

## ADMINISTERING FAIR USE

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### ABSTRACT

*Fair use is not working. As written by Congress and applied by the courts, the fair use law fails to give individuals sufficiently clear guidance to determine in advance whether their uses of copyrighted works are fair and therefore noninfringing. When the law does not regulate adequately, markets can supply the rules. Thus, copyright owners and prospective users of copyrighted works can—and do—negotiate over and enter into contracts specifying permissible uses. However, leaving fair use to the market is far from desirable. Fair use is not meant to be something that is sold and bought like other market goods. Fair use is free use. Nobody is meant to be paying for the privilege of using a copyrighted work in a manner that the law deems not to infringe the copyright in the work. Moreover, the fair use market is not a fair market. The failure of Congress and of the courts to provide clear guidance on the meaning of fair use permits copyright owners to leverage the vagueness of the law and persuade prospective users that virtually any unauthorized use constitutes copyright infringement—and that if the use is not paid for it will result in a lawsuit and substantial damages.*

*This Article offers a new approach to fair use. It proposes a role for the one branch of the federal government that has so far been left out of the picture: the executive branch. In most areas of the law where clear legal directives are needed to guide behavior in particular contexts and where Congress and the courts are unable to supply the clarity, we turn to administrative agencies. An administrative agency*

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*can, and should, regulate fair use. Accordingly, the Article offers two possible models of agency regulation. In the first model, an agency is responsible for generating regulations that determine what constitutes fair use in specific contexts as well as preventing efforts to interfere with fair uses of copyrighted works. In the second model, an agency issues fair use regulations and determines prior to any copyright infringement claim being brought in court whether the use in question constitutes fair use. Agency regulation can bring much needed clarity and predictability to fair use in ways that neither Congress nor the courts are able to accomplish; an agency can also protect fair use in ways that the market does not.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 398  
I. FAIR USE IN CONGRESS AND THE COURTS . . . . . 400  
II. FAIR USE AND MARKETS . . . . . 404  
III. FAIR USE AND THE ADMINISTRATIVE STATE . . . . . 412  
    *A. Model One: The Office for Fair Use* . . . . . 415  
    *B. Model Two: The Copyright Infringement  
        Review Office* . . . . . 419  
    *C. Fair Use Regulations* . . . . . 421  
    *D. Locating the Agency* . . . . . 427  
IV. THE BENEFITS OF AGENCY ADMINISTRATION . . . . . 430  
CONCLUSION . . . . . 437

## INTRODUCTION

Who should regulate fair use? Codifying the judicially-recognized fair use doctrine, Congress incorporated a fair use defense in the 1976 Copyright Act, which established that a fair use of a copyrighted work does not infringe the exclusive rights the Act grants to the copyright owner. Courts have been responsible for applying the fair use provision of the Copyright Act when they adjudicate copyright infringement claims. Yet neither Congress in enacting the fair use law nor the courts in applying it have supplied sufficiently clear guidance to permit individuals who wish to make use of a copyrighted work—and who also desire to avoid infringing the copyright in the work—to determine whether their proposed use is fair. Where law does not regulate, markets can, of course, supply the rules. Thus, copyright owners and prospective users of copyrighted works can—and do—negotiate over and enter into contracts specifying permissible uses. Yet leaving fair use to the market is far from desirable. Fair use is not meant to be something that is sold and bought like other market goods. Fair use is free use. Nobody is meant to pay for the privilege of using a copyrighted work in a manner that the law already deems *not* to infringe the copyright. Moreover, the fair use market is not a fair market. The failure of Congress and of the courts to provide clear guidance on the meaning of fair use permits copyright owners to leverage the vagueness of the law and persuade prospective users that virtually *any* unauthorized use constitutes copyright infringement—and that if the use is not paid for it will result in a lawsuit and substantial damages.

There is widespread—though not universal—agreement that fair use does not function well and that reform is needed. A variety of commentators have suggested ways to reform fair use. For example, some commentators have suggested that in implementing the fair use provision of the Copyright Act, courts should take greater account of First Amendment interests and of social practices.<sup>1</sup> Other commentators have called on Congress to amend the fair use law with safe harbors that specify amounts of permissible copying.<sup>2</sup>

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1. See *infra* notes 162-64 and accompanying text.

2. See *infra* notes 165-68 and accompanying text.

Different proposals eliminate or reduce damages against defendants who have a good faith basis for believing their use of a copyrighted work was fair.<sup>3</sup> One commentator suggests that Congress create an arbitration system for users of copyrighted material who are unable to negotiate a license agreement with the copyright owner.<sup>4</sup> Another commentator advocates a fair use procedure similar to the process for obtaining a private letter ruling from the IRS.<sup>5</sup>

This Article offers a new approach. It proposes a role for the one branch of the federal government that so far has been left out of the picture: the executive branch. In most areas of the law where clear legal directives are needed to guide behavior in particular contexts and where Congress and the courts are unable to supply the clarity, we turn to administrative agencies. An administrative agency can, and should, regulate fair use. Accordingly, this Article offers two possible models of agency regulation. In the first model, an agency is responsible for generating regulations that determine what constitutes fair use in specific contexts as well as preventing efforts to interfere with fair uses of copyrighted works. In the second model, an agency issues fair use regulations and determines whether the use in question constitutes fair use prior to any copyright infringement claim being brought in court. Agency regulation can bring much needed clarity and predictability to fair use in ways that neither Congress nor the courts can; an agency can also protect fair use in ways that the market does not.

Parts I and II set out the deficiencies of current approaches to fair use, examining respectively the inadequacy of the law of fair use and the problems that market regulation produces. Part III offers the proposal for agency regulation and describes the two models. Part IV discusses the benefits of agency regulation.

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3. *See infra* note 147.

4. *See infra* notes 152-58 and accompanying text.

5. *See infra* notes 149-51 and accompanying text.

## I. FAIR USE IN CONGRESS AND THE COURTS

The 1976 Copyright Act permits fair uses of copyrighted works,<sup>6</sup> but nobody knows whether any proposed use would be fair. Cognizant of the “endless variety of situations and combinations of circumstances that can rise” and wanting to avoid “freez[ing] the doctrine in the statute, especially during a period of rapid technological change,”<sup>7</sup> Congress adopted a notoriously vague fair use provision. Section 107 of the Copyright Act, which governs fair use, comprises a nonexclusive list of purposes for which use of a copyrighted work could be deemed fair,<sup>8</sup> along with a list of four factors derived from case law that must be taken into account in making a fair use determination.<sup>9</sup> Given these elements, the statute provides little advance guidance. For the critic who seeks to quote a copyrighted passage, the sampler who wants to incorporate the drum introduction to a copyrighted song, the documentary filmmaker whose camera has captured a television playing in the background, and for others who propose to make use of a copyrighted work, it is hard to determine in advance whether a given use would be fair. Indeterminacy, of course, is not without benefit. The upside of the vague fair use statute is that it is also flexible. The statutory factors can be applied to a variety of uses and in a range

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6. 17 U.S.C. § 107 (2006).

7. H.R. REP. NO. 94-1476, at 68 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5678, 5680.

8. 17 U.S.C. § 107 (specifying that “the fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use, scholarship, or research, is not an infringement of copyright)”).

9. *Id.* Section 107 provides:

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.

*Id.*

of contexts—including to uses and in contexts that Congress may not have anticipated at the time it passed the law.

Certainty as to fair use comes only through litigation. Applying § 107, courts determine whether a use is fair and therefore non-infringing. If Congress was too general in enacting the fair use provision, the judicial decisions construing § 107 entail the opposite problem. Whereas Congress refused to think in terms of specific cases, judges necessarily issue rulings closely tied to the facts of individual disputes. The question a judge is asked to resolve is whether a particular defendant's copying of a specified amount of a given work for a certain purpose falls within the protections of fair use.<sup>10</sup> Judicial decisions therefore fail to provide *general* guidance about when a proposed use is fair—again, making future determinations difficult. Judges themselves have recognized this problem. As one federal judge has put it, judicial opinions “reflect widely differing notions of the meaning of fair use,” and “[e]arlier decisions provide little basis for predicting later ones,” so parties “can only guess and pray” as to whether a court will find any particular use fair.<sup>11</sup> Fair use law, then, exists at one extreme as a body of vague statutory language and at the other extreme as a collection of narrow, fact-specific, judicial decisions.<sup>12</sup> Neither Congress nor the courts have supplied sufficient clarity to guide prospective users of copyrighted works.

Stated differently, the fair use provision of § 107 provides standards rather than rules. In the classic formulation, legal directives fall somewhere on a continuum between rules at one end and standards at the other.<sup>13</sup> A rule provides clarity but it is also rigid; a standard allows for flexibility but, because it depends upon judgment calls, its application also can be unpredictable.<sup>14</sup> The choice between adopting a rule or a standard depends very much on

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10. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 507 U.S. 1003 (1993).

11. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990).

12. *But see* Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537, 2541-43 (2009) (arguing that fair use law is more coherent than typically perceived and that analyzing putative fair uses in light of cases previously decided in the same “policy-relevant cluster” makes it possible to predict whether a use is likely to be fair).

13. See, e.g., Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

14. See *id.* at 57-59.

context; commentators have long debated the relative benefits of rules and standards in light of such considerations as fairness, social productivity, liberty, and democracy.<sup>15</sup>

When constitutional interests are implicated, the right choice—rule or standard—is particularly significant.<sup>16</sup> When legal regulations implicate an individual’s *constitutional rights*, we typically demand that government regulate with sufficient precision—a rule—so as to allow individuals to conform their behavior to the law’s requirements as well as to prevent governmental officials from exercising undue discretion when they enforce the law.<sup>17</sup> That principle finds expression in the constitutional doctrine that unduly vague criminal laws violate due process.<sup>18</sup>

Fair use, like copyright, implicates constitutional interests. The Supreme Court has described fair use as copyright law’s “built-in First Amendment accommodation.”<sup>19</sup> Fair use prevents the exclusive rights copyright law confers from achieving a monopoly on, and therefore suppressing, speech.<sup>20</sup> As a result of fair use, a copyright, although conferring substantial rights on the owner, does not bar the critic, the parodist, and the commentator from making use of the copyrighted work.<sup>21</sup> A significant measure of free speech is protected.

Given the constitutional interests at stake, the standards-based approach of fair use law is troubling. Whether any particular use is

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15. *See id.* at 62-69 (summarizing the rules versus standards literature).

