THE LEGAL RIFT BETWEEN COPYRIGHT DOCTRINE AND "COPYNORMS" WITH RESPECT TO THE MUSIC INDUSTRY: A POLICY ANALYSIS

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November 2015

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I. Introduction

Copyright law is widely regarded as the driving force of the music industry. At its core, it houses the idea that ownership of a work is conferred onto the creator, and that exclusive ownership functions to protect an artist's creation from unauthorized copying and use by others. Considered from the vantage point of large trade associations, it also confers great monetary benefits onto the economy. According to a November 2013 Report by the International Intellectual Property Alliance (whose members include large trade association moguls such as the Recording Industry Association of America and Motion Picture Association of America), copyright industries contributed $1 trillion to the U.S. economy and added 5.4 million direct jobs that year.[1] The report sheds light on a broader normative viewpoint generally harbored by such trade associations regarding the importance of maintaining a strong copyright regime; it tellingly states that, "in order to preserve and enhance jobs, exports and economic contributions, it is critical that we have strong legal protections for U.S. creativity and innovation in the U.S. and abroad."[2]

In the last ten to fifteen years, however, concerning legal fissures have arisen out of the application of copyright law to the music industry. This is largely due to the abundance in creative expression that the rise and development of the Internet has precipitated—so high a degree of abundance that it has significantly altered social norms (i.e., "copynorms") regarding the ethical issue that underlies the act of duplicating copyrighted material.[3] This is because the unauthorized copying and sharing of digitized works of music in high volumes has become much easier to execute, and legislation and enforcement against copyright infringement increasingly fail to keep up. Internet piracy has, essentially, ushered in an era of massive reproduction of copyrighted works. And, in doing so, it has nearly nullified traditional macroeconomic market forces such as supply and demand, which, until recently, were kept within the creative industry's tight control through exclusive ownership. Faced with floods of piracy, reliable and predictable market forces yield considerably less influence over the production and dissemination of creative musical works. It is not surprising, then, that as technological advancement increasingly fosters conditions that allow for easy peer-to-peer (P2P) filesharing of copyrighted materials, the rate of piracy will continue to rapidly increase. Accordingly, the growing rift that exists between copyright doctrine and actual compliance deserves due consideration. Unfortunately, copyright legislation and enforcement are often ten steps behind in terms of adequately addressing prevailing copynorms that severely undermine copyright. In fact, the law seems to be developing in a different direction altogether. As a result, concerned copyright critics, academics, stakeholders, etc., have proposed various alternative

1. International Intellectual Property Alliance, "Copyright Contributes $1 Trillion to the U.S. Economy." 19 Nov. 2013. Web. 17 Sept. 2015.
2. *Id.*
3. Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, INTELLECTUAL PROPERTY AND INFORMATION WEALTH (Peter Yu ed., forthcoming), *available at* BERKELEY CTR. FOR LAW & TECH., 2006, Paper 26, at 1, http://repositories.cdlib.org/bclt.Its/26.

copyright frameworks and alternative licensing platforms in an effort to bridge the rift between current doctrine and societal compliance at large.

The body of this paper is divided into four substantive parts: First, the analysis will briefly overview the current copyright regime and the policy justifications that purportedly undergird it; in the next part, it will delve into why copyright doctrine is largely mismatched with social norms regarding compliance; after that, it will assess the Creative Commons model as a viable alternative framework to copyright; lastly, the paper will endeavor to provide possible solutions for what can be done about the gap that exists between copyright and copynorms. In sum, the overall aim of this paper is to make the case that stakeholders and artists in the music industry as well as legislative policymakers might benefit from shifting more towards ideas espoused by alterative frameworks to copyright and away from current copyright law. This is largely because, in certain ways, some alternative frameworks are relatively more aligned with contemporary copynorms and, as a result, are perhaps more effective in furthering the policy justifications that copyright law was originally founded on.

II. A Look into Copyright Doctrine in the Context of the Music Industry

Copyright law draws its persuasive thrust from Article I, § 8, cl. 8 of the United States Constitution, which states that Congress is empowered to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[4] The Copyright and Patent Clause expressly lays out the constitutional justification and policy that is presumably reflected throughout all copyright legislation: that is, to promote the "Progress of Science and useful Arts," while conferring to the creator ownership over his or her work for "limited Times"—a qualifying term meant to circumscribe the scope of natural rights a creator enjoys over his or her work.[5] Given the rift between doctrine and societal norms concerning compliance, however, one might wonder whether copyright law as applied in the music industry has strayed from what the constitutional framers' original constitutional intent was at its conception.

