimental to creativity derived from these intrinsic sources. In a meta-analysis of 128 experiments on reward effects, it was found that tangible rewards, such as money, tend to have a substantially negative effect on intrinsic motivations, decreasing creativity.⁸⁹

79. Johnson, *supra* note 22, at 647.

80. *Id.*

81. *Id.*; Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN LAW, 29, 57 (2011).

82. Leval, *supra* note 72, at 1107.

83. *Id.*

84. *Id.*

85. Johnson, *Intellectual Property and the Incentive Fallacy*, *supra* note 22, at 647.

86. DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* 37 (2009) (citing Edward L. Deci et al., *Extrinsic Rewards and Intrinsic Motivation in Education: Reconsidered Once Again*, 71 REV. EDU. RES. 14 (2001)).

87. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 528–32 (2009).

88. *Id.*

89. Edward L. Deci, Richard Koestner, & Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627, 658–59 (1999).

The negative effect occurs because people, who were once intrinsically motivated, tend to lose their drive and desire once they receive monetary rewards.⁹⁰ The activity becomes only about receiving the money—turning interesting tasks into dull and laborious work.⁹¹

Recognizing economic incentives are not always effective in promoting “the Progress of Science and the useful Arts[,]” and that there are other sources for creativity, the courts have undergone a major doctrinal shift from the Market-Centered paradigm, focusing on factors protecting the creator’s economic incentives to the Transformative Use paradigm.⁹² Under this new paradigm, while the factors should all receive consideration, the key is arguably just whether the defendant uses the work in a transformative manner, or whether the use promotes a further purpose or different character.⁹³ This shift is confirmed in Neil Natanel’s empirical study of seventy-nine published opinions concerning claims of fair use, occurring from 2006 to 2010.⁹⁴ Out of the sixty-eight unique cases, it was found that defendants won hundred percent of the time when a district court found a use to be unequivocally transformative, regardless of the findings of other factors.⁹⁵

Immediately, it is noticeable that the statutory test for fair use, contained within 17 U.S.C. § 107, does not mention the transformative nature of a use. The identification of ‘transformative’ as a necessary consideration for weight was only included within § 107(1) when the Supreme Court issued its opinion for *Campbell v. Acuff-Rose Music, Inc.* in 1994.⁹⁶ In an earlier case, the Second Circuit declared that “the ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts . . . would be better served by allowing the use than by preventing it.”⁹⁷ Specifically, “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message[,] . . . in other words, whether and to what extent the new work is *transformative*.”⁹⁸

90. EDWARD L. DECI & RICHARD FLASTE, *WHY WE DO WHAT WE DO: THE DYNAMICS OF PERSONAL AUTONOMY*, 29 (1995).

91. *Id.*

92. Natanel, *Making Sense of Fair Use*, *supra* note 20, at 734.

93. *Id.* at 735–36.

94. *Id.* at 731.

95. *Id.* at 755.

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

97. *Arica Inst., v. Palmer*, 970 F.2d 1067, 1077 (1992).

98. *Campbell*, 510 U.S. at 580.

C. Derivative Use/Transformative Use Paradox

17 U.S.C. § 106(2) provides copyright protection to creators in their derivative works while 17 U.S.C. § 107(1), examining the purpose and character of a use, has come to mean that the more transformative a use the more likely it will fall within the fair use exception.⁹⁹ A derivative work, by statutory definition, is a “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, *transformed*, or adapted.”¹⁰⁰ Consequently, there is both an exclusive right and an exception based on the transformative nature of a work.¹⁰¹ Courts are now finding fair use based on the transformative nature of a work, but because of the paradox above, it is still unclear what kind of works are transformative under 17 U.S.C. § 106(2), and what works are transformative under 17 U.S.C. § 107(1).¹⁰² Justice Easterbrook critiqued this exact issue in *Kientz v. Scennie Nation, LLC*, stating:

To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). Cariou and its predecessors in the Second Circuit do not explain how every “transformative use” can be “fair use” without extinguishing the author’s rights under § 106(2).¹⁰³

It seems like the easiest approach to the problem would be to get rid of one of these sections, but this solution seems to be a poor one.¹⁰⁴ While it seems the majority of the legal scholarship is moving toward allowing more uses under the fair use exception, most scholars still also acknowledge that economic incentives, such as the ability to receive economic gains from some derivative works, are useful to a degree.¹⁰⁵ The usefulness is particularly true in cases where the creative labor is not being engaged in by an individual, but a corporation, which may not subscribe to intrinsic motivators, as the focus is often monetary.¹⁰⁶ Additionally, it is certain that currently some societally valuable works, such as large-scale cinematic productions with budgets upwards of \$100,000,000 or more, would simply not exist without economic

99. *Id.*

100. 17 U.S.C. § 101 (1976) (describing the definition of a derivative work).

101. Lipton & Tehranian, *supra* note 7, at 384.

102. Netanel, *Making Sense of Fair Use*, *supra* note 20, at 750–51.

103. *Kientz v. Scennie Nation, LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

104. Johnson, *Intellectual Property and the Incentive Fallacy*, *supra* note 22, at 661.

105. *Id.*

106. *Id.*

incentives.¹⁰⁷ Therefore, copyright law must both provide adequate economic incentives to produce and disseminate some creative works—as many creative works do still cost money, but also limit these protections in other cases to allow for intrinsic motivating factors to result in the creation of new works as well.¹⁰⁸ To provide a workable balance, we need to publish judicial opinions, creating judicial policy with regards to the types of transformative works we should protect under derivative works and the types of transformative works that we should be allow as fair use.