16. *See id.* at 69 (discussing “whether the [Supreme] Court’s own constitutional precedents ought to be construed as rules or standards; second, whether the Constitution’s provisions should be interpreted as rules or standards; and third, whether the Court,” in issuing doctrines to guide lower courts, should craft “rules or standards”).

17. *See, e.g.,* *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also* Sullivan, *supra* note 13, at 62 (explaining that rules may be considered more fair than standards).

18. *See, e.g., Grayned*, 408 U.S. at 108 (explaining that the laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and “provide explicit standards for those who apply them”).

19. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

20. *See, e.g., id.* at 197.

21. I recognize that this is not the only justification for fair use. *See, e.g.,* Wendy J. Gordon, *Fair Use as Market Failure, A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (analyzing fair use as a response to market failures); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1328-30 (2001) (discussing fair use as promoting semiotic democracy).

fair should not be unknowable until a judge interprets the fair use standards and decides a case that has made its way to court. Indeed, the uncertainty of fair use law is in tension with two core First Amendment principles. The first principle, reflected in the doctrine against prior restraint injunctions, is that speech should not be curtailed during the time in which a court is deciding whether that speech is protected.<sup>22</sup> That the law's uncertainty and the speaker's own aversion to risk, rather than a court order, produce the curtailment does not alter the fact that speech is not heard. The second principle, reflected in the rules against licensing schemes that give decision makers unbridled discretion, is that governmental officials should not be empowered to make ad hoc decisions about which speech is permitted.<sup>23</sup> That judges are the governmental officials who exercise this discretion in fair use cases may be of some comfort, but it does not fully remedy the problem. More generally, First Amendment concerns are especially strong in the modern fair use context. In an age in which everybody is an author, the uncertainty about fair use affects vast numbers of individuals—and vast amounts of speech. Copyright infringement also can trigger very substantial civil<sup>24</sup>—and in some cases criminal—penalties.<sup>25</sup> Much

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22. *See* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556-59 (1976) (describing prior restraint as “the least tolerable infringement on First Amendment rights”).

23. *See, e.g.,* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

24. A copyright owner can seek injunctive relief, impounding and disposition of infringing articles, actual damages and profits earned by the infringing party, or statutory damages up to \$30,000 per work, or \$150,000 per work in the case of willful infringement. 17 U.S.C. §§ 501-504 (2006). In addition, at the discretion of a court, reasonable costs and attorneys' fees may be awarded. *Id.* §§ 501, 505.

25. *See id.* § 506(a) (specifying that “[a]ny person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—(A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution ... of 1 or more copyrighted works, which have a total retail value of more than \$1,000”). As a result of the 1982 Piracy and Counterfeiting Amendments Act (passed to address large-scale infringement of movies and records), Pub. L. No. 97-180, 96 Stat. 91 (1982) (codified as amended at 18 U.S.C. §§ 2318-2319 (2006) and 17 U.S.C. § 506(a) (2006)), and the Copyright Felony Act of 1992, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (providing for prison sentences of one, five, and ten years) (codified as amended at 18 U.S.C. § 2319 (2006)), violations of § 506(a) can trigger prison time and other substantial penalties. *See also* 18 U.S.C. § 2319 (2006) (imposing criminal penalties, including imprisonment for up to ten years, for repeat offenders making ten or more illegal copies with a value of more than \$2500). In addition to the Copyright Act, other federal statutes provide civil and criminal remedies for specific kinds of copyright violations. *See* 17 U.S.C. §§ 1201, 1204 (2006) (providing criminal penalties for circumventing antipiracy protections contained in software

is at stake, then, for many people. Standards do not work well in protecting constitutional rights under these circumstances.

## II. FAIR USE AND MARKETS

Where the law does not regulate with sufficient clarity, markets can fill the void. Somebody who wants to make use of a copyrighted work without facing a legal penalty can, therefore, license the use from the copyright owner. A valid license removes the use from the vagaries of fair use doctrine. Contract law can produce the certainty that copyright law, as written by Congress and applied by the courts, fails to supply.

However, reliance on contracts is inconsistent with the purpose of fair use. Fair use is a use that does not require permission because it is not infringement.<sup>26</sup> When fair uses require licensing, fair use law is not performing its very function. Moreover, fair use does not exist merely for the benefit of private parties. The basic idea of fair use goes back to the constitutional purpose behind copyright: to promote creative progress. In some circumstances, society benefits by authorizing people to make use of a work even though the work is protected by copyright. Without a fair use doctrine, copyright owners would have virtually complete control over use of their works. Fair use reflects the idea that this would not be desirable for the public as a whole. Many creative works build upon, borrow from, and react to earlier works. Fair use permits these kinds of activities. A commentator who wants to make a point about a prior work often needs to reproduce a small part of that

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and for making, selling, or distributing code-cracking devices used to copy software illegally); 18 U.S.C. § 1961(1)(B) (2006) (including counterfeiting and criminal infringement of copyright as predicate RICO offenses); 18 U.S.C. § 2318 (2006) (making punishable by fines and up to five years imprisonment these acts: trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, copies of motion pictures or other audio visual works, and trafficking in counterfeit computer program documentation or packaging); 18 U.S.C. § 2319A (2006) (prohibiting unauthorized fixation of and trafficking in sound recordings and music videos with fines and up to five years imprisonment for first-time offenders and ten years imprisonment for repeat offenders); 47 U.S.C. § 553 (2006) (prohibiting unauthorized reception of cable services with maximum penalty of six months imprisonment and \$1000 fine for individual use, two years imprisonment and \$50,000 fine for commercial gain, and five years imprisonment and \$100,000 fine for repeat offenders).

26. *See supra* note 8.

work. A movie critic may desire to quote language from the script. News broadcasters often need to repeat statements made by others. Historians enrich their works by reproducing the words and works of their subjects. Humorists draw on preexisting writings and images to poke fun at them. If these uses could not be made without the permission of—and payment to—the copyright owner, the loss to the public would be enormous. This is particularly true with respect to works that criticize or ridicule earlier works. In a world in which permission were needed for any use, the flatterer would be more likely to receive the necessary authorization than would the critic. Fair use promotes the overall flow of creative works by authorizing some copying of copyrighted works.

Leaving the rules of fair use to private parties to determine impedes these public ends. An absence of sufficient guidance in either § 107 of the Copyright Act or court decisions construing and applying § 107 permits content owners to make the extraordinary claim that *no* unauthorized use of their works is fair. Several examples help to illustrate this point:

- (1) Book publishers routinely attach notices to books stating that no portion of the book can be copied without the publisher's consent. Penguin USA claims that permission is required "for the use of an excerpt from copyrighted material to be used in another work," including "a short quotation from one book used in another book."<sup>27</sup>
- (2) The estate of James Joyce threatened to sue Carol Loeb Shloss, an English professor at Stanford University, if she published a book containing excerpts, however short, from Joyce's writings.<sup>28</sup>
- (3) Major League Baseball (MLB) asserts: "Any rebroadcast, reproduction or other use of the pictures and

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27. Penguin Group Permissions FAQ, <http://us.penguin.com/static/pages/permissions/PermissionsFAQ.html> (last visited Oct. 21, 2009).

28. Represented by law professor Larry Lessig, Shloss filed an action against the estate seeking a declaratory judgment that the excerpts at issue were covered by the fair use doctrine. The case settled and publication proceeded. See *Shloss v. Sweeney*, 515 F. Supp. 2d 1083, 1084 (N.D. Cal. 2007); Press Release, Stanford Law School, Stanford Scholar Wins Right to Publish Joyce Material in Copyright Suit (Mar. 22, 2007), available at <http://www.law.stanford.edu/news/pr/55/>.

accounts of this game without the express written consent of Major League Baseball is prohibited.”<sup>29</sup> So, too, the National Football League (NFL) asserts: “This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL’s consent, is prohibited.”<sup>30</sup>

- (4) The *New York Times* claims: “Authorized permission is always necessary when using New York Times content for photocopying, republication or redistribution and for all uses in electronic formats.”<sup>31</sup>
- (5) ABC News tells other networks they may use no more than 30 seconds of footage from a 2008 presidential debate.<sup>32</sup>
- (6) DVDs carry notices like this one: “All material is protected by copyright laws of the United States and all countries throughout the world. All rights reserved. Any unauthorized exhibition, distribution, or copying of this film or any part thereof (including soundtrack) is an infringement of the relevant copyright and will subject the infringer to severe civil and criminal penalties.”<sup>33</sup>
- (7) Computer software comes with a notice prohibiting reverse engineering even though most reverse engineering is fair use.<sup>34</sup>

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29. See Cory Tadlock, *Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies are Overreaching Their Copyright Protections*, 7 J. MARSHALL REV. INTELL. PROP. L. 621, 623 n.13 (2008).

30. See Tyler McCormick Love, *Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 J. INTELL. PROP. L. 369, 379 (2008) (citing *NFL Football: Dallas Cowboys v. New England Patriots* (CBS television broadcast Oct. 14, 2007)).

31. New York Times Reprint Services, <http://www.nytreprints.com/Products.asp> (last visited Oct. 21, 2009).

32. Brian Stelter, *ABC Restricts Debate Clips to 30 Seconds*, N.Y. TIMES, Apr. 15, 2008, <http://mediadecoder.blogs.nytimes.com/2008/04/15/abc-restricts-debate-clips-to-30-seconds-cable-channels-may-cite-fair-use/>.

33. See, e.g., Roger & Me Credits, <http://www.michaelmoore.com/dogeatdogfilms/rmcredits.html> (last visited Oct. 21, 2009).