The following subsections (A and B) will take a look at how applied copyright doctrine has markedly deviated from the original justification contained in the Copyright and Patent Clause of the Constitution in two principal ways: First, copyright currently operates in ways that effectively run counter to the "Progress of Science and useful Arts"; second, legislation implementing copyright doctrine has, for a long time (especially since the 1970s), effectively bypassed the "limited Times" provision of the Clause, which functions to circumscribe the period during which a creator enjoys a monopoly over his or her copyrighted work.

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4. U.S. CONST. art. I, § 8, cl. 8.
5. Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15(2) VAND. J. ENT. & TECH. L. 294, 322 (2008) [hereinafter Suzor, *Rethinking Exclusivity in Copyright*].

A. Copyright as Applied Creates Barriers to Access, Countering its Original Constitutional Justification: "Progress of Science and useful Arts"

The U.S. Copyright Act of 1976 provides a copyright owner with six exclusive rights: 1) to reproduce the work; 2) to prepare derivative works, compilations, and collective works; 3) to distribute copies; 4) to perform the work in public; 5) to display the work in public; and 6) to digitally transmit sound recordings.[6] The standard policy justification for copyright is that it strikes a utilitarian balance between providing incentives to the creative industries to invest in cultural production on the one hand, and encouraging access to and use of those works by the public on the other.[7] Put differently, in an effort to maintain incentives for creators and makers to continue their work, copyright law assumes that the creator will enjoy a monopoly over his or her creation because he or she has incurred creation costs in addition to production costs in the process. Both utilitarian and rights-based theories of copyright accept and build on the premise that a creator naturally feels entitled to benefit from the intangible works he or she has created, simply by virtue of the fact of creation. Essentially, mainstream copyright theory operates based on a dichotomy that exists between: rights granted to authors and producers as well as incentives to create works of cultural production and the public's interest in access to those works. By continually framing itself as an incentives-access paradigm, copyright law and attendant discourse have essentially created a zero-sum tug-of-war of sorts between creators and the public, precipitating a scenario in which copyright exclusivity (that is, exclusive ownership rights granted to the creator of a work) is starkly at odds with access. Legal copyright theorists have noted that that the dichotomous opposition of these two theories…

> "masks a deeply ingrained assumption in copyright law that . . . exclusivity is necessary to provide incentives and reward to authors that 'Progress' requires. [That] Exclusivity creates a market that satisfies both theoretical approaches by (1) incentivizing authors and producers to invest in the most valuable cultural production and (2) rewarding authors in proportion to the worth of their work . . . [Simply put,] An exclusive market . . . equates incentives with fair rewards."[8]

The assumption that a functioning market that is driven by exclusivity best ensures "Progress" is also one that many believe to be firmly embedded in the constitutional justification for copyright.[9] That soundness of such an assumption, however, should be critically questioned. That is because the incentives-access paradigm, although so deeply entrenched in copyright law and discourse, in actuality, introduces a significant degree of uncertainty by pitting the interests of the creator and of the public against each other,

6. 17 U.S.C. § 106 (2006).
7. Suzor, *Rethinking Exclusivity in Copyright*, at 298.
8. *Id.* at 299.
9. Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 98 (1993) ("[B]ecause of the instrumental tone of the Copyright and Patent Clause ['to *promote* the Progress . . . by *securing*'], no one truly disputes that such 'Progress' is to be encouraged through the frankly instrumental use of laws").

which makes it far from clear where exactly the optimal point of balance between incentives and access should lie.