II. THE STATUS QUO

Currently, all interpretation of copyright law and fair use has been left up to the federal court system.¹⁰⁹ Historically, copyright developed on a mix of federal and state laws, but Congress's creation of the Copyright Act of 1976 provided exclusive jurisdiction to the federal courts in all cases of copyright infringement.¹¹⁰ Exclusive jurisdiction was granted to the federal courts because copyright law is federal law and Congress hoped to ensure both consistency of decisions and the quality of those decisions, as the decision making by judges in federal courts is considered more reliable and possessing higher degrees of expertise than is found in the state courts.¹¹¹ However, the fact that copyright is limited to the federal courts is effectively creating a roadblock to interpreting copyright law and the fair use doctrine.¹¹² Specifically, the roadblocks consist of the cost and time associated with claiming copyright infringement and the potential damages that may result from attempting to defend yourself under the fair use doctrine.¹¹³ These roadblocks are detrimental for creators in copyright because it has made it difficult for both copyright owners to enforce their exclusive rights and for copyright users to defend themselves through fair use.¹¹⁴ Ideally, the federal courts are supposed to hear cases and issue opinions, creating judicial policy on what society has decided the proper balance should be between what is considered a protected work and what should be allowed as fair use. However,

107. *Id.*

108. *Id.*

109. Ciolli, *supra* note 27, at 1001; Virginia Knapp Dorell, *Recent Development: Picturing a Remedy for Small Claims of Copyright Infringement*, 65 ADMIN. L. REV. 449, 454 (2013).

110. Ciolli, *supra* note 27, at 1001–2.

111. Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives 109th Congress, 2nd Session (Mar. 29, 2006).

112. Tehranian, *supra* note 1, at 1216–17.

113. *Id.*

114. Jeffrey Bills, *David's Sling: How to Give Copyright Owners a Practical Way to Pursue Small Claims*, 62 UCLA L. REV. 464, 469 (2015).

the current federal court system is clearly ill-equipped to provide this service.¹¹⁵

A. Number of Cases:

In the 175 years since the first fair use argument in *Folsom v. Marsh*, there have been less than 900 fair use cases that have resulted in a reported opinion issued by the federal courts.¹¹⁶ Admittedly, the majority of those cases appeared in the last forty years, but even in 2015, there were only ten total copyright infringement cases involving a claim of fair use that resulted in a reported judicial opinion from the federal courts.¹¹⁷ A direct cause of this lack of opinions is simply that copyright infringement cases do not often make it to court or terminate prematurely—and without infringement cases, there are no fair use cases. While people filed 4,680 copyright infringement cases in 2015, 4,253 of those copyright cases terminated that same year.¹¹⁸ Of these 4,253 cases, 1,574 resulted in no court action taken, and another 2,295 terminated before a pretrial hearing.¹¹⁹ Taking even a low estimate of 2.3% of copyright cases involving a claim of fair use, which is the ten fair use cases resulting out of the 427 copyright cases not terminated in 2015, the 4,253 terminated copyright cases likely represent at least 98 never heard fair use cases.

Theoretically, it could be possible that the 900 published cases could be enough for the courts to clearly determine which works we should protect under exclusive derivative rights and which works we should protect under claims of fair use, but this is not realistic.¹²⁰ Entire areas of works such as fan fiction, appropriation art, and even remixing videos on YouTube are still in an entirely gray area within the legal realm despite their relatively common use in society.¹²¹ In fact, there has not been a single published opinion regarding fan fiction fair use,¹²² only five published opinions regarding appropriation art fair

115. Stoltz, *supra* note 12, at 8.

116. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); Published Cases Involving Copyright Fair Use, LEXISNEXIS, <http://advance.lexis.com/usersearchhome>; search “Fair Use AND Copyright Infringement,” follow Cases hyperlink, then narrow by “Reported,” “Federal,” and “Jan. 1, 1869–Dec. 31, 2015.”

117. Published Cases Involving Copyright Fair Use, LEXISNEXIS, <http://advance.lexis.com/usersearchhome>; search “Fair Use AND Copyright Infringement,” follow Cases hyperlink, then narrow by “Reported,” “Federal,” and “Jan.1 2015–Dec. 31, 2015.”

118. *Federal Judicial Caseload Statistics*, *supra* note 24.

119. *Id.*

120. Ciolli, *supra* note 27, at 1009.

121. Lipton & Tehranian, *supra* note 7, at 386–388.

122. Published Cases Involving Fair Use Fan Fiction, LEXISNEXIS, <http://advance.lexis.com/usersearchhome>; search “Fan Fiction AND Fair Use AND Copyright Infringement,” follow Cases hyperlink, then narrow by “Reported,” “Federal,” and “1869–2015.”

use,¹²³ and only five published opinions on video remixing fair use.¹²⁴ Each and every one of these cases are being viewed with caution, as they all have been subject to negative treatments by other districts.¹²⁵

A lack of cases is problematic for fair use because fair use is a flexible standard.¹²⁶ Flexible standards involve interpretation through the resolution of individual cases, which create judicial opinions regarding specific factual circumstances, which in turn then create judicial policy for those circumstances within the standard.¹²⁷ Congress does not often enact perfectly specified legislation, and statutes are often purposefully left vague to some degree to allow for later interpretation over issues Congress could not agree on themselves, or simply because bright line rules would create problematic consequences for later unseen technological or legal developments.¹²⁸ In common law legal systems, such as the United States, there is a strong connection between distinct factual circumstances and effective practice of legal rules; precedent, the principle often used to determine individual cases, requires that rules be applied consistently in factually similar cases.¹²⁹ When there are relatively few factually similar cases on a subject, uncertainty occurs because judges can dispute the relevance of previous decisions for ruling on new cases based on the factual distinctions.¹³⁰ A similar problem was behind the creation of lower courts in the first place, as they were supposed to act almost as laboratories for the cases—hearing and experimenting with all sorts of factual scenarios and creating judicial policy, which could then be taken up by the higher courts and become binding.¹³¹ Unfortunately, lower courts are unable to do this job, as the federal courts do not hear cases often enough to perform it.¹³² Therefore, it is necessary to come up with an alternative solution, which would allow the courts to issue judicial opinions on more factual

123. Published Cases Involving Appropriation Art and Fair Use, LEXISNEXIS, <http://advance.lexis.com/usersearchhome>; search “Appropriation Art AND Fair Use AND Copyright Infringement,” follow Cases hyperlink, then narrow by “Reported,” “Federal,” and “1869–2015.”