34. See, e.g., Brad Frazer, *Open Source is not Public Domain: Evolving Licensing*

Many people are sufficiently risk-averse—or are pressured by risk-averse publishers, distributors, or insurers—that, when faced with these kinds of notices they forego copying or making other uses of copyrighted works entirely or they obtain permission before doing so.<sup>35</sup> Compounding the problem, a variety of authoritative-sounding voices instruct potential users always to seek permission. The “Friends of Active Copyright Education,” an initiative of the Copyright Society of the U.S.A.,<sup>36</sup> says on its website that “consent is required from the copyright owner to use clips or photographs in a motion picture, no matter [how] de minimis or short” and that “[u]se of any copyrighted music ... no matter how short (even if only a few notes) ... must be cleared with the copyright owner.”<sup>37</sup> In addition, “[i]f you intend to quote or even paraphrase the words of another author, you should obtain the author’s permission before doing so.”<sup>38</sup> As to § 107, the Friends advise, “[i]t is risky to rely on the ‘fair use’ doctrine” and thus “[t]he best course of action is simply to seek permission for all copied materials you intend to use.”<sup>39</sup> Even the Copyright Office takes a highly cautious view of fair use. In its circular on fair use, it states the following:

The safest course is always to get permission from the copyright owner before using copyrighted material.... When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of “fair use” would clearly apply to

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*Philosophies*, 45 IDAHO L. REV. 349, 372 (2009); Chilling Effects Clearinghouse: Reverse Engineering, <http://chillingeffects.org/reverse/> (last visited Oct. 21, 2009).

35. For example, Amy Sewell, the producer of “Mad Hot Ballroom,” a documentary about New York City children and ballroom dancing, paid out \$170,000, more than a quarter of her \$500,000 budget, for clearance costs for music played during filming, including \$2500 to EMI because a cellphone belonging to one of the film’s subjects had a six-second ringtone that played the theme from *Rocky*. See Nancy Ramsey, *The Secret Cost of Documentaries*, N.Y. TIMES, Oct. 16, 2005, § 2, at A13. Although Sewell thought she could invoke fair use, her lawyer advised her that “for your first film, you don’t have enough money to fight the music industry” and that she should license everything, however short. *Id.* The “fear factor” prompted her to pay up. How Did Mad Hot Ballroom Survive the Copyright Cartel?, Stay Free! Daily, [http://blog.stayfreemagazine.org/2005/06/mad\\_hot\\_ballroo.html](http://blog.stayfreemagazine.org/2005/06/mad_hot_ballroo.html) (June 22, 2005).

36. Welcome to FACE, <http://www.csusa.org/face/> (last visited Oct. 21, 2009).

37. Moving Images Frequently Asked Questions, <http://www.csusa.org/face/movim/faqs.htm> (last visited Oct. 21, 2009).

38. Words Frequently Asked Questions, <http://www.csusa.org/face/words/faqs.htm> (last visited Oct. 21, 2009).

39. *Id.*

the situation. The Copyright Office can neither determine if a certain use may be considered “fair” nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.<sup>40</sup>

If the Copyright Office does not put much stock in fair use, it is hard to expect members of the general public to rely on fair use either. Worse, as James Gibson explains, licensing that occurs as a result of the law’s uncertainty ends up narrowing judicial interpretations of what fair use permits.<sup>41</sup>

Beyond deterring fair use by misinformation and threat, content owners who can control *access* to a copyrighted work routinely prevent fair uses by limiting access to those who agree in advance not to make any use of the work and to forego any fair use claim.<sup>42</sup> Here is a scenario that is familiar to many researchers: As a result of a bequest, an archive owns the physical copy of a letter of historical significance as well as the copyright in the letter. In order to view the letter, the researcher must sign an agreement with the archive that provides, among other things, that the researcher will never publish any excerpt of the copyrighted letter without the permission of the archive even if such publication were protected by the fair use provision of the Copyright Act. To access the letter, the researcher waives fair use.

Digital delivery facilitates the role of markets and contract law in making fair use disappear. Books, music, and other works increasingly are delivered in electronic form. In order to receive these digital works, the consumer is required to agree to “terms of use” imposed by the vendor.<sup>43</sup> Content owners have used these arrangements to extract from consumers their agreement that they will not use the delivered materials in ways that the Copyright Act would deem fair and therefore noninfringing.<sup>44</sup> Vendors of databases, for example, often condition access to the database upon an agreement not to copy or distribute the materials without the vendor’s per-

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40. U.S. Copyright Office, Fair Use Factsheet, <http://www.copyright.gov/fls/fl102.html> (last visited Oct. 21, 2009).

41. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887-906 (2007) (discussing copyright’s feedback loop).

42. See *infra* notes 45-62 and accompanying text.

43. See *infra* notes 45-54 and accompanying text.

44. See *infra* notes 45-62 and accompanying text.

mission, even though fair use law allows at least some forms of copying and distribution. Consider, for example, this provision in the terms and conditions accompanying U.S. News and World Report's ranking of colleges:

The materials contained on the Web site are provided by *U.S. News* as a service to you for your noncommercial, personal use ... and may be used by you for information purposes only.... All materials published on the Web site are protected by copyright laws, and may not be reproduced, republished, distributed, transmitted, resold, displayed, broadcast, or otherwise exploited in any manner without the express written permission of [ ] *U.S. News*.<sup>45</sup>

The Copyright Act does not limit uses of copyrighted materials to noncommercial, personal, and informational uses. Fair use allows some reproduction and dissemination without the permission of the copyright owner.<sup>46</sup> By accepting the terms and conditions imposed by U.S. News, however, the individual who accesses the college rankings purportedly foregoes activities that the Copyright Act permits.

In similar fashion, individuals who purchase music in MP3 format from Amazon.com enter into a click-through contract that states: "[Y]ou agree that you will not redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, license or otherwise transfer or use the Digital Content."<sup>47</sup> In order to make music purchases from the iTunes store, the consumer must agree to a long series of provisions, including an acknowledgment that the consumer may "use the Products only for personal, noncommercial use."<sup>48</sup> Before users of Amazon's Kindle, the electronic book-reading device, can read a book in digital form, they must agree to the following provision: "[Y]ou may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital

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45. U.S. News & World Report, Terms & Conditions of Use and Privacy Policy, <http://www.usnews.com/usnews/usinfo/terms.htm> (last visited Oct. 21, 2009).

46. See *supra* note 8 and accompanying text.

47. Amazon MP3 Music Service: Terms of Use, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200154280> (last visited Oct. 21, 2009).

48. iTunes Store, Terms and Conditions, <http://www.apple.com/legal/itunes/us/terms.html#SERVICE> (last visited Oct. 21, 2009).

Content or any portion of it to any third party.”<sup>49</sup> Subscribers to Rhapsody, an audio streaming service, enter into a contract that provides:

The Services available through the Application, and the Application itself (including the Content), are the property of Rhapsody or its licensors and are protected by copyright and other intellectual property laws. The Services provided through the Application may be used for your personal, non-commercial use only. You agree not to (i) reproduce, record, retransmit, redistribute, disseminate, sell, rent, lend, broadcast, publicly perform, adapt, sub-license or circulate the Application or any Content received through the Application or any Service (including music content) to any third party, (ii) exploit any such Content or the Application for commercial purposes without the express prior written consent of Rhapsody, or (iii) to share your password with any third party. You may not make any unauthorized copies of the Application or the Content obtained through the Services, and may only make such copies as are reasonably necessary for your personal, non-commercial use.

Many uses that the Rhapsody subscriber, by assenting to the contract, agrees to forego would be protected by fair use law.<sup>50</sup>

Computer software licensees also must agree to forego uses that would be considered fair. Licensees of Adobe Acrobat Pro software, for example, must agree “not to modify, adapt [or] translate” any compiled software.<sup>51</sup> The Microsoft Vista license prohibits licensees from “us[ing] components of the software to run applications not running on the software.”<sup>52</sup> Users of Minitab Statistical Software must agree not to use it for “develop[ment of] any commercially resalable product that is generally competitive” with Minitab.<sup>53</sup>

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49. Amazon Kindle: License Agreement and Terms of Use, <http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=200144530> (last visited Oct. 21, 2009).

50. Rhapsody Service Terms and Conditions, [http://rhapreg.real.com/rhapsody/freeform?freeformname=RhapC Terms](http://rhapreg.real.com/rhapsody/freeform?freeformname=RhapC%20Terms) (last visited Oct. 21, 2009).

51. Adobe Acrobat Reader, End User Licensing Agreement, <http://www.adobe.com/products/acroviewer/eula.html> (last visited Oct. 21, 2009).

52. Microsoft Software License Terms § 8, *available at* [http://download.microsoft.com/documents/useterms/Windows%20Vista\\_Ultimate\\_English\\_36d0fe99-75e4-4875-8153-889cf5105718.pdf](http://download.microsoft.com/documents/useterms/Windows%20Vista_Ultimate_English_36d0fe99-75e4-4875-8153-889cf5105718.pdf) (last visited Oct. 21, 2009).

53. License Agreement for Minitab Statistical Software, <http://www.minitab.com/en-US/company/legal/license-agreements/minitab-eula.aspx> (last visited Oct. 28, 2009).

Watching ABC television programs on a computer requires installing software made available only to users who agree they will not “redistribute, sell, auction, decompile, reverse engineer, disassemble or otherwise reduce the Software to a human-readable form.”<sup>54</sup>

The world of sports provides another example in which control of access is used to limit activities that the Copyright Act protects. Major League Baseball requires reporters seeking press credentials to sign an agreement imposing strict limitations on the reporter’s activities. The contract prohibits uses of photographs and videos as well as any “account, description ... or other information concerning the Games” other than for “news coverage of, or magazines, books or stories about, the Games, or for First Amendment-protected purposes.”<sup>55</sup> During the game, the bearer of the press credential is prohibited from “transmitting any Game Information on a play-by-play or pitch-by-pitch basis, more frequently than once every half-inning.”<sup>56</sup> Other provisions limit the length of video and audio feed, prohibit excising advertising, restrict posting of video from inside the ballpark online, and require photographers to sell prints to the MLB under the best terms made available to any other party.<sup>57</sup> So, too, the National Football League permits only press conferences and team practice sessions to be posted online; footage is limited to forty-five seconds, cannot be available for more than twenty-four hours, and cannot be archived.<sup>58</sup> In issuing media credentials for its events, the National Collegiate Athletic Association (NCAA) also limits the activities of reporters. The NCAA requires that video of its events be used within seventy-two hours following the event (twenty-four hours in the case of web use) and not exceed three

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54. ABC Open, Terms of Use, <http://developer.abc.com/user/register> (last visited Oct. 21, 2009).

55. Terms and Conditions of Credentials for Major League Baseball Games, Workouts, Activities and Events, *available at* <http://www.apme.com/news/2008/022808mlbcredentials.pdf> (last visited Oct. 28, 2009).