The incentives required to encourage creative industries to continue investing in cultural production are perceived to be fairly high, partly because the music industry rewards an extremely small proportion of artists highly and often fails to provide the minimal level of financial support that most professional creators need in order to pursue the field. In effect, copyright as applied in the music industry supports an "asymmetry in market power between professional artists and publisher intermediaries and generally fails to adequately reward all but superstar artists . . .[I]t provides extremely high rewards to an extremely small proportion of creators who are able to win a lottery for attention."[10] However, high creation incentives tends to ramp up efforts in controlling and reaffirming exclusivity, which increasingly bars public access to cultural works of production. Therefore, it is difficult to imagine a copyright regime in which an asymmetry in market power could, in good faith, function to promote genuine "Progress of Science and useful Arts." This problem is also exacerbated by the realities of the music industry, as the likelihood of commercial success in the market is simply unpredictable and unlikely. In fact, one's likelihood of success in the music industry is likened by many to that of winning the lottery. Thus, in this sense, copyright law with respect to the music industry, which is hooked on exclusivity, has equated artist incentives with high rewards and autonomy with control, and operates on the assumption that "the price an author can command is both the amount required to incentive her to create the amount she deserves."[11] The fact that, the incentives—or rather, rewards—necessary to ensure the continued creation of works in the music industry are widely perceived to be high, coupled with the tendency of copyright law to source its legitimacy from a so-called balance between incentives and access that is grounded in exclusivity, demonstrates how copyright law as applied to the music industry systematically prefers incentives to access. Preference towards incentives at the expense of access is not, practically speaking, entirely surprising since a creator's interests (i.e., his or her incentives and/or rewards to create) are relatively more pronounced, known and established than the more inchoate interests of the public (i.e., access to and use of creative works). The result of all of this, of course, is that the access piece of the copyright balance remains impoverished. As a result, barriers imposed on access due to exclusivity adversely affect the ability of future creators to generate works of cultural production, since creative expression often draws on past works. Increases in reward-type incentives through unfettered exclusivity for copyright owners will impose more barriers on future creators, as access will continue to climb in cost. Thus, if "Progress of Science and useful Arts" is copyright's stated life purpose and core goal, that fact alone should persuade

10. Suzor, *Rethinking Exclusivity in Copyright*, at 324.
11. *Id.* at 308.

one to critically reexamine contemporary lawmakers' and the content industry's wide assumption that copyright is best served by an exclusive market of expression.

Exclusivity in copyright with respect to the music industry has made a commodity market out of creative expression, one in which the market presumably functions as an objective method of valuing creative works. Not surprisingly, the practice of balancing incentives and access for content industries has been reduced to ensuring that there are *just enough* incentives to maintain variety in cultural work creation and competition, which maintains relatively low price levels. While this perspective of access likely offers the most optimal outcome for music publishers and recording industries in general, it is not clear whether it represents the best copyright balance imaginable for the public. Many music publishers' view of access envisions an ideal market to be like a "celestial jukebox"—a hybrid of simple markets and volume licensing, priced proportionality to demand and varying degrees of access. It is imagined that, in a "celestial jukebox," the "entire store of recorded human creativity will be digitized and everyone will, for a reasonable fee, be able to access the most obscure, esoteric works in any format and on any device."[12] While online streaming services like the *iTunes Music Store*, *Steam*, *Netflix*, and *Spotify* have begun to lean towards this vein of normative support for exclusivity through utilizing business models that provide users with a better deal than traditional models, these models still seem to fall short from furthering the type of "Progress" of the sciences and the useful arts that is contemplated in the Constitution. From a law-and-economics perspective, when the content industry treats copyright as a commodity market, it fortifies a mode of controlling access that is fundamentally predicated on artificial scarcity—scarcity that intentionally limits access in order to generate more profits.[13] As such, music publishers are encouraged by market forces to control and monetize each distinct act of access. Public access to musical works, then, is generally considered to be synonymous with monetary consumption, which leaves the creation and dissemination of cultural works within the iron-tight grip of intermediary publishers.

Because copyright law provides owners with a set of exclusive rights to their creative works, another problem that arises, as a result, is the difficulty of obtaining a license to legally use materials. Non-owners are required to seek a license for every use of a work that is covered by these rights (with the exception of fair use).[14] The barriers imposed on access by copyright have emerged in two important ways: first, the owner has the right to apply for an injunction in the case of an unauthorized use; second, securing a license incurs high information costs.[15] With regard to the latter, high information costs in securing a license exist because of the type of subject matters that are housed within the realm of

12. Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 199-200 (1994).
13. Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?* 18(1) HARV. L. REV. 85, 126-132 (2004).
14. Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in The Future of Public Domain 325, 327 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) [hereinafter Elkin-Koren, *Exploring Creative Commons*].
15. Elkin-Koren, *Exploring Creative Commons*, at 327.