124. Published Cases Involving Video Remixing and Fair Use, LEXISNEXIS, <http://advance.lexis.com/usersearchhome>; search “Video AND Remix AND Fair Use AND Copyright Infringement,” follow Cases hyperlink, then narrow by “Reported,” “Federal,” and “1869–2015”.

125. See notes 122–124 (LexisNexis offers a notification when a case has been negatively treated by another court).

126. Callander & Clark, *supra* note 25, at 25.

127. *Id.*; Stoltz, *supra* note 12, at 8.

128. Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 786 (2011).

129. Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TULANE L. REV. 1591, 1594 (1992); Callander & Clark, *supra* note 25, at 1.

130. Netanel, *Making Sense of Fair Use*, *supra* note 20, at 729–730.

131. *Id.*

132. Lipton & Tehranian, *supra* note 7, at 386–388.

scenarios—which would inexorably decrease total uncertainty.¹³³

B. Costs

The second factor causing cases either a lack of filing or early termination of a suit is cost. Per the most recent AILPA Report of the Economic Survey 2015, the typical costs of a copyright infringement case range anywhere from \$250,000 to as much \$1.2 million dollars.¹³⁴ While the claims discussed in this article are more likely to be on the lower part of that spectrum, that is still an exorbitant amount of money for the average creator, as the median household income in the U.S. for an entire year, \$51,939, does not even begin to approach covering it.¹³⁵

Further, it is important to acknowledge that the costs of litigation tend to be almost the same for the defendant.¹³⁶ Thus, even when a person successfully brings a case of copyright infringement, it can still fail to proceed to a judicial opinion because the defendant cannot afford the costs of pursuing a claim of fair use.¹³⁷ In general, the majority of copyright users when threatened with copyright infringement will immediately cease disseminating their work, settle, obtain a license that is completely unnecessary, or not bother creating further works at all, even when they might have an extremely good case for fair use.¹³⁸

C. Time

The third factor of concern is the amount of time it takes to process a copyright infringement claim in the federal courts. A civil case that goes through the federal court system has a median time of twenty-five months.¹³⁹ The foremost of the factors causing this delay is case backlog.¹⁴⁰ Currently, in the US federal court system, there is a backlog of more than 340,000 pending civil cases.¹⁴¹ Additionally, this number does not reflect that the federal courts

133. Tom S. Clark & Jonathan P. Kestellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75(1) J. OF POLITICS 150, 152 (2013).

134. Richard W. Goldstein & Donika P. Pentcheva, *Report of the Economic Survey*, AM. INTELL. PROP. L. ASS'N, 39 (2015) <http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf> [<https://perma.cc/J3US-8P8T>].

135. Balganes, Shyamkrishna, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013).

136. Goldstein & Pentcheva, *supra* note 134, at 47.

137. Gibson, *supra* note 29, at 887–895.

138. *Id.*

139. *Federal Judicial Caseload Statistics*, *supra* note 24.

140. Rowley, *supra* note 40, at 523.

141. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *Federal Judicial Caseload Statistics*, C series (Mar. 31, 2015) <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015-tables>.

must attempt to resolve criminal matters before they address civil ones in circumstances where it is reasonable to do so, and the number of backlogged criminal cases is over 80,000.¹⁴² While the nature of criminal cases can make the delay seem justifiable, it does not change the fact that copyright gets put on a backburner and “if decisions on contracts, mergers and intellectual-property rights can’t be reached through quick and prompt justice, things unravel for business.”¹⁴³ This kind of time investment is not feasible for the average individual or amateur creator.¹⁴⁴ Judge Lawrence J. O’Neill spoke on this issue stating “[o]ver the years I’ve received several letters from people indicating, ‘Even if I win this case now, my business has failed because of the delay. How is this justice?’ And the simple answer, which I cannot give them, is this: It is not justice. We know it.”¹⁴⁵

D. Statutory Damages

Finally, the last factor affecting early termination of copyright suits or a causing the suit never to occur is the excessive damages available to those making claims of infringement. Under the current copyright regime, 17 U.S.C. § 504 allows statutory damages awards in amounts up to \$150,000 per work infringed with no necessity to show evidence of harm.¹⁴⁶ While § 504 does leave the determination of damages up to the discretion of the court, the courts have had a history of awarding large statutory damages well in excess of any actual damages.¹⁴⁷ These high statutory damages have occurred even in cases where actual damage is minimal, and users had attempted to comply with the law in good faith.¹⁴⁸ In the current statutory regime, there is always the possibility that a court could make any given individual, such as those who have in good faith attempted to create some new transformative work by remixing a bunch of videos, songs, or pictures, liable for anything from a couple hundred

142. John Conyers, Jr., *Class Action “Fairness”: A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 506 (2003); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *Federal Judicial Caseload Statistics*, D series (Mar. 31, 2015) <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015-tables>.

143. Joe Palazzolo, *Glut of Criminal Cases Puts the Squeeze on Civil Litigation*, WALL ST. J. BLOG (Nov. 10, 2011) (quoting Judge W. Royal Furgeson).

144. Notice, Remedies for Small Copyright Claims, 76 Fed. Reg. at 66,758 (Oct. 27, 2011).

145. Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015) (quoting Judge Lawrence J. O’Neill).