56. *Id.*

57. *Id.* MLB, in imposing these requirements, obviously is concerned about protecting the interests of broadcasters who purchase the rights to carry the games live. In addition, the league and individual teams have their own websites with game footage, photographs, and reports that generate substantial revenues. *See, e.g.*, The Official Site of the Houston Astros, <http://houston.astros.mlb.com> (last visited Oct. 21, 2009).

58. ASNE, NFL Memo on Rules for Credentials (May 21, 2007), <http://204.8.120.192/index.cfm?ID=6605>.

minutes in length (sixty seconds for web use).<sup>59</sup> The NCAA gives credential holders the “privilege to blog” during games but limits the number of postings depending on the sport.<sup>60</sup> For example, during soccer games, bloggers may make no more than five posts per half and one post at halftime.<sup>61</sup> The NCAA also prohibits credentialed parties from providing images from the games to anybody else.<sup>62</sup>

In sum, neither Congress nor the courts have provided sufficient clarity to allow individuals to determine in advance whether a proposed use of a copyrighted work is a fair use and therefore does not infringe the copyright. As a result, copyright owners, by leveraging the vagueness of the fair use doctrine to threaten litigation and controlling access to works, are able to determine what uses, if any, can be made of copyrighted works. Fair use is meant to limit the rights of copyright owners. Instead, it has become one more area that copyright owners control. The next Part proposes restoring fair use to its proper status by assigning the task of regulating fair use to a federal agency.

### III. FAIR USE AND THE ADMINISTRATIVE STATE

The modern state is an administrative state. For the day-to-day implementation of the law, government relies upon administrative agencies. Agencies are especially important when legal directives are required to guide people’s behavior but neither Congress nor the courts are able to regulate with sufficient clarity. Congress often lacks the institutional capacity (or the will) to determine how a statute will apply on the ground and in a variety of contexts. And although courts decide individual issues, it often takes a long time for judicial rulings to form a comprehensive regulatory framework. Administrative agencies fill these voids.

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59. NCAA, 2008-09 NCAA CHAMPIONSHIPS MEDIA COORDINATION MANUAL, *available at* [http://web1.ncaa.org/web\\_files/champ\\_handbooks/general/2008-09/2008-09\\_media\\_handbook.pdf](http://web1.ncaa.org/web_files/champ_handbooks/general/2008-09/2008-09_media_handbook.pdf).

60. *Id.*

61. See 2007-08 Conditions Placed on Use of Media Credentials, *available at* [http://cache.deadspin.com/assets/resources/2007/12/2008\\_blogging\\_policy.pdf](http://cache.deadspin.com/assets/resources/2007/12/2008_blogging_policy.pdf); *NCAA Goes Medieval On Live Blogging*, WEBPRONEWS Dec. 20, 2007, <http://www.webpronews.com/topnews/2007/12/20/ncaa-goes-medieval-on-live-blogging>.

62. NCAA, *supra* note 59.

Federal agencies play a part in the administration of some aspects of intellectual property law.<sup>63</sup> Yet compared to other areas of federal law, the role of agencies in intellectual property law is quite limited. This is surprising. Intellectual property law is well-suited to agency governance. In the modern information society, intellectual property laws affect vast numbers of individuals and entities. Virtually every use or creation of information raises questions of intellectual property rights. Intellectual property law also is increasingly complex. New issues of how intellectual property law applies in a specific context regularly arise. Under these conditions, it is unrealistic to expect Congress or the courts to provide and update the legal directives that can guide behavior on a daily basis.<sup>64</sup>

In other nations, agencies play roles in administering copyright law. In Finland, a Copyright Council within the Ministry of Education issues opinions on the application of that nation's Copyright Act.<sup>65</sup> The Council is composed of representatives of the major right holders and users of protected works as well as academic professionals.<sup>66</sup> Although the Council's opinions are not

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63. Two agencies are especially significant: the Library of Congress, a legislative agency, and the United States Patent and Trademark Office (USPTO), an agency that is part of the Department of Commerce. Within the Library of Congress, the United States Copyright Office registers copyrights, provides assistance to Congress (including preparing copyright legislation and legislative reports and providing advice on compliance with multilateral agreements), and administers compulsory and statutory licenses. *See* U.S. Copyright Office, <http://www.copyright.gov> (last visited Oct. 21, 2009). The Copyright Royalty Board, appointed by the Librarian of Congress, is responsible for determining and adjusting the rates and terms of statutory licenses. *See* U.S. Copyright Royalty Board, <http://www.loc.gov/crb/> (last visited Oct. 21, 2009). The USPTO issues patents and registers trademarks. *See* United States Patent and Trademark Office Homepage, <http://uspto.gov/> (last visited Oct. 21, 2009).

64. One commentator describes a shift in copyright law from a property rights model to a regulatory model—but without a corresponding rise in the role of administrative agencies. *See* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 90-92 (2004) (discussing how, in the past, copyright law defined a simple, industry-neutral property entitlement that the courts enforced and elaborated in a common-law-like manner, whereas today copyright law is characterized by greater legal intervention in the structure and functioning of a particular market through complex and detailed statutes, industry- and technology-specific rules, intervention into markets, and stronger policymaking power in Congress—and to a lesser extent the Library of Congress—rather than the courts).

65. *See* Finnish Ministry of Education, Copyright in Finland, <http://www.minedu.fi/OPM/Tekijaenoikeus/?lang=en> (last visited Oct. 21, 2009).

66. *See* Finnish Ministry of Education, Copyright Council, <http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=en> (last visited Oct. 21, 2009).

binding, courts have given them deference. The Council's opinions also inform the public's understanding of copyright law.<sup>67</sup> A recent development in Israel is also notable. In 2007, Israel enacted a new copyright statute, which took effect in May 2008.<sup>68</sup> Chapter Four of the statute provides for "Permitted Uses."<sup>69</sup> It specifies:

Notwithstanding the provisions of section 11 [setting out the exclusive rights of the copyright owner], the doing of the actions specified in sections 19 to 30 is permitted subject to the conditions specified respectively in the aforesaid sections and for the purpose of carrying out the objectives specified therein, without the consent of the right holder or payment.<sup>70</sup>

Section 19 of Chapter Four provides for fair use of copyrighted works.<sup>71</sup> It contains three subsections. The first, which tracks the purpose clause of § 107 of the U.S. Copyright Act, states: "Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution."<sup>72</sup> The second subsection adopts the four fair use factors from § 107 of the U.S. Copyright Act for determining whether a use is fair.<sup>73</sup> The third subsection provides: "The Minister [of Justice] may make regulations prescribing conditions under which a use shall be deemed a fair use."<sup>74</sup> Authorizing the Ministry of Justice to issue fair use regulations resulted from a concern that greater precision was needed but neither the legislature nor the courts could supply it. With this statutory authority in place, the Minister of Justice is now beginning the process of issuing fair use regulations.<sup>75</sup>

It is time to consider how intellectual property law in the United States can benefit from increased involvement by federal agencies. The current state of fair use demonstrates the problem of keeping

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67. See Finnish Ministry of Education, *supra* note 65.

68. Israeli Copyright Act of 2007, *translated in* [www.tau.ac.il/law/members/birnhack/IsraeliCopyrightAct2007.pdf](http://www.tau.ac.il/law/members/birnhack/IsraeliCopyrightAct2007.pdf).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. This statement is based on my own conversations with Israeli law professors.

intellectual property law out of the hands of agencies. It is therefore a good place to begin. Here, then, is a proposal: Congress should do what it does in a variety of contexts where the details of laws need to be filled out and direct an agency to administer fair use. Agency regulation can shift fair use from standards to rules and from litigation to administration. While there are a variety of ways in which agency administration of fair use might be structured, this Part offers two possible models.

*A. Model One: The Office for Fair Use*

Under Model One, Congress would do three things. First, Congress would make it unlawful to interfere with fair uses of copyrighted works and subject offenders to civil penalties. Similar to federal consumer protection laws,<sup>76</sup> a federal fair use protection statute would protect the public from false claims and other practices by copyright owners that limit fair uses of copyrighted works. Second, Congress would create an agency whose principal task would be to enforce this statute. Let us call this agency the Office for Fair Use (TOFU). TOFU would enforce the statute through the usual agency mechanisms of rulemaking and adjudication. Third, Congress would specify that federal fair use law, including TOFU's regulations, preempts state laws of contract that limit fair uses of copyrighted works.

Under Model One, TOFU would generate regulations prohibiting interference with fair uses of copyrighted works. These regulations would specify, consistent with the provisions of § 107 of the Copyright Act,<sup>77</sup> the uses that constitute fair uses of copyrighted works in specific sectors. In developing regulations that define fair

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76. See, e.g., 15 U.S.C. § 45(a)(1), (n) (2006) (making unlawful “unfair or deceptive acts or practices in or affecting commerce” and defining unfair practices as those that “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”); Federal Cigarette Labeling and Advertising Act (2006) (codified as amended at 15 U.S.C. §§ 1331-1340 (West 2009)) (providing the text of four health-related warning labels and requiring that cigarette packages and advertisements carry these warnings on a rotating basis); Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461 (2006) (requiring that all consumer commodities other than food, drugs, therapeutic devices, and cosmetics be labeled to disclose net contents, identity of commodity, and name and place of business of the product's manufacturer, packer, or distributor).

77. See *supra* notes 6-9 and accompanying text.

use and prohibit interference with it, TOFU would be expected to receive input from copyright owners, those who seek to make use of copyrighted works, representatives from relevant industries and interest groups, copyright law experts, and other interested parties.

In making rules, most federal agencies use the procedure of notice and comment provided for under the Administrative Procedure Act (APA).<sup>78</sup> Under this procedure, the agency gives the general public notice that a rule is being contemplated, provides the language or a general description of the proposed rule, and invites comments from the public.<sup>79</sup> Some agencies, including the Environmental Protection Agency, use a process of regulatory regulation prior to notice and comment. In regulatory regulation, the agency brings together representatives of groups affected by a rulemaking to negotiate the terms of the proposed rule.<sup>80</sup> Fair use rules are well-suited to the public notice and comment procedure, and also may be suited to regulatory regulation. Developing fair use regulations also might be an especially good vehicle for the use of the technological measures Beth Noveck has identified for promoting high-quality public participation in the comment process.<sup>81</sup>

Like other agency regulations, TOFU's fair use regulations would have the force of law.<sup>82</sup> Uses of copyrighted materials in accordance with TOFU's regulations, therefore, would be fair use and non-infringing.<sup>83</sup> Conversely, use of materials in ways that TOFU's rules do not permit would not be fair use. In accordance with the provi-

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78. See 5 U.S.C. § 553 (2006).