copyright, as they are generally non-tangible assets. Therefore, although property rights are relatively straightforward with respect to actual physical property, those rights, when applied to creative works, are not nearly as intuitive. Ergo, in an age where music and the fine arts have collectively tended towards embracing collage-style works as a form of artistic expression, high information costs associated with procuring licensing permissions can be quite burdensome—especially for a composer who, for example, wants to incorporate or sample a small part of another musical composition into his or her original piece. In other words, the costs for a musician to accurately assess the scope of a copyright in another creator's work are prohibitively high, since often:

> "The average user . . . hardly know[s] what aspects of the work are protected (expressions but not ideas) and what uses are prohibited without a license . . . Consequently, people . . . often find it too burdensome to define the exact scope of protection and . . . simply assume that the entire work is protected . . . The need to secure permission prior to any use makes it very expensive, and often impossible, to use other people's works for further creation and distribution."[16]

Compliance is often too burdensome for the average musician who might be looking to, say, remix or sample a work, especially since costs associated with licensing copyrighted material have increased substantially in recent years.[17] In fact, in many instances, just finding the contact information and even the name of the owner can prove to be quite the onerous task, since, in its current form, copyright law allows business entities to assign copyrights to multiple other business; it also allows devisees or heirs of deceased human owners to inherit the copyright, effectively allowing it to be enforced for another 70 years.[18] Sampling and remixing styles of creative musical expression have effectively been rendered nearly impossible because of attendant licensing requirements and fees. It seems, then, that current copyright law tends to chill the creation, innovation and "Progress of Science and useful Arts." Siva Vaidhyanathan, a noted copyright scholar and prolific writer on the subject, opines: "The death of tricky, playful, transgressive sampling occurred because courts and the industry misapplied stale, blunt, ethnocentric, and simplistic standard to fresh new methods of expression."[19] Individual licensing can likewise prove to be expensive for rights holders, since they might require costly legal counseling to determine the scope of copyright protection over a work. It is not surprising, then, that rights-holders are more likely to incur the cost of licensing only when they expect to benefit in some material way (e.g., when their work is licensed for commercial use). As such, information and licensing costs not only prevent compliance, but also inhibit the use of works that otherwise might have been available, thereby impeding both access and future creation.

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16. *Id.* at 328.
17. *Id*.
18. 17 U.S.C. § 302(a) (2006).
19. Joanna Dembers. *Steal This Music: How Intellectual Property Law Affects Creativity*, (2006) Athens: U of Georgia, 119 [hereinafter Dembers, *Steal This Music]*.

Although copyright law grants the copyright owner with six exclusive rights that read much like property rights, the copyright statute is completely silent on how the owner might give public notice of a divestiture of *some* of these exclusive rights. Granted, a copyright owner can decide to transfer some of these rights to another entity through a gift or sale (i.e., selling the rights to copy and distribute, or transferring the right to prepare derivative works to another), but there is no avenue for those wishing to throw open *some* of their rights to the general public. Public access to cultural works is hampered in this instance, since creators, assumed to be acting rationally, are rightfully reluctant to forfeit *all* of their rights to the public domain. Accordingly, they are more likely to retain control over *all* of their granted exclusive rights. On top of that, copyright law assumes that all creators share homogenous motivations with regard to the creation, access and sharing of their musical works. This assumption, however, is out of touch with reality. There is tremendous diversity with respect to how stringently owners choose to enforce their rights and observe copyright law—an example of that being the varying degree of one's willingness to investigate and litigate against infringement, which often turns out to be too costly of an endeavor for some, given the resulting harm or low likelihood and prospective amount of recovery.[20] For example, rapper Chuck D. is famous for his acceptance of unauthorized filesharing, while Metallica's heavy metal drummer Lars Ulrich famously opposes it.[21] It follows, then, that there are at least *some* artists who would like to share *some* of their exclusive rights to the public; however, copyright law in its current form does not make it easy to do so.

In sum, the identified practical issues that plague current copyright law should give stakeholders, artists and legislators pause about basic assumptions that are unequivocally accepted as part of copyright doctrine: that is, whether exclusivity and incentives (especially at the expense of access) are truly effective at promoting the "Progress of Science and useful Arts." Copyright law as applied in the music industry has erected formidable barriers to the access of creative musical works, and exclusivity has lead it astray from an optimal balance between incentives and access—arguably so such an extent that it deconstructs the very constitutional policy goal that originally legitimized it.