146. 17 U.S.C. § 504 (1976) (describing the definition, allowances, and requirements of pursuing statutory damages).

147. Tehranian, *supra* note 1, at 1206.

148. *Id.*; See e.g., L.A. Times, Inc. v. Free Republic, No. CV 98-7840 MMM (AJWx), 2000 WL 565200, at *1 (C.D. Cal. Apr. 4, 2000).

dollars to millions of dollars for the singular, newly created work.¹⁴⁹ These possible damages effectively throw aside the safeguards Congress and the courts have created, as companies and copyright trolls can often threaten and coerce settlements of thousands of dollars out of confused, unsure, and terrified users who have in fact likely done little wrong.¹⁵⁰ The result being that copyright cases are often never heard in a meaningful way that allows for the creation of judicial opinion and precedent.¹⁵¹

E. Practical Assessment

Overall, these factors all have an incredibly detrimental effect on the ability of the federal courts to issue judicial opinions. The lack of judicial opinions stops courts from providing guidance and interpreting the inherent paradox of exclusive derivative rights of the copyright owner under 17 U.S.C. § 106(2), and the ability for new works to be created under the protection of 17 U.S.C. § 107. Fair use is a purposefully flexible doctrine, but this paradox has consistently produced inconsistent and unclear results for the few cases that have been heard, leaving creators, both amateur and professional, without any real idea of what uses constitute fair use or copyright infringement.¹⁵² As the digital age advances and the opportunity to create and disseminate works becomes easier and more accessible, this hindrance will only stagnate the creation of new copyright works, going against the inherent purpose of copyright law, which the creation of new works furthers.¹⁵³

F. Status Quo in the United Kingdom: IPEC Analysis

Faced with similar problems as those discussed above, such as costly and timely litigation, other countries around the world have been implementing new programs and restructuring their courts in attempts to correct for these problems.¹⁵⁴ In particular, the United Kingdom created several new smaller

149. Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1194, 1196 (2010).

150. Stoltz, *supra* note 12, at 7.

151. *Id.*

152. Lipton & Tehranian, *supra* note 7, at 388–89. Compare *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177 (where the photograph used in News Story was not Fair Use), with *Harris v. San Jose Mercury News*, No. C 04-05262 CRB. (N.D. Cal. Feb 03, 2006) (where the parties settled after no Fair Use found for use of a Photograph in News Story).

153. Lipton & Tehranian, *supra* note 7, at 443; *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

154. MARIA PALLANTE, U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013) <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> [<https://perma.cc/DQ4M-HFZS>]; CHRISTIAN HELMERS, YASSINE LEFOUILI, & LUKE MCDONAGH, INTELLECTUAL PROPERTY OFFICE [IPO], EVALUATION OF THE

and multi-level accelerated tracks at IPEC (Intellectual Property Enterprise Court), receiving critical acclaim.¹⁵⁵ Before the court began restructuring in 2010, IPEC had already been operating as a specialty court, known then as the PCC (Patents County Court), hearing patent, copyright, and other intellectual property cases. However, in the court's original form, it offered little procedural distinction from the more generalist High Court and heard only a few cases per year, usually less than thirty.¹⁵⁶ Upon further research surrounding the time and high costs associated with hearing claims, a recent independent report on IPEC found these to be incredibly detrimental to small and medium enterprises bringing their claims.¹⁵⁷ To address these problems, reforms were initiated in 2010 to improve access and provide a cost effective forum for small and medium enterprises, as well as larger enterprises with smaller matters, to resolve their IP disputes.¹⁵⁸ These reforms largely consisted of changes relaxing procedure, introducing damage caps, and creating proactive case management, allowing early identification of issues by judges, and better allowing for *pro se* representation.¹⁵⁹ For example, judges now conduct limited pre-trial conferences, held by telephone or video conference, which directly lay out the issues the parties should address during a hearing and the evidence that will be required to support them.¹⁶⁰

Following the fourth year after initiating reforms, IPEC reported a 353% increase in the number of copyright cases that it hears per year.¹⁶¹ While the effect only represents a 15% increase in the total number of all the copyright cases filed in the UK, as copyright cases still come before the High Court, it is still not insignificant.¹⁶² It is also of note that 90% of the litigants that accounted for that increase were small to medium enterprises and individuals.¹⁶³ Additionally, while representing just 10% of the claimants, it shows that even some large companies have found it preferable to file claims using the accelerated IPEC tracks rather than the pursue the High Court, resulting in an overall increase in the number of intellectual property disputes heard.¹⁶⁴ Judges and solicitors in the field assert that clients are simply feeling more confident

REFORMS OF THE INTELLECTUAL PROPERTY ENTERPRISE COURT 2010-2013 (June 22,2015); ANGELA FOX, INTELLECTUAL PROPERTY ENTERPRISE COURT: PRACTICE AND PROCEDURE 1 (2015).

155. HELMERS ET AL., *supra* note 154, at 2.

156. *Id.* at 4.

157. *Id.* 4–5; FOX, *supra* note 154, at 4.

158. HELMERS ET AL., *supra* note 154, at 4–6.

159. *Id.*

160. *Id.* at 8–9.

161. *Id.* at 17.

162. *Id.*

163. *Id.*

164. *Id.* at 25.

about both bringing claims and defending their claims in court since the reforms.¹⁶⁵ A recent independent report on IPEC suggests that the likely cause of this confidence is the cost cap changes and the increased speed of litigation, as these provide the benefit of letting litigants have a better idea of the potential costs and exposure they open themselves up to in the courts.¹⁶⁶

Unfortunately, there has not been any empirical research done on the effect IPEC has had directly on the development of Intellectual Property Law and judicial policy in the United Kingdom. However, the reforms represent a positive outlook for pursuing alternative solutions to increase access to the courts, which directly results in the resolution of more individual cases.