79. See *id.* The APA permits agencies to receive comments through an "oral presentation," and it sets up a mechanism for an evidentiary hearing when such a hearing is required by the agency's enabling act. *Id.* §§ 553(c), 556-557.

80. See *id.* §§ 570-581.

81. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 480-92 (2004).

82. See U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) ("[R]ules, other than organizational or procedural [rules] ... issued by an agency pursuant to statutory authority and which implement the statute, ... have the force and effect of law.").

83. As is normally true of agency rules, TOFU's rules would have only prospective effect. See 5 U.S.C. § 551(4) (defining a rule as "an agency statement of general or particular applicability and future effect"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring) ("The only plausible reading of the ... phrase is that rules have legal consequences only for the future.").

sions of the APA, judicial review of TOFU's regulations would be limited.<sup>84</sup>

In addition to rulemaking, TOFU could bring enforcement actions to enforce the prohibition on interfering with fair use through the adjudicative mechanisms provided in the APA.<sup>85</sup> When TOFU believed that a violation of the law has occurred, it would issue a complaint setting forth its charges. The respondent could settle with TOFU or contest the charges and proceed to adjudication before an Administrative Law Judge (ALJ). The ALJ would issue an initial decision setting forth findings of fact and conclusions of law and the disposition of the case. The ALJ could decide in favor of the respondent and dismiss the case, or, upon finding that the respondent violated the statute, assess civil penalties, issue an order to cease and desist, or impose other appropriate remedies. The ALJ's initial decision would be subject to review within the agency, which would enter a final decision and order. TOFU's final orders would be reviewable in the U.S. Court of Appeals. Violations of TOFU's

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84. See 5 U.S.C. § 706 (2006) (providing that the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action" that violates a statute, the Constitution, or a procedure established by law or that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court set out the standard of judicial review of an agency's interpretation of a statute:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.... If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. 837, 842-44 (1984) (citations omitted).

85. See 5 U.S.C. §§ 554, 556-557 (2006).

final orders would also be subject to separate civil penalties through a suit in district court to enforce the agency's order. Once TOFU has determined in a litigated administrative adjudicatory proceeding that a practice constitutes an unlawful interference with fair use and has issued a final cease and desist order, TOFU would be able to obtain civil penalties from other parties who thereafter violate the standards articulated by TOFU. Similar to the authority of the Federal Trade Commission (FTC),<sup>86</sup> TOFU could also be empowered to challenge a practice directly in court without first making a final agency determination that the challenged conduct is unlawful.

Under Model One, defendants in copyright infringement actions could assert fair use as a defense. In determining whether a particular use is fair and therefore renders the defendant's copying noninfringing, courts would defer to TOFU's regulations. Given that those regulations would define fair use with considerable specificity, in most instances, it would be clear whether a use is fair well before appearing before a judge.

Administrative law experts will recognize that giving TOFU power to enforce a prohibition on interfering with fair use may be essential in order for courts to defer to TOFU's regulations on what fair use permits. The Supreme Court has indicated that *Chevron* deference is inappropriate where a statute is administered by the courts rather than by the agency itself.<sup>87</sup> It is, therefore, unlikely that courts would accept an agency's understanding of fair use law if the agency's sole function was to issue interpretive regulations. By contrast, giving TOFU enforcement power makes judicial deference on the meaning of fair use appropriate.

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86. 15 U.S.C. § 53(b) (2000) (authorizing the FTC to seek preliminary and permanent injunctions in district court to remedy violations of "any provision of law enforced by the Federal Trade Commission"). Courts have construed this provision to also permit equitable monetary relief. *See, e.g., F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1024-28 (7th Cir. 1988).

87. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute. A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

*B. Model Two: The Copyright Infringement Review Office*

Under Model Two, Congress would give a federal agency more general responsibility in copyright infringement claims. Let us call this agency the Copyright Infringement Review Office (CIRO). As in Model One, CIRO would have power to issue regulations defining fair use, which would remain a defense to a claim of copyright infringement. CIRO also would have adjudicative authority. A copyright owner alleging infringement would be required to file, prior to going to court, a complaint with CIRO. The respondent then would be given an opportunity to assert a fair use defense. If within some designated time period no fair use defense is asserted, the copyright owner would be entitled to proceed with the copyright infringement claim in federal court, where the respondent would be deemed to have waived a fair use defense.<sup>88</sup> If, on the other hand, the respondent asserts a fair use defense, CIRO would conduct an investigation to determine if the allegedly infringing use is a fair use under CIRO's fair use regulations. If CIRO concludes that the use is fair and there was no infringement, it would issue a notice to this effect. The copyright owner then would have a period of time in which to file a lawsuit. If CIRO concludes that no fair use defense is available and therefore the respondent's copying is likely infringing, it could attempt a settlement between the parties or issue a notice authorizing the copyright owner to bring a lawsuit within a designated period of time. In deciding the copyright infringement action, courts would defer to the agency's decision as to whether under the Copyright Act and agency regulations the use at issue is a fair use.

There are, of course, existing models for this form of streamlined dispute resolution. The Equal Employment Opportunity Commission (EEOC) enforces federal laws prohibiting employment discrimination through a charge processing procedure. Under this procedure, an individual who believes he or she is a victim of employment discrimination files a charge with the EEOC,<sup>89</sup> which then conducts an investigation.<sup>90</sup> The EEOC may dismiss the charge and issue the complaining party a notice to that effect; the complaining party then

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88. There would be a procedure for expedited review by CIRO in cases where the plaintiff seeks a preliminary injunction.

89. 29 C.F.R. § 1601.7 (2002).

90. 29 C.F.R. § 1601.15.

has ninety days in which to file a lawsuit.<sup>91</sup> If the EEOC determines that discrimination did occur, it will attempt conciliation with the employer to develop a remedy.<sup>92</sup> If conciliation is unsuccessful, the EEOC may bring a lawsuit<sup>93</sup> or close the case and give the employee ninety days to bring suit.<sup>94</sup>

In a different context, the Internet Corporation for Assigned Names and Numbers (ICANN) has established a Uniform Domain Name Dispute Resolution Policy (UDRP) to resolve internet domain name registration disputes.<sup>95</sup> A registrant seeking to register a domain name must represent that the name does not infringe any third party's rights and agree to participate in a mandatory administrative proceedings should a third party assert a claim.<sup>96</sup> Administrative Panels formed by approved dispute resolution providers conduct these proceedings.<sup>97</sup> Administrative Panels have authority to cancel a domain name registration (or transfer it) if the complainant demonstrates that the registrant's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights, the registrant has no rights or legitimate interests in the domain name, and the domain name has been registered and is being used in bad faith, determined through a multifactor test.<sup>98</sup> Although UDRP does not preclude subsequent litigation, it provides a streamlined process for resolving domain name disputes. Commentators have offered different perspectives on the effectiveness of the process.<sup>99</sup>

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91. 29 C.F.R. § 1601.19.

92. 29 C.F.R. § 1601.24.

93. 29 C.F.R. § 1601.27.

94. 29 C.F.R. § 1601.28.

95. ICANN, Uniform Domain Name Dispute Resolution Policy, Aug. 26, 1999, <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

96. *Id.*

97. *Id.*

98. *Id.*

99. On the UDRP, see A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 670-711 (2002) (describing criticisms of UDRP and proposing reforms); Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. & TECH. L. REV. 285, 368-69 (2005) (reporting on problems of forum shopping by complainants and performance differences across UDRP providers); Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 299 (2005) (reporting that UDRP handled over 6,000 disputes in five years); Michael

Authorizing an agency to issue regulations defining fair use would allow individuals to determine in advance whether a proposed use of a copyrighted work is fair. Empowering the agency to adjudicate the fair use element of any copyright infringement claim would remove questions of fair use from litigation. An agency can provide both precision in the law and a streamlined process for resolving disputes that arise.

### *C. Fair Use Regulations*

Both Model One and Model Two provide for an agency to issue regulations governing fair use. Although it is not the purpose of this Article to set out the specific fair use regulations the agency should adopt, it is useful to consider the form such regulations would take. Fair use guidelines have been developed in specific contexts, particularly to guide educators and librarians. Although these guidelines lack the force of law, they are the obvious starting point for thinking about an agency's task in developing fair use regulations.

The legislative history of the 1976 Copyright Act included two sets of educational guidelines. First, it included the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals (Classroom Guidelines).<sup>100</sup> These guidelines were developed by representatives of the Authors League of America, Inc., the Association of American Publishers, Inc., and the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision "to state the minimum [and not the maximum] standards of educational fair use."<sup>101</sup> Second, the legislative history of the 1976 Copyright Act set forth the Guidelines for Educational Uses of Music.<sup>102</sup> These guidelines, designed to provide minimum standards, were developed

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Geist, *Fundamentally Fair.Com? An Update on Bias Allegations and the ICANN UDRP*, (unpublished manuscript available at, <http://aix1.uottawa.ca/~geist/fairupdate.pdf>) (reporting on different success rates depending on the size of the Administrative Panel).

100. H.R. REP. NO. 94-1476, at 68-70 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5681-83; *see also* UNITED STATES COPYRIGHT OFFICE, CIRCULAR 21: REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 7-8 (1995), *available at* <http://www.copyright.gov/circs/circ21.pdf> [hereinafter CIRCULAR 21].

101. H.R. REP. NO. 94-1476, at 68 (1976).

102. *Id.* at 70-74; *see also* CIRCULAR 21, *supra* note 100, at 9.

by representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision.<sup>103</sup>

The House also considered guidelines for "Off-Air Taping of Copyrighted Works for Educational Use."<sup>104</sup> Unlike the guidelines for books, periodicals, and music, these guidelines do not articulate that they are intended to state only the minimum standards of fair use. Rather, they "specify periods of retention and use of such off-air recordings in classrooms and similar places devoted to instruction and for homebound instruction" in order to "provide standards for both owners and users of copyrighted television programs."<sup>105</sup>

In addition, in 1998 the Conference on Fair Use (CONFU) attempted to make educational fair use guidelines that addressed the concerns raised by new technologies.<sup>106</sup> CONFU developed three sets of guidelines: Educational Fair Use Guidelines for Digital Images, Educational Fair Use Guidelines for Distance Learning, and Fair Use Guidelines for Educational Multimedia (Multimedia Guidelines).<sup>107</sup> Although a set of guidelines also was developed for electronic reserve systems, it failed to gather the necessary consensus support to become CONFU guidelines.<sup>108</sup>

Librarians also sought to develop guidelines. One early set of library guidelines was the CONTU Guidelines on Photocopying Under Interlibrary Loan Arrangements, which was adopted in 1978 by the National Commission on New Technological Uses of Copyrighted Works.<sup>109</sup> These guidelines set forth procedures to determine whether a given amount of photocopying is allowed.<sup>110</sup> The American Library Association (ALA) also has developed guidelines for the use

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103. H.R. REP. NO. 94-1476, at 70 (1976).