B. Copyright Legislation Undermines the Constitution's Qualifying Term: "limited Times"

The Copyright and Patent Clause in the U.S. Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

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20. *See* R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COL. L. REV. 995 (2003). Wagner doubts that rights owners can ever fully control use of their creations because of transaction costs and other pragmatic considerations.

21. Dembers, *Steal This Music,* 2-4 (Metallica had filed a lawsuit against Unfaith, a Canadian band for using "E chords followed by F chords without permission, a harmonic progression that Metallica claimed to have trademarked. MTV posted a link to Metallica's Web site, in which bandleader Lars Ulrich defended the suit as justifiable protection of the band's distinctive sound." Although the lawsuit was later determined to be a hoax, it was believable because it seemed to confirm the litigious nature of the entertainment industry embodied by Metallica's attitude towards copyright.)

exclusive Right to their respective Writings and Discoveries."[22] This section examines the judicial and legislative interpretation of the term, "limited Times," which refers to the notion that an owner enjoys exclusive rights over his or her work for a limited period of time before the work enters the public domain, where anyone is free to use it. Despite what is expressly stated in the Clause, however, Congress over the years has enacted copyright legislation authorizing copyright term extensions with increasing frequency.

In 1790, Congress enacted the first copyright law, which created a federal copyright and secured that copyright for fourteen years.[23] Under that law, an author could opt to renew his copyright for another fourteen years if he was alive at the end of the term. Otherwise, his work would pass into the public domain. Of all the works created before 1790 and those created during 1790-1800, 95 percent immediately passed into the public domain.[24] That system of renewal assured that the maximum terms of copyright would be granted only for works where they were sought. The term of copyright was only changed once in the first 100 years of American nationhood.[25] In 1831, the maximum limit to the term was raised from 28 years to 42 by increasing the initial term of copyright from 14 years to 28.[26] During the next 50 years, the term was increased once again. Congress extended the renewal term of 14 years to 28 years, setting the maximum term at 56 years.[27] In stark contrast to today's Legislature, lawmakers during the Progressive Era denied composers and music publishers the right to control the ways in which their compositions would be used, reasoning that music-lovers should more or less be free to do what they want with a song or recording once they have purchased it. Throughout the 1930s and 1940s, courts continued to vacillate on the issue of how much record companies could and should control the use or reproduction of their works. And, until the 1960s, courts generally leaned towards upholding the idea of free competition as opposed to expanding creators' monopolies over their musical works.[28] By contrast, copyright legislation that has been passed since the 1970s has dramatically shifted towards advancing the interests of copyright holders by statutorily extending copyright term lengths with much more frequency—a far cry from what the norm was at the conception of copyright law.[29]

Regrettably, the idea embraced by lawmakers seems to be that that if copyright law worked in the 19th and early 20th centuries, then more of the same type of Post-1970s law will work even better in subsequent centuries. From the 1970s onward, American politicians seemed to be far more solicitous of

22. *See supra* note 4.
23. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004), 132 [hereinafter Lessig, *Free Culture]*.
24. Lessig, *Free Culture*, at 137.
25. *Id.*
26. *Id.*
27. *Id.*
28. Alex S. Cummings, *Democracy of Sound* (2013), 81.
29. Lessig, *Free Culture*, at 136.

rights owners. This policy shift is primarily reflected in legislation enacted during that time—ranging from harsher penalties for infringement to longer copyright terms. In the last forty years, Congress has extended the terms of existing copyrights eleven times, and twice for the term of *future* copyrights.[30] At first, the extensions of existing copyrights were relatively short—mostly one to two years. However, in 1976, Congress extended *all* existing copyrights by nineteen years. Most significantly, in 1998, Congress extended the term of all copyrights by twenty years by passing the Sonny Bono Copyright Term Extension Act.[31] Essentially, the duration of copyright protection was extended to life plus 70 years for non-corporate works. For works owned by corporations, copyright duration was now set at 95 years from publication or 120 years from creation, whichever ended up being shorter.[32] The number of copyright extensions passed in the 1970s onwards juxtaposed with the number passed in the early 20th, 19th, and late 18th centuries paints a macro picture of the seismic shift in copyright legislation and unearths copyright law's progressive and steady deviation from its original, constitutionally ordained policy functions. What is especially telling is Representative Mary Bono's recollection that her late husband believed that "copyrights should be forever," [33] although such a law would violate the constitutional requirement providing copyright protection for "limited Times." Moreover, the then-president of the MPAA, Jack Valenti proposed a term of "one day less than forever."[34] These measures essentially reflect a mindset harbored by many present-day legislators that tougher copyright rules are always better and therefore better suited to protect vital content industries.