III. HYPOTHESES

Before continuing into the part IV, which will present the proposed solutions to correct the problems with status quo discussed above, it is necessary to acknowledge that section IV proceeds from two hypotheses. These hypotheses are that 1) reducing statutory damages will decrease the incentive to file cases with the Federal Court; and 2) If the cost/benefit of pursuing a case in federal court is too high, copyright owners will look for alternative methods of enforcement.

A. If Statutory Damages Were Reduced, the Incentive to File Cases with the Federal Court Would Also Be Reduced

Statutory damages were originally introduced into various fields of law as a mechanism to increase incentives to litigate, as damages sometimes do not exceed the costs of litigation.¹⁶⁷ This theory has proved to be true across various fields of law with the introduction of statutory and punitive damages, resulting in filing rates in some areas that are ten and even a hundred times than previous numbers.¹⁶⁸ In civil litigation, this is explained by the commonly accepted idea that a plaintiff will bring a case to court only if the result would equal or exceed the costs of pursuing the claim.¹⁶⁹ In federal court, as the costs can be incredibly high, statutory damages are seen as especially necessary for this reason.¹⁷⁰ Therefore, basic logic would suggest that if incentives are lowered again, fewer plaintiffs will seek the federal courts to hear their claims

165. *Id.* at 7.

166. *Id.* at 34.

167. Lemos, *supra* note 128, at 792; Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 61 (2005).

168. Lemos, *supra* note 128, at 802.

169. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982).

170. Lemos, *supra* note 128, at 790.

because few copyright cases would result in a positive cost/benefit scenario.

Immediately this seems counter to the goal of this article, which is to get more copyright cases heard. However, the distinction that is important to make here is that while there is universally agreeance that increased economic incentives in the form of higher damages increase the number of copyright cases filed, it also arguably decreases the number of cases that result in a judicial opinion.¹⁷¹ The lack of judicial opinions is incredibly problematic for fair use cases because, without judicial opinion, new accepted fair uses can arguably not be created with any certainty.¹⁷²

B. If the Cost/Benefit of Pursuing a Case in Federal Court is Too High, Copyright Owners Will Look for Alternative Methods of Enforcement

Currently, an overwhelming majority of copyright cases do not have a positive cost/benefit ratio for creators to pursue.¹⁷³ In practice, this has caused creators to avoid pursuing the federal courts at all, leaving them without a practical method of enforcement, and cries for change have ensued.¹⁷⁴ Specifically, there have already been calls for affordable and timely processes to assert copyright infringement by many organizations in America who represent both individual and small business creators, such as the Professional Photographers of America and the Author's Guild.¹⁷⁵ The latter, being America's oldest and largest professional organization for writers, even polled the organization's members to find that a majority favored the creation of some new type of small claims process for copyright infringement, as they felt a practical remedy was not available to them.¹⁷⁶

IV. AN ALTERNATIVE TO THE STATUS QUO: REDUCED STATUTORY DAMAGES & SMALL CLAIMS COPYRIGHT COURT

While the United States Copyright Office proposed a small claims court system in 2013, following the creation of several other such copyright expedient measures in court systems around the globe such as the UK, the time is now ripe to act on it, and this proposal mirrors much of the 2013 proposal.¹⁷⁷ By creating small claims copyright court, the courts will not only address the shortcomings of the federal courts, but they will also create opportunities to

171. Stoltz, *supra* note 12, at 8; Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 741–2 (2013).

172. Stoltz, *supra* note 12, at 8.

173. Dorell, *supra* note 109, at 456.

174. *Id.* at 457.

175. *Id.*

176. *Id.*

177. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154.

clarify an unclear fair use standard. With this in mind, we propose a two-fold approach including: (1) reducing the maximum statutory damages allowed for cases that do not deal with direct reproduction, and (2) creating a specialty small claims courts that deal only with copyright.

A. Reduced Statutory Damages

The reduction of statutory damages should occur in both the federal court and the specialty court for cases that do not involve direct reproduction for two reasons. First, statutory damages have created a culture of fear that has effectively turned just their possibility into a club that is used to beat settlements out of copyright users who may not even be infringing copyright.¹⁷⁸ Secondly, the goal of getting more copyright infringement cases heard would be advanced if wealthier plaintiffs were disincentivized from filing claims in federal court when damages are relatively minimal, and instead encouraged to pursue alternative venues.

In addressing the culture of fear, statutory damages were never meant to serve the sole purpose of acting as the ultimate deterrence against all forms of potential copyright infringement.¹⁷⁹ Congress originally intended for statutory damages to be compensatory in instances where damages could not be readily obtained, with a modest level of deterrence as a secondary consideration.¹⁸⁰ Further, the amount of deterrence necessary from the tripartite structure of 17 U.S.C. § 504 was supposed to operate on separate levels of infringement, which were modest, ordinary, and exceptional cases of infringement, reflected by the wide range of damages in the section.¹⁸¹ However, this section is too often a means of abuse.¹⁸² The first two categories have become largely irrelevant, as willfulness, the main factor for determining an exceptional case, has been too easily and too often assigned, resulting in maximum statutory damages.¹⁸³ While it is not entirely clear what the reduced number should be, it is more likely appropriate that it should be in the lower range of the spectrum, as the higher damages currently in place operate at a level of overdeterrence that discourages socially beneficial conduct, or in this case, fair use.¹⁸⁴

178. Samuelson & Wheatland, *supra* note 28, at 444; See David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1816 (2013) (describing the success of several entities in mass copyright infringement settlements, such as Righthaven, Masterfile, and Getty).

179. *Id.*

180. *Id.*

181. *Id.* at 445.

182. *Id.*

183. *Id.*

184. Thomas Colby, *Clearing the Smoke from Philip v. Morris: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 468 (2008).