104. 127 CONG. REC. 24,048-49 (1981); *see also* CIRCULAR 21, *supra* note 100, at 22.

105. CIRCULAR 21, *supra* note 100, at 22.

106. *See generally* BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE (1998) [hereinafter CONFU FINAL REPORT].

107. *Id.* at 33-57.

108. Fair-Use Guidelines for Electronic Reserve Systems (Mar. 5, 1996), <http://www.utssystem.edu/ogc/intellectualproperty/rsrvguid.htm>.

109. NAT'L COMM. ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 54-55 (1978), available at <http://digital-law-online.info/CONTU/PDF/index.html>.

110. *Id.* at 55.

of materials in libraries in compliance with the fair use provisions of the Copyright Act.<sup>111</sup>

In addition to guidelines for educators and librarians, private entities have recently issued fair use guidelines for documentary filmmakers<sup>112</sup> and creators of online videos.<sup>113</sup> The Documentary Filmmakers' Statement of Best Practices in Fair Use, issued in 2005, sets out what documentary filmmakers understand as "reasonable application" of fair use law.<sup>114</sup> The Code of Best Practices in Fair Use for Online Video, issued in 2008 by a group of professors and lawyers, is designed to help creators of online video understand what uses they can make of copyrighted works.<sup>115</sup>

Fair use guidelines have been met with varying success. Given that guidelines lack the force of law, courts have not been uniform in the significance assigned to them.<sup>116</sup> In some cases, guidelines have been used in ways contrary to their original purpose. For example, the Classroom Guidelines have been treated as setting out a fair use ceiling rather than a minimum. In a closely watched case, *New York University*, in settling a lawsuit by the Association of American Publishers, agreed to be bound by the Classroom

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111. In 1982, the ALA released its *Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use*. Mary Hutchings, *Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use*, COLL. & RES. LIBR. NEWS, Apr. 1982, at 127. In 1986, Mary Hutchings Reed and Debra Stanek developed guidelines entitled *Library and Classroom Use of Copyrighted Videotapes and Computer Software*. Mary Hutchings & Debra Stanek, *Library and Classroom Use of Copyrighted Videotapes and Computer Software*, AM. LIBR., Feb. 1986, at 120A.

112. ASS'N OF INDEP. VIDEO & FILMMAKERS, ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), available at [http://www.centerforsocialmedia.org/files/pdf/fair\\_use\\_final.pdf](http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf) [hereinafter DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES].

113. PROGRAM ON INFO. JUSTICE & INTELLECTUAL PROP., CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (2008), available at [http://www.centerforsocialmedia.org/files/pdf/online\\_best\\_practices\\_in\\_fair\\_use.pdf](http://www.centerforsocialmedia.org/files/pdf/online_best_practices_in_fair_use.pdf) [hereinafter BEST PRACTICES FOR ONLINE VIDEO].

114. DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES, *supra* note 112, at 1.

115. BEST PRACTICES FOR ONLINE VIDEO, *supra* note 113, at 1.

116. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1390-91 (6th Cir. 1996) ("Although the guidelines do not purport to be a complete and definitive statement of fair use law for educational copying, and although they do not have the force of law, they do provide us general guidance. The fact that [defendant's] copying is light years away from the safe harbor of the guidelines weighs against a finding of fair use."); *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522, 1535, 1537 (S.D.N.Y. 1991) (noting that "the Classroom Guidelines express a specific prohibition of anthologies," but "refus[ing] to hold that all unconsented anthologies are prohibited without a fair use analysis").

Guidelines as setting forth the maximum amount of permissible copying.<sup>117</sup> Guidelines also have been subject to criticism for failing to properly reflect the law of fair use,<sup>118</sup> for being unduly rigid,<sup>119</sup> and for supplanting a more nuanced fair use analysis.<sup>120</sup>

Guidelines can help inform the choices an agency will face in adopting fair use regulations. The agency will need to select a point on the continuum from standards to rules. Preexisting guidelines have taken different approaches. The Multimedia Guidelines adopt a rules approach. These guidelines meticulously set out “portion limitations” defining the amount of specific kinds of copyrighted works educators and students may use in their multimedia projects.<sup>121</sup> For example, with respect to motion media, the guidelines state: “Up to 10% or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines.”<sup>122</sup> With respect to numerical data sets, the guidelines provide:

Up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table may be reproduced or otherwise incorporated as part of a [sic] educational multimedia project .... A field entry is defined as a specific item of information, such as a name or Social Security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.<sup>123</sup>

On the other hand, the Code of Best Practices in Fair Use for Online Video reflects a standards approach. For example, with

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117. See *Addison-Wesley Publ'g Co. v. N.Y. Univ.*, No. 82-CIV-8333 (ADS), 1983 WL 1134, at \*2 (S.D.N.Y. May 31, 1983).

118. See, e.g., Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 665 (2001) (writing that the Classroom Guidelines “depart abruptly from the law itself”).

119. See *id.* at 697 (writing that most fair use guidelines fail to reflect the inherent flexibility of fair use law).

120. Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1920 (2007) (“The extreme specificity of the Classroom Guidelines stands in stark contrast to the open-ended nature of the [statutory] fair use criteria.”).

121. CONFU FINAL REPORT, *supra* note 106, at 53.

122. *Id.*

123. *Id.* at 54.

respect to commentary or criticism, the Code states: “Video makers have the right to use as much of the original work as they need in order to put it under some kind of scrutiny,” but “[t]he use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience’s taste for the thing (or the kind of thing) that is being quoted.”<sup>124</sup>

The Classroom Guidelines combine rules and standards. Under these guidelines, copying of books and periodicals for classroom use is permitted when the copying meets designated tests of brevity, spontaneity, and cumulative effect.<sup>125</sup> The tests for brevity and cumulative effect reflect a rules approach. Each is defined with precision. For example, with respect to poetry, brevity is defined as “(a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.”<sup>126</sup> Other numerical limits apply to different kinds of works. The test for cumulative effect contains three conditions: the copying is “for only one course in the school”; “[n]ot more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term”; and no more than nine instances of copying may be made for a single course.<sup>127</sup> Under the same guidelines, however, the definition of spontaneity reflects a standards approach. The guidelines define spontaneity as when:

- (i) The copying is at the instance and inspiration of the individual teacher, and (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.<sup>128</sup>

As these examples suggest, the agency’s regulations can be written more like rules, more like standards, or as a combination of rules and standards. This is not the place to resolve which choice

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124. BEST PRACTICES FOR ONLINE VIDEO, *supra* note 113, at 5, 6.

125. H.R. REP. NO. 94-1476, at 68-69 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681-82.

126. *Id.* at 68.

127. *Id.* at 69.

128. *Id.*

the agency should make along the continuum. The agency cannot make the appropriate choice until it receives input from experts, interested parties, and members of the public. The right choice also likely will depend on the types of works at issue. In some cases, when precision is more important than flexibility, a strong rules-based approach—like numerical limitations on copying—might be appropriate. In other instances, the agency might conclude that it is too difficult or undesirable to adopt numerical limits or other rules and that an approach grounded in standards better reflects and protects fair use. Dissatisfaction with the quantitative approach of preexisting guidelines should not lead one to think that an agency, empowered to make legally binding regulations, should avoid precision. Likewise, the current shortcomings of the four statutory standards should not mean all standards-based approaches should be off the table. Past experiences should inform the future process but not limit its options.<sup>129</sup> That said, the agency should ensure that it does not produce regulations that are so complex that only experts can decipher and apply them. Right now, fair use is too vague to guide behavior. The agency needs to be careful that it does not produce the opposite problem of requiring users to work through a thicket of confusing rules before making use of a copyrighted work. An open process, in which nonexperts have an opportunity to play a role in the development of regulations, is essential for guarding against this risk.

The agency (or Congress in empowering the agency) likewise will need to consider how the agency's own regulations will relate to the existing fair use case law. At a minimum, it would be wise for the agency to take account of how courts have decided fair use issues. Courts have experience in this area. Cases demonstrate the kinds of disputes that may arise, and judges have written extensively on the reasons for and the meaning of fair use law. Based on a close reading of approximately 300 fair use cases, Pamela Samuelson

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129. Professor Crews, while critical of guidelines that are inconsistent with the flexible nature of fair use, offers several recommendations for developing guidelines in the future that may be applicable to the agency's work. *See* Crews, *supra* note 118, at 696-700. He suggests that guidelines should begin with the four statutory fair use factors. *Id.* at 696. The guidelines should be flexible in their definition of fair use and in how the statutory factors may be met. *Id.* at 697. Guidelines also should be developed through a process that is open to the public and in which parties staking out positions are required to provide legal justifications for those positions. *Id.* at 699-700.

reports that the cases fall into common patterns or policy-relevant clusters—such as educational uses, news reporting, and parody—and that within such clusters there is coherence among the cases.<sup>130</sup> Samuelson argues that identifying which cluster a case falls into is a helpful tool for determining whether a proposed use would be fair—beyond simply applying the statutory fair use factors.<sup>131</sup> Although Samuelson’s target audience is judges (and commentators), her recommendation to “look ... for common patterns in the fair use case law upon which to build a more predictable body of fair use law”<sup>132</sup> is also useful advice to the agency as it develops fair use regulations. Nonetheless, it is undesirable for the agency to be bound by the courts’ applications of the fair use provision of the Copyright Act in past cases. The agency needs to be free to develop regulations for future uses that reflect the interests of relevant parties and of the general public. Requiring the agency to adhere to past judicial decisions in specific disputes would interfere with this task.