The Sonny Bono Copyright Term Extension Act (CTEA)—also derisively known as the Mickey Mouse Protection Act—was passed largely due to aggressive lobbying efforts by the creative industries.[35] Ten out of the thirteen original sponsors of the Act in the House received the maximum amount allowed in contributions from The Walt Disney Company's political action committee; and in the Senate, eight out of the twelve sponsors received contributions.[36] On top of that, the RIAA and the MPAA spent around $1.5 million in lobbying efforts in the 1998 election cycle and paid out more than $200,000 in campaign contributions.[37] As Lawrence Lessig, founder of Creative Commons and highly esteemed copyright scholar, critically points out in his seminal book (albeit a manifesto to many) on copyright reform, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*:

> "[E]ach time copyrights are about to expire, there is a massive amount of lobbying to get the copyright term extended. Thus a congressional perpetual

30. *Id.* at 137.
31. *Id.* at 134.
32. 17 U.S.C. § 302 (2006).
33. *Id.* at 215.
34. Cummings, *Democracy of Sound*, at 203.
35. *Id.*
36. Lessig, *Free Culture*, at 218.
37. *Id.*

> motion machine: So long as legislation can be bought (albeit indirectly), there will be all the incentive in the world to buy further extensions of copyright."[38]

The Constitution, however, explicitly contemplates limits on copyright protection, as a means towards ensuring that rights-holders do not disproportionately influence the development and distribution of cultural production. This is evidenced by the constitutional framers' inclusion of the phrase, "limited Times," in the Copyright and Patent Clause of the Constitution. In other words, the way in which copyright doctrine has been implemented through legislation is contrary to the intent that was interred, in a sense, into the Clause. Lessig, popularly cited as a staunch critic of the CTEA, further noted:

> "The effect of these extensions is simply to toll, or delay, the passing of works into the public domain. This latest extension means that the public domain will have been tolled for thirty-nine out of fifty-five years, or 70 percent of the time since 1962. Thus, in the twenty years after the Sonny Bono Act, while one million patents will pass into the public domain, zero copyrights will pass into the public domain by virtue of the expiration of a copyright term. The effect of these extensions has been exacerbated by another, little-noticed change in the copyright law."[39]

In the last few decades, people have increasingly criticized such legislation as operating as a loophole-type workaround, fundamentally at odds with the Constitution. So, in 2003, the constitutionality of the Copyright Term Extension Act was duly challenged in *Eldred v. Ashcroft*.[40] Lessig, who was also coincidentally Eldred's legal counsel, argued that virtually no works would pass into the public domain until 2019, since Congress had extended copyright terms to both existing and future works through the CTEA.[41] Lessig asserted that since Congress has extended copyright terms repeatedly over the last few decades, it has impermissibly violated the constitutional requirement that copyright terms be instated only for "limited Times"—a clear constitutional boundary beyond which the power of Congress to extend copyright terms should not venture. Put differently, if Congress has the power to extend the term of a copyright that is about to expire, then Congress does what the Constitution expressly forbids—"perpetual terms 'on the installment plan.'"[42] What is particularly remarkable about the CTEA is that most of the works it covers are commercially worthless—that is, almost all of the sound recordings, novels, films, etc., from the 1920s are commercially inactive.[43] So, by applying retroactive copyright extensions to commercially worthless works, the Act prevents them from being digitized and preserved for the future. In face of those arguments, the Supreme Court still affirmed the constitutional validity of the CTEA.

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38. *Id.* at 217.
39. *Id.* at 134.
40. *Id.* at 215.
41. Lawrence B. Solum, *The Future of Copyright: Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 83 TEX. L. REV. 1137, 1148 (2005) (reviewing Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004)).
42. Solum, *The Future of Copyright*, at 1166.
43. *Id.* at 1166, 1167.