Secondly, should the statutory damages remain unchanged, it is likely that many wealthier copyright owners would not voluntarily choose to take their claims to an alternative venue where possible damages are considerably less, as the other obstacles of the federal court remain a beneficial advantage for them to force an early settlement in many cases.¹⁸⁵ This would cause several thousand cases, in fact, the majority of the copyright infringement claims currently pursued in federal court, to be left either unheard or terminated before completion.¹⁸⁶ The goal of hearing more copyright cases, which directly results in the hearing of more fair use defenses, would be considerably quickened should these wealthier copyright owners have less incentive to file in federal courts and were open to pursuing alternate venues, where the cost/benefit ratio is easier to meet.

B. Small Claims Copyright Court

Currently, every single state in the U.S. has a small claims court.¹⁸⁷ While these are not as claim specific as the specialty courts proposed below, the benefits of the process should be directly applicable. Small claims courts provide an alternative to the courts of general jurisdiction for claimants who do not foresee a positive cost/benefit ratio in pursuing the courts of general jurisdiction.¹⁸⁸ Getting parties to file in a small claims court is accomplished through a number of factors, such as limiting and simplifying procedural rules, decreasing the necessity for attorneys, and reducing the costs of filing and litigating a claim.¹⁸⁹ The combination of these factors creates a process that is much more accessible and efficient.¹⁹⁰

1. Voluntary

The most prominent feature of the small claims court is that its system would be based entirely on voluntary consent. Admittedly, there would preferably be a system of specialty federal copyright courts, which would be mandatory for both parties, cheap, easily accessible, and operated quickly, but we could say that about any field of law. The U.S. has created barriers that hinder the possibility of a mandatory system conducted without the presence of a jury, namely Article III and the Seventh Amendment.¹⁹¹ However, these

185. Ciolli, *supra* note 27, at 1003.

186. *Id.*

187. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 52.

188. *Id.*

189. *Id.*

190. *Id.*

191. Bils, *supra* note 114, at 483–4.

barriers are easily overcome in this case of a voluntary consent.¹⁹² Allowing for voluntary consent, parties will likely pursue this alternative option, which would give parties an option that is cheap, easy, and relatively quick in comparison to the federal courts.

While it is possible that some creators who either can afford the federal court system or do not yet trust the new small claims system will not pursue these courts, the appeal of not needing to go to federal court provides strong incentives, such as a positive cost/benefit ratio and the possibility of expediency. These incentives will be especially beneficial to individuals and small enterprises, but will also be beneficial for larger companies as well.¹⁹³ State small claims court are often used by businesses to act almost like a judicial collection agency.¹⁹⁴ While this is often not seen as a good thing by many in the public realm, it strongly suggests that copyright infringement claims will be filed, meaning fair use defenses can be asserted, and unclear questions can be addressed.¹⁹⁵ In the short term, it may be painful, but in the long term many of those same cases, based on unclear rights, will not be able to be asserted so easily, if even at all. Small claim court systems already operate in every single state and are active for a reason.¹⁹⁶

Additionally, as a point of clarification, it is also important to note that voluntary consent should operate on an opt-out basis.¹⁹⁷ Opt-out means that the party claiming infringement would still need to provide service to the respondent under Rule 4 of the Federal Rules of Civil Procedure, but once provided, the respondent would need to respond within a certain limited time, with a lack of response operating as consent to the proceedings.¹⁹⁸ While implementing affirmative consent may seem preferable, it would likely not operate as effectively, as infringers could simply ignore the notices completely.¹⁹⁹

192. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49 (1986) (explaining that personal constitutional rights can be waived, including the right of trial by jury in civil cases); *Seaboard Lumber Co. v. U.S.*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (describing that the Supreme Court has long recognized that a private litigant may waive its right to a jury and to an Article III court in civil cases).

193. *Bils*, *supra* note 114, at 480.

194. Leslie G. Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 940–41 (1976).

195. *Bils*, *supra* note 114, at 480–81.

196. *Cioli*, *supra* note 27, at 1023–24.

197. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 98.

198. *Id.* at 99.

199. *Id.* at 98–99.

2. Centralized

The court should probably at least begin in one centralized location, which would most likely be the U.S. Copyright Office.²⁰⁰ In the digital age, the possibility of copyright infringement is much less limited to a particular geographic area than many other crimes, and it may be difficult for many claimants to appear in person.²⁰¹ To address the difficulty of appearance, the court would allow for parties to file their claims through either written or online submissions to the office and continue their communications with the court, including participation in the trial over several forms of potential communication, such as written submissions, telephones, or video conference.²⁰² Alternate methods of appearance take away the practical hurdles often associated with travel and expense necessary to litigate such claims in a traditional federal court system.²⁰³ Proximity to the Copyright Office would also allow for a source of immediate assistance with the organization of cases after their completion, so that cases may become available to the public and others in the judicial system.

3. Costs

The costs taken on by a claimant in the court would be kept minimal. Similar to state small claims courts, they would consist only of a simple filing fee, based on the amount of damages claimed, likely ranging from about \$30-\$100.²⁰⁴ In the event of a success claim, this fee could be recoverable within the damages, similar again to state small claims.²⁰⁵ Further, while hiring an attorney would be up to each litigant, there would be no necessity for it, as the rules of evidence and procedure would be relaxed, allowing for the panel as proposed in the next subsection to provide guidance when making determinations.²⁰⁶ The court could also provide information and assistance with trial preparation and the filing process that lays out requirements for making a claim, available defenses, and information that the parties will want prepared.²⁰⁷ California and Massachusetts already offer this type of assistance on a regular basis, as well as the UK Intellectual Property Enterprise Court, discussed in Part II, which could provide various models.²⁰⁸ The availability of

200. *Id.* at 103.