#### *D. Locating the Agency*

Thus far, this Article has described the creation of a new federal agency to administer fair use. However, this function also could be assigned to an existing federal agency. One possible candidate is the Copyright Office, which is part of the Library of Congress, a legislative agency.<sup>133</sup> Other commentators also have proposed an increased role in intellectual property law by the Copyright Office. For example, Mark Lemley and R. Anthony Reese have proposed giving copyright owners the option to bring an infringement action before an ALJ within the Copyright Office against consumers who upload copyrighted works on peer-to-peer networks.<sup>134</sup> Joseph Liu argues in favor of giving the Copyright Office increased rulemaking, adjudicatory, and enforcement authority, particularly with respect

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130. Samuelson, *supra* note 12, at 2541 & n.27.

131. *Id.* at 2542 & n.28.

132. *Id.* at 2621.

133. U.S. Copyright Office, A Brief Introduction and History, <http://www.copyright.gov/circs/circ1a.htm> (last visited Oct. 21, 2009).

134. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1413 (2004).

to complex issues raised by technological change.<sup>135</sup> As Professor Liu notes, however, significant changes would need to be made to the structure and makeup of the Copyright Office in order for it to have the expertise and resources to fulfill these sorts of additional responsibilities.<sup>136</sup>

The role of the Copyright Office in rulemaking under the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA) shows the possibility of relying upon that office to administer fair use and also suggests some need for caution.<sup>137</sup> The DMCA provides for the Librarian of Congress, based on rulemaking recommendations from the Register of Copyrights, to adopt three-year renewable exemptions to the access prohibition for particular “class[es] of copyrighted works,” when users of the works “are, or are likely to be ... adversely affected” in their ability to make non-infringing uses of the works.<sup>138</sup> In issuing exemptions, the Librarian of Congress is required to take account of the availability of the copyrighted works for nonprofit, archival preservation, and educational purposes; the impact of the prohibition on circumvention on criticism, comment, news reporting, teaching, scholarship, or research; the effect of circumvention on the market for or value of copyrighted works; and other factors as the Librarian considers appropriate.<sup>139</sup> The exemptions the Librarian of Congress has issued under this provision have followed extensive notice and comment and public hearings conducted by the Copyright Office.<sup>140</sup> These

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135. Liu, *supra* note 64, at 148-56. In a suggestion that resonates with the themes of this Article, Professor Liu writes, for example, that “rather than enacting specific industry exemptions to copyright liability, Congress could delegate to the Copyright Office the authority to promulgate additional exemptions via regulation,” such that “exemption through regulation could perhaps usefully fill a gap currently left by the relative lack of guidance from fair use doctrine, and provide additional guidance and certainty to industries that routinely encounter difficult fair use issues.” *Id.* at 151-52.

136. *Id.* at 156-57. The United States Patent and Trademark Office also could be given responsibility for administering fair use. CONFU acted under the auspices of the USPTO in developing its guidelines (although the USPTO had no authority to make legally binding guidelines). See CONFU FINAL REPORT, *supra* note 106. The USPTO, however, already is understaffed and would require additional resources.

137. 17 U.S.C. §§ 1201-1205 (2006).

138. *Id.* § 1201(a)(1)(C).

139. *Id.*

140. See U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, <http://www.copyright.gov/1201/anticirc.html> (last visited Oct. 21, 2009).

exemptions take the form of rules—specific classes of works are exempted from the anticircumvention provision—based on the Librarian’s application of the standards set forth in the DMCA.<sup>141</sup> Under the most recent DMCA rulemaking in 2006, the Copyright Office recommended and the Librarian of Congress adopted six exemptions, of which three were renewed from prior rulemakings.<sup>142</sup>

This DMCA rulemaking has not been without controversy. Critics have complained that the Librarian—and by extension the Copyright Office—has unduly favored content owners, particularly by failing to provide an exemption for fair use or for consumers to make backup copies of lawfully-purchased media.<sup>143</sup> There also has been criticism that the Librarian (and the Copyright Office) has taken a very narrow view of the exemption provision of the DMCA, imposed unduly high standards for granting an exemption, and granted far fewer exemptions than were warranted.<sup>144</sup>

Thus, although the Copyright Office has some rulemaking experience, this experience suggests that Congress would need to consider carefully whether and how the Copyright Office can be relied upon to implement fair use regulations—or whether the task should be assigned to a new agency. More generally, whether a new agency is created or an existing agency assigned responsibility, there is a risk that the agency will be captured by special interest

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141. *Id.*

142. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201).

143. See, e.g., ELECTRONIC FRONTIER FOUNDATION, DMCA TRIENNIAL RULEMAKING: FAILING THE DIGITAL CONSUMER 2 (2005), [http://www.eff.org/IP/DMCA/copyrightoffice/DMCA\\_rulemaking\\_broken.pdf](http://www.eff.org/IP/DMCA/copyrightoffice/DMCA_rulemaking_broken.pdf) (“[T]he DMCA triennial rulemaking has failed to protect lawful consumer activities.”).

144. See *The Digital Media Consumers’ Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 100, 102, 107 (2004) (statement of Chris Murray, Legislative Counsel, Consumers Union, Consumer Federation of America) (complaining that despite hundreds of legitimate requests and thousands of pages of written submissions and oral testimony, the “rulemaking proceeding has largely failed to protect non-infringing uses” because of the Copyright Office’s “constricted interpretation of the standard one must meet to acquire an exemption”); Christine Haight Farley et al., *Clinical Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735, 741 (2008) (“By the time the 2006 rulemaking round arrived, many disenchanted public interest advocates had written off the rulemaking process as futile, and many of those who had earlier requested exemptions took a pass.”).

groups. Given the high stakes involved in fair use determinations and the far-reaching effects of an agency's fair use regulations, particular care should be taken to ensure the agency's decision making is balanced. Agency funding is an important element of agency independence. Jessica Litman contends that, rather than serving the interests of Congress (and by extension the general public), "the Copyright Office has tended to view copyright owners as its real constituency"<sup>145</sup> because the copyright bar protects the Copyright Office from congressional budget cuts. One way to avoid this problem is to give the agency responsible for fair use an independent income source. For example, TOFU could retain civil penalties it collects from parties who unlawfully interfere with fair use. CIRO could collect fees from the copyright owners who appear before it before bringing a copyright infringement suit.

#### IV. THE BENEFITS OF AGENCY ADMINISTRATION

Administering fair use has significant benefits. Fair use regulations issued by an agency are preferable to other efforts to bring predictability to fair use determinations. In particular, many commentators have offered proposals to adjust the rules of litigation in order to protect fair uses from the risk of litigation or from adverse rulings. Some commentators recommend increasing the accuracy of fair use rulings by shifting the burden of proof of fair use elements when the copyright owner is more likely to have access to the relevant evidence.<sup>146</sup> Other proposals eliminate or reduce

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145. JESSICA LITMAN, *DIGITAL COPYRIGHT* 74 (2001).

146. See, e.g., Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1178-79 (2000); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1308-11 (2008); Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 321-23 (1988); see also Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 1028 (2007) (proposing that fair use should focus on whether there is harm to the original use's market, and as a part of that suggestion proposing that courts should shift the burden of proof for the market harm factor); Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 68-70, 77-80 (1999) (suggesting that, with regard to fair use of unpublished works, once a defendant shows a lack of awareness regarding the owner's intent to publish the work or to prevent publication of the work, a presumption should be established that the copyright owner has the burden of rebutting); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1014 (2002); cf. Gordon, *supra* note 21, at 1624-26 (arguing that

damages against defendants who have a good faith but mistaken belief that their use was a fair use.<sup>147</sup> A different proposal makes attorney's fees available to a prevailing party to deter copyright owners from bringing weak copyright infringement claims while encouraging defendants to assert fair use defenses.<sup>148</sup> Each of these proposals seeks to reduce the risks that a fair use of a copyrighted work will be the subject of a copyright infringement action. Yet these proposals are based on a model of fair use as litigation rather than as administration. Under the litigation model, only a judicial ruling determines whether any particular use is ultimately fair (or not). Fair use regulations, issued by an agency, instead would provide predictability at the outset. Individuals would be able to consult the regulations and determine in advance whether a proposed use of a copyrighted work is fair. The risk of litigation would vastly diminish.

Fair use regulations also would provide certainty to a large number of users at once. An agency, therefore, offers an advantage over the nonjudicial entities other commentators have proposed to make fair use determinations. Michael Carroll has suggested that Congress amend the Copyright Act to create a "Fair Use Board" within the Copyright Office with power to declare a proposed use of a copyrighted work to be a fair use.<sup>149</sup> Similar to a private letter ruling from the IRS or a no action letter from the SEC, a favorable opinion from the Fair Use Board would immunize the petitioner from copyright liability for the proposed use. Under Carroll's approach, the copyright owner would receive notice and an opportunity to challenge the petition.<sup>150</sup> Because a favorable ruling by the Fair Use Board would only apply to the party bringing the petition, the

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courts should shift the burden of proof of market failure only on a case-by-case basis).

147. See MAJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 57 (2005), available at [http://www.brennancenter.org/page/-Id/download\\_file\\_9056.pdf](http://www.brennancenter.org/page/-Id/download_file_9056.pdf) (offering a proposal to "eliminate money damages against anybody who reasonably guesses wrong about a fair use or free expression defense," leaving only injunctive relief as a remedy); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1145-46 (2007) (suggesting that "statutory damages should be unavailable against those who use a copyrighted work in good faith but with a mistaken belief that such a use was a fair use").

148. Cotter, *supra* note 146, at 1304-08 (arguing in favor of the English rule of an automatic award of attorney fees to the prevailing party).

149. See Carroll, *supra* note 147.

150. *Id.* at 1090-91.

copyright owner would remain free to challenge the same or similar uses by other parties.<sup>151</sup> David Nimmer would have Congress authorize a fair use arbitration system.<sup>152</sup> Under Nimmer's approach, the Register of Copyrights would identify a list of qualified arbiters.<sup>153</sup> A user of copyrighted material who is unable to negotiate a license agreement with the copyright owner would be permitted to institute a Fair Use Arbitration.<sup>154</sup> The copyright owner would have an opportunity to respond.<sup>155</sup> Both parties would be permitted to object to a certain percentage of the available arbiters.<sup>156</sup> The case would be heard before one arbiter that neither party had objected to, or, if the case is identified by the parties as a complex matter, before three arbiters that neither party had objected to.<sup>157</sup> The arbiter or arbiters would issue a ruling on whether the use is fair, along with reasons for the decision.<sup>158</sup>

Although there is much to commend in allowing parties to obtain a determination prior to infringement litigation as to whether a use is fair,<sup>159</sup> both proposals fall short in that they provide certainty only to the individual user who goes through Carroll's Fair Use Board or Nimmer's arbitration, and the certainty is only with respect to the particular use that is reviewed. Other users will not know whether their uses are fair use unless they, too, go through the process. Certainty on a large scale is therefore impossible. Millions of uses of copyrighted works occur annually. Even if a small portion of these uses were the subject of a request for individual review, it quickly would overwhelm the capacities of the board or the arbiters.