Justice Ginsberg, delivering the majority opinion, relied on congressional deference and established historical practice for support—the reasoning being that Congress has passed copyright extensions in the past, so it should be able to do so again. She wrote:

> "'[S]ince 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today.' The CTEA follows this historical practice by keeping the duration provisions of the 1976 Act largely in place and simply adding 20 years to each of them. Guided by text, history, and precedent, we cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress' authority under the Copyright Clause . . . Nothing before this Court warrants construction of the CTEA's 20–year term extension as a congressional attempt to evade or override the 'limited Times' constraint."[44]

The Court's seemingly kneejerk reliance on historical practice and precedent lacked critical reasoning. Justice Breyer in his dissent surmised that, although Congress probably did not intend to act unconstitutionally, it may have sought to push the Constitution's limits. Unlike Ginsberg, he analyzed the circumstances of the case under a lens of legal realism, and made it a point to recognize that the statute was named after a member of Congress, after all, and that "the economic effect of this . . . extension . . . [was] to make the copyright term not limited, but virtually perpetual.[45] It seems, then, that the majority's holding in *Eldred* affirms the notion that Congress is indeed fixed in a cycle of extensions. Although one could (somewhat) rationally argue that the arguments put forth in this section of this paper are grounded in Originalism to an impractical degree, he or she would still be hard-pressed to conclude that current trends in copyright legislating and policymaking should not be viewed with at least some suspicion, and that these trends have not at all procedurally circumvented the constitutional requirement of protection lasting for "limited Terms." Put differently, it seems more likely than not that the way copyright has been and continues to be legislated in Congress countermands original copyright doctrine, which, unlike now, was unadulterated by relentless term extensions at its constitutional conception.

III. "Copynorms" and Emerging Piracy Issues in the Music Industry: Why Policy Goals continue to be Unfulfilled

As evidenced in the sections above, long-standing assumptions about copyright doctrine should, at the very least, come into serious question, especially since problems arise when those assumptions are applied to the industry via legislation and litigation. Moreover, the legal rift that exists between said doctrine and normalized social standards regarding the unauthorized copying and sharing of copyrighted works shines even brighter light on the idea that applied copyright doctrine counters prescribed

44. *Eldred v. Ashcroft,* 537 U.S. 186, 204 (2003).
45. *Eldred*, 537 U.S. 186 at 243 (Breyer, J., dissenting)

constitutional justifications and limitations. This section will take a look at how and *why* social norms are at odds with copyright enforcement—especially so, given the rapid technological advancement and increasing file-sharing capabilities witnessed in the Information Age.

The term "copynorms" refers to the prevailing current social standard with respect to the ethical issue that underlies the act of duplicating copyrighted material.[46] Copynorms—whether those of librarians or file sharers—moderate, extend, and undermine the effect of copyright law.[47] They matter because social norms matter. Thus, in the context of copyright enforcement, copynorms is conceptually key, since it has the potential to serve as a metric in gauging the level of success of enforcement efforts against copyright infringement. Today, unauthorized copying simply lacks the social stigma that policymakers and business stakeholders wish for, since millions continue to copy music, share files, and buy bootleg CDs despite attempts at enforcement. Ergo, when analyzed against the backdrop of existing copynorms, copyright doctrine applied via enforcement unsurprisingly falls short in many key respects.

Certainly the idea of a legal gap between copyright and copynorms is not a new phenomenon. In the 1930s, for instance, fan communities took it upon themselves to copy and curate works of jazz, which lead to "battles in the courts and Congress over who should control music in subsequent decades."[48] Legislation from the 1970s onward (discussed in the above sections) began to inflict harsher penalties and repeatedly extend copyright terms. Before the 1970s, only a few pirates sporadically spoke out against copyright reform; by contrast, during and after the 1970s, alarmed legal scholars and activists emerged in droves to note their concern about overprotective tendencies mushrooming in copyright law.[49] Infringement began to emerge as a serious *monetary* concern for industry stakeholders during that time, as sound-recording technologies became increasingly sophisticated and cheaper, ushering a bout of copynorms that were increasingly at odds with the law.[50] Contemporary lawmaking with respect to copyright enforcement has largely been reactionary to the increasing rift between copynorms and law. Copyright legislation during the 1960s and 1970s, for example, reflected a Congressional response to the decades-old counterculture practice of bootlegging and tape-trading.[51] And, in the 1970s, the topic of "intellectual property" transformed into a major subject of organized political pressure. In fact, both the Reagan and Clinton administrations embraced copyright as a key topic in trade negotiations.[52]