201. Ciolli, *supra* note 27, at 1025.

202. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 102.

203. *Id.*

204. *Id.* at 55–56.

205. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 59.

206. *Id.* at 57.

207. *Id.* at 56.

208. *Id.*

pro se litigation would greatly reduce the costs undertaken by a claimant, allowing the full pursuit and defense of claims to their full extent.²⁰⁹

4. Panel of Copyright Experts

The cases would appear before a panel of judges who have particular expertise in the field of copyright. The expertise would help expedite the process of litigation, as the panel would not need parties to spend time discussing and briefing the panel on applying the appropriate law.²¹⁰ Expertise addresses the problem that many federal court judges, as generalist judges, are not always equipped to handle the realities and the complexity of copyright cases.²¹¹ The jurisdiction of the federal courts is so vast that it would be almost impossible for judges to develop more than a passing familiarity with many of the areas they are called to address, leaving some areas where the Judge has no familiarity at all.²¹²

5. Time

The cases would likely proceed within around thirty to forty days after the filing of the claim by the plaintiff.²¹³ The actual cases themselves should only take one to two days to result in a final judgment, as procedures in a small claims court are intended to be simple and more informal, with limited discovery.²¹⁴ There should also be no need for additional witnesses or experts, as the judges of the court will already have specialized knowledge in the field of copyright, and there will not be a jury to instruct.²¹⁵ While determinations of weight and the overall analysis of fair use factors are often complicated, the underlying facts both parties must provide are often easily acquired, such as the amount and descriptions of the parts taken, the commercial nature of the works, and what the contested work is proposing to do.²¹⁶ This information could be provided either within in the initial claim or acquired in the time leading up to the hearing.²¹⁷ Further, the availability of an appeal would be limited to cases of fraud, misconduct or material error, so cases would not be unnecessarily

209. *Id.* at 57.

210. *Id.* at 99–101.

211. Oldfather, *supra* note 28, at 854–55.

212. *Id.*

213. *Basic Consideration and Questions*, CAL. DEPT. OF CONSUMER AFFAIRS http://www.dca.ca.gov/publications/small_claims/basic_info.shtml [<https://perma.cc/Z3Y9-RTLW>] (last visited Aug. 27, 2017).

214. *Id.*

215. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 99–101.

216. Snow, *supra* note 16, at 1800.

217. *Id.*

prolonged.²¹⁸

Should the court be immediately overwhelmed with frivolous lawsuits or delays, there are several regulatory measures that would be available.²¹⁹ In particular, Rule 11 of the Federal Rules of Civil Procedure already acts as a procedural mechanism for this purpose and could be applied to these courts.²²⁰ Also, should these already existing civil procedure mechanisms fail, measures could be later added by Congress, such as banning plaintiffs with a history of filing such claims or allowing the pursuit of malicious prosecution claims.²²¹

6. Damages

The damage cap would initially be set around \$10,000-30,000, based on the recommendations of the Copyright Office, who surveyed a number of organizations such as the Motion Picture Association of America, the American Society of Media Photographers, the Graphic Artists Guild, and National Press Photographers Association on their willingness to litigate in a small claims court based on damages allowed.²²² Additionally, the option to elect for statutory damages should still be allowed, despite registration of the copyright, but it should be offered in drastically reduced figures and in limited circumstances, as the current regime under 17 U.S.C. § 504 has proved to be grossly excessive.²²³ The Copyright Office proffered a limit of \$7500, per infringing work, up to the damage cap, but admitted the possibility that it may need to be lower, as this number could still operate as overdeterrence, if regularly relied on in situations of limited apparent damage.²²⁴ Ideally, statutory damages could be eliminated entirely, but the allowance for statutory damages takes into consideration the time sensitive nature of the hearings and the potential difficulty in determining actual damages.²²⁵

Recognizing the critical nature of damages in these voluntary proceedings, it is important to acknowledge that these initial limits should be reassessed as

218. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 129.

219. Ciolli, *supra* note 27, at 1028.

220. *Id.*

221. *Id.*

222. *Id.* at 110–12.

223. Samuelson & Wheatland, *supra* note 28, at 480. *See e.g.*, Childress v. Taylor, 798 F. Supp. 981, 996–97 (S.D.N.Y. 1992) (\$30,000 awarded against defendant for rewrite of previously collaborated play, despite no proof of damages); Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996) (\$400,000 awarded against defendant for using similarly formed mannequins as plaintiff, actual damages less than \$10,000); Lipton v. Nature Co., 71 F.3d 464, 472 (2d Cir. 1995) (\$100,000 awarded against defendant attempting to sell scarves depicting phrases supposedly taken from plaintiff's book, despite no proof of damages).

224. PALLANTE, U.S. COPYRIGHT OFFICE, *supra* note 154, at 111.

225. *Id.*

the court goes forward and further empirical research is conducted.²²⁶ The limit should be kept low enough to limit exposure and encourage defending parties to consent to the voluntary proceedings, but high enough that litigating parties believe the proceedings are worth pursuing.²²⁷

7. Limitation of Appeal

As briefly mentioned above, appeals would be limited to cases of fraud, misconduct, or material error.²²⁸ Limiting the ability of appeal is done simply for the reason that if litigants were allowed to take cases to federal court on appeal, many of the benefits regarding time and cost offered by the small claims court would disappear.²²⁹ Additionally, those parties who received default judgments as a result of the opt-out basis of the proceedings would be allowed to appeal based on their ability to show excusable neglect on their part.²³⁰

8. Precedent

Finally, the decisions reached in this specialty copyright court would have no binding precedent on federal courts. While this immediately seems counter to the goal of this solution, which is to give both the courts and the public a better idea of what constitutes derivative works and what constitutes fair use, it will still operate as an outlet for persuasive authority.²³¹ The creation of persuasive authority on a variety of cases allows copyright users, lawyers, and even judges to rely on them in later federal cases.²³² Further, it is universally accepted that persuasive precedents play an important role in the development of legal doctrine.²³³ The facts, judgments, and opinions of the cases would be recorded, organized, and gradually made available to the public. Thus, this would cause a larger number of specific factual scenarios that have been legally analyzed, decreasing uncertainty.