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151. *Id.*

152. See David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006).

153. *Id.* at 12.

154. *Id.*

155. *Id.* at 13.

156. *Id.*

157. *Id.* at 14.

158. *Id.*

159. Neither Carroll's nor Nimmer's model entirely escapes the litigation model of fair use. Under Nimmer's approach, the Fair Use Board's rulings would be subject to administrative review in the Copyright Office and to de novo review by the federal courts of appeals. Carroll, *supra* note 147, at 1123. While the user would know in advance whether the proposed use is fair (rather than after making the use and being sued for it), judicial review is likely to slow down and make expensive fair use determinations. Under Nimmer's approach, the arbiter's ruling would not be binding on a court in an infringement action but would be relevant to the court's determination of damages and attorney's fees. Nimmer, *supra* note 152, at 14-15.

Regulations issued by an administrative agency, by contrast, work wholesale. They apply to all users, giving them virtual certainty as to whether their uses are fair, without the need for individualized adjudication.

An administrative agency is in a better position than is a court to generate fair use rules that are tailored to individual contexts but that still reflect a uniform body of law.<sup>160</sup> An agency can both tailor rules to particular sectors and harmonize rules across sectors. Among other things, an agency will be able to take account of practices and interests in specific industries, assess the economic impact on copyright owners of allowing particular uses as fair, and hear from creators about their needs and interests. An agency can track the success and failings of regulations in one sector in order to inform decisions about regulating in another. Similarly, an agency is in a better position than is a court to examine broadly the purposes of fair use. Courts necessarily operate with limited information and on the basis of a record developed by the parties. Commentators have offered thoughtful proposals for how to implement each of the four fair use factors,<sup>161</sup> including in ways that

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160. Executive Order 12866 imposes a number of requirements on rulemaking by executive agencies. It provides that agencies should promulgate “only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.” Exec. Order No. 12,866, 58 C.F.R. 190 (1993). Further, in deciding whether and how to regulate, agencies must “assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating,” and in selecting among regulatory approaches, agencies should seek to “maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.” *Id.*

161. See, e.g., Africa, *supra* note 146, at 1175-80 (proposing various modifications to how courts have implemented the fourth fair use factor concerning market effects); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1739-44 (1988) (arguing in favor of broadening the conception of harm to copyright owners to include: the loss in the owner’s general welfare as a result of the use if the use is permitted; sensitivity to harms that occur when a use undermines the owner’s price discrimination scheme, considering the creative character of the use and providing greater protection to more creative uses; and setting forth a systematic way of categorizing copyrighted works and uses and establishing fair use rules for each respective category); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 448-50 (2008) (proposing that, when asking whether a use is transformative in applying the first fair-use factor, the analysis focus on the degree of transformation from the perspective of the reader of the new work); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110-36 (1990) (providing an analysis of the relevant considerations in applying each of the

protect First Amendment interests,<sup>162</sup> recognize social and cultural practices,<sup>163</sup> and take account of other public interests.<sup>164</sup> An agency would be in a stronger position to take account of these kinds of concerns in developing regulations than can a court when it decides a specific case based on a limited record.

In addition, an agency would provide a setting for articulating the qualities of works that should be protected by fair use and identifying the kinds of works that present those qualities. Although few would admit it (and fewer judges still), determinations of whether a use is fair reflects some degree of judgment about the value of the work. Value can mean different things in the fair use context: from how closely the use of the work reflects the purposes of fair use to whether the use of the work is of sufficient importance to deserve protection. Those values are often left unarticulated. Agency rule-making provides an opportunity for value judgments to be made openly and brought under scrutiny.

At the same time, an agency would be in a better position than Congress to adapt to change. Some commentators have recommended that Congress amend the fair use provision of the Copyright Act to more specifically set out uses that are fair. In particular, these commentators urge that Congress should adopt statutory safe harbors that would specify an amount of copying that is *per se* fair use—leaving uses beyond that amount subject to enforcement in the courts.<sup>165</sup> Gideon Parchomovsky and Kevin Goldman, for example,

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fair use factors).

162. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004) (advocating “tinker[ing] with the elements in the standard fair use test, in particular the purpose of the use and the amount used,” in order to accommodate free speech concerns).

163. See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623, 1642-44 (2004) (advocating that the fair use factors be applied with a view to whether the use is fair “in the context of a recognized social or cultural pattern”); Lloyd L. Weinreb, *Fair Use*, 67 FORDHAM L. REV. 1291, 1296, 1301, 1306-10 (1999) (suggesting that societal acceptance of what is a fair use should inform fair use analysis); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138-40, 1150-53, 1160-61 (1990) (same).

164. See Lunney, *supra* note 146, at 999-1029 (advocating an approach that balances “the extent to which prohibiting a particular use will lead to more and better works of authorship” with “what the public stands to lose if the use is prohibited”).

165. See Cotter, *supra* note 146, at 1312-14 (advocating the incorporation into fair use law of a rule setting minimum amounts of permissible copying while retaining the current flexible standard for uses that involve copying above and beyond the minimum permitted amount);

argue that Congress should specify that for literary works that are at least one hundred words long, either a total of fifteen percent or three hundred words of a work, whichever is shorter, may be copied without permission.<sup>166</sup> With respect to sound recordings and musical compositions, either a total of ten percent or ten seconds, whichever is shorter, should be deemed fair use.<sup>167</sup> For audiovisual works, these authors argue that a total of either ten percent or thirty seconds, whichever is shorter, may be reproduced and that “anyone may include in an audiovisual work any architectural, choreographic, or pictorial work, so long as that work is not displayed for more than thirty seconds and provided those thirty seconds comprise no more than ten percent of the new work.”<sup>168</sup> Clarity in fair use is surely desirable. However, Congress is not the best entity for producing it. Congress’s slow and deliberate processes are not well-suited to generating fair use rules that keep pace with changing circumstances. An agency, which has the flexibility to adopt rules quickly, is in a better position to specify the details of uses that are fair, to revise and update its rules when necessary, and to issue new rules as industries or technologies evolve, new practices emerge, different uses become prevalent, or new concerns take hold.<sup>169</sup>

Agency regulation is also preferable to relying on contracts and the market to determine which uses of copyrighted works are permissible. The current vagueness of the fair use law allows copyright owners to use contracts in ways that undermine fair use. By providing precision, agency regulation will promote uses of copyrighted works that do not require advance approval by and payment to a copyright owner. Many contracts are highly restrictive. Agency regulation will allow uses beyond those a copyright owner would permit. Contracts also allow copyright owners to prevent criticism and stifle other forms of speech they do not favor. Agency regulation will better serve the First Amendment interests

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Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1511-18 (2007).

166. Parchomovsky & Goldman, *supra* note 165, at 1511-12.

167. *Id.* at 1512-14.

168. *Id.* at 1514-18.

169. The APA allows members of the public to petition an agency for rulemaking. See 5 U.S.C. § 553(e) (2006) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

that fair use protects. Further, reliance upon contracts means that permissible uses may vary. Different copyright owners have different rules about how their works may be used; contract law is state law and so the enforceability and interpretation of contractual provisions vary among states. Agency regulation will restore uniformity to fair use.

Each of the two agency models offered here confers particular additional benefits.<sup>170</sup> Model One provides for affirmative protections for fair uses of copyrighted works. Recognizing that agency-issued rules are only effective if people abide by them, Model One addresses two sources of noncompliance. First, copyright owners might continue to assert a more restrictive version of fair use than the law—now in the form of agency regulation—in fact provides and threaten copyright infringement actions against users who comply with the applicable fair use rules. Although it is likely that clarity in fair use will reduce the likelihood of this problem, there nonetheless remains a risk that copyright owners will interfere with fair use of copyrighted works. Under Model One, TOFU therefore is empowered to respond to efforts by copyright owners to interfere with fair uses of copyrighted works. In much the same way as the FTC brings enforcement actions in cases of unfair or deceptive trade practices, TOFU would be able to charge a copyright owner with interfering with fair uses of the copyrighted works, and, in appropriate cases, to assess civil penalties and issue cease and desist orders. Second, fair use regulations will lose their enforcement power if copyright owners continue to condition access to a copyright work on an agreement to forego fair uses of the work. Having clear fair use rules is meaningless if fair use has been waived. Under Model One, federal law, therefore, preempts state contract law that permits copyright owners and consumers of copyrighted works to contract out of fair use. Agreements in which a consumer gives up a fair use claim, or accepts a definition of fair use that is more restrictive than provided for by federal law, become unenforceable.

Model Two reflects the recognition that even when regulations clarify uses that are fair, some disputes over fair use will nonetheless occur. Therefore, in addition to issuing regulations, the agency is empowered to determine fair uses in the first instance in specific

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170. See *supra* Parts III.A-B.

cases. In any subsequent lawsuit, the court would defer to those determinations. While this procedure does not prevent copyright owners from bringing infringement lawsuits in federal court even when the use is fair according to the agency's judgment, the procedure likely will deter virtually all claims in which the defendant has made use of a work in accordance with the agency's fair use regulations. Under Model Two, a regulation on point combined with agency power to issue a decision in a specific case will shield most fair uses from litigation.

#### CONCLUSION

This Article has sketched an approach to fair use based in administrative law, and it has offered two specific proposals for how an agency could administer fair use. Although there are additional details that would need to be worked out, the goal here has been to move in a new direction within a long-standing conversation about reforming fair use law. I share the concern expressed by many other commentators that fair use law presently does not work well. So far, however, most efforts to reform fair use have assumed that it should remain the province of Congress and the courts. In my judgment, neither entity is likely to provide a law of fair use that meets the current—and future—needs of those who seek to make use of copyrighted works while protecting also the interests of copyright owners. Administration may prove to be fair use law's best partner.