The obvious difference between the 1970s-90s and the pre-1970s eras is that legislation passed in the latter time period could more or less contain the harms resulting from instances of infringement to an

46. Schultz, *Copynorms: Copyright Law and Social Norms*, at 7.
47. *Id.* at 5-7.
48. Cummings, *Democracy of Sound*, at 204.
49. *Id*. at 203.
50. *Id.* at 202.
51. *Id.* at 154.
52. *Id.* at 203.

extent that was satisfactory (though, far from ideal it must be emphasized) to rights holders. This was because cases of infringement were generally non-commercial in nature and relatively low in number. Now, the "it'll do for now"-breed of appeasement among rights holders has largely dissipated. More significantly, the difference in copynorms between now and roughly anytime before the 1990s arguably exists because of the introduction of the World Wide Web in 1989, which transformed the Internet into an easily accessible network.[53] In his book, *Democracy of Sound*, author and law-and-technology historian, Dr. Alex Cummings eloquently frames the rise of piracy as a reflection of evolving copynorms:

> "The flamboyance of the bootleggers . . . came at a price. States and then the federal government granted unprecedented protection to recordings, as composers, musicians, and labels united against the common foe of rampant piracy . . . [P]irates in the United States adapted to a newly hostile legal climate [in the 1970s and 1980s], developing new networks of production and exchange. New genres such as jam music and hip-hop challenged ideas of ownership, and piracy reached epic proportions in the developing world . . . The advent of widespread Internet access paved the way for the compressed audio file (most prominently, the MP3) in 1993 and a new era of unconstrained panic and lawlessness with the rapid rise of the file-sharing network Napster."[54]

The emergence of the MP3 file format was a turning point in copyright infringement history. It led to an era where unauthorized copying and sharing of music files in high volumes—whether that be in the form of MP3s attached to emails, torrents on file-sharing networks, or uploads to user-generated content websites like YouTube or Reddit—became a widely accepted norm. The MP3 was and is an emblem of a jarring clash between technology and property rights, making it clear that treating copyrights over intangibles as property rights leads to problems that seriously challenges the legal turgidity of a copyright's enforceability. During the 1990s, filesharing networks such as Napster of LimeWire made copyrighted music available free of charge for users to download.[55] During that crucial period of time, when the recording industry could have adjusted its business strategy, it instead stuck to selling physical CDs and did so until iTunes finally provided a legal means for users to purchase music files in the new format. But the industry's catch-up in business strategy occurred much later than the introduction of services like Napster and LimeWire, and by then considerable infringement had already taken place. (In fact, if it were not for services like Napster, the music industry would probably still be dealing exclusively in physical copies of music, since there would arguably be no incentive to change.) The numbers are staggering: Within nine months of its launch, Napster had amassed over 10 million users; and after eighteen months, it boasted an estimated 80 million registered users. KaZaA, too, had a high user base

53. *Id.* at 202.
54. *Id.* at 7.
55. *Id.* at 202.

with over 100 million members.[56] In sum, during the industry lag, piracy filled the shortfall between widespread uses of available technology and established channels for the legal purchasing of media. Thus, a huge number of Americans "have tasted file-sharing technology."[57] In 2003, for example, it was estimated that 43 million American citizens used file-sharing networks to exchange content.[58] What principally distinguishes the post-World Wide Web generation of consumers from those from before the 1990s, then, is that the copynorms shared by the former have rapidly evolved far beyond the capabilities of copyright law, which has remained static for the most part, especially with respect to its moral and normative stance against infringement. In fact, copyright law especially since the 1970s has conceptually progressed in the opposite direction through the passage of such restrictive legislation as the CTEA that has established more and more barriers to access, thereby inadvertently adding distance between copyright law and compliance—two very contentious and opposing forces.

As discussed in Part II, copyright law has seeks to strike a balance between incentives and access through a doctrinal assumption of exclusivity. But that has made a commodity