While citing to state small claims courts is not a practice usually engaged in by the judiciary, the point of focus is that the small claims copyright court proposed here would also be a specialty court. Over time, opinions should hopefully begin to hold authoritative value similar to other specialty courts, such as the U.S. Tax Court. The U.S. Tax Court shares several features with

226. *Id.* at 109.

227. *Id.*

228. *Id.* at 129.

229. *Id.*

230. *Id.* at 129–130.

231. *Id.*

232. *Id.*

233. Grant Lamond, *Persuasive Authority in the Law*, 17(1) *THE HARV. REV. OF PHIL.* 16, 16–17 (2010).

the Copyright Court presented here: most claimants can represent themselves; there is no jurisdictional limit as to a specific geographic region; judges are tax specialists; and jury trials are not available.²³⁴ Despite the separated nature of U.S. Tax Court from the federal judiciary, the U.S. Tax Court is considered to possess higher degrees of technical expertise than other generalist courts.²³⁵ Additionally, the court publishes their regular decisions, normally involving debated or new points of law, which are regularly cited to as persuasive legal authority in federal jurisdictions and given more weight than U.S. district court opinions on the same tax issue.²³⁶

CONCLUSION

There is a paradox present within copyright law, which is effectively hobbling the goals of copyright.²³⁷ This paradox occurs because transformative works are protected by both the exclusive rights of creators under 17 U.S.C. § 106 and by the fair use factors under 17 U.S.C. § 107. Understanding the history behind the development of these sections sheds some light on how this situation developed, but unfortunately, does little to address the problem. While the immediate reaction to solving this problem seems apparent, to simply get rid of one of these protections, neither section can or should be eliminated, as they both have still have value to the copyright system.²³⁸

Presently, it is up to the federal courts to examine unique factual scenarios and gradually interpret the flexible fair use standard, so that it is clear which kind of transformative works constitute derivative works and which constitute fair use. However, the federal courts are ill-equipped to provide this necessary function, as they hear relatively few cases involving claims of fair use per year, which directly affects their ability to create new judicial policy.²³⁹ The lack of litigation occurs due to several factors such as the cost of a trial, the time necessary to litigate, and the statutory damages that are available when pursuing copyright infringement claims in the federal courts.²⁴⁰ The combination of

234. *About the Court*, UNITED STATES TAX COURT, <https://www.ustaxcourt.gov/about.htm> [<https://perma.cc/5BSG-JZGK>] (last updated Aug. 5, 2016).

235. Crimm, *supra* note 35, at 74.

236. American Institute of Certified Public Accountants, *U.S. Federal Tax Law Hierarchy* (2016) <https://www.aicpa.org/InterestAreas/Tax/Resources/practicemanagement/Downloadable Documents/U-S-Federal-Tax-Law-Hierarchy-Quick-Reference-Chart.pdf>; *See e.g.*, Meruelo v. Comm’r, 691 F.3d 1108, 1114 (9th Cir. 2012) (quoting Merkel v. Comm’r, 192 F.3d 844, 847–48 (9th Cir. 1999)) (describing that because the Tax Court has special expertise in the field, its opinions bearing on the Internal Revenue Code are entitled to respect in the federal courts).

237. Lipton & Tehranian, *supra* note 7, at 443.

238. *Id.* at 386.

239. *Id.*

240. Ciolli, *supra* note 27, at 1001–02.

these factors causes the majority of people not to file their cases, to settle their cases to early, or to withdraw their cases.²⁴¹ The result is an unworkable process for interpreting fair use, as fair use operates as a shield and not a sword.²⁴² A person cannot assert fair use until someone else brings a copyright infringement case.²⁴³ Therefore, unique factual scenarios cannot be assigned a position on the sliding scale that is the flexible standard of fair use until a copyright infringement case concludes, and the court publishes a judicial opinion.²⁴⁴

To address the issue that the current federal system is not adequately interpreting these competing copyright statutes or their application to transformative works, this article offers a two-fold solution. First, the federal courts should reduce the statutory damages available in cases that do not involve direct reproductions of an entire work. Second, a specialty small claims courts, which deals only with copyright claims, should be created. While these courts would only be a voluntary alternative to the federal court, they would have large benefits, as the reduced time and cost would be beneficial to both claimants and defendants.²⁴⁵ Additionally, as defendants would have less reason to be afraid of litigating a full fair use defense with reduced damages, judicial opinions could be created applying to the individual factual scenarios of each case, decreasing uncertainty for later judges, lawyers, and claimants.²⁴⁶ While the precedent set in these cases would not be immediately binding on the federal courts, it would allow for the creation of persuasive authority, which the federal courts could then use as guidance in their decisions to create binding precedent.²⁴⁷ The introduction of persuasive authority would not be an immediate solution to solving the paradox present between § 106(2) and § 107(1), but it would provide guidelines for their proper application on an influx of new cases, causing interpretation to proceed at a much faster rate than is offered by the current federal court system. The aim of argument, or discussion, should not be victory, but progress.²⁴⁸

241. *Id.*

242. Lipton & Tehranian, *supra* note 7, at 410.

243. *Id.*

244. *Id.* at 410–11.

245. Ciolli, *supra* note 27, at 1030–31.

246. *Id.*

247. Lamond, *supra* note 233, at 16.

248. JOSEPH JOURBERT, *PENSÉES* 7.31 (1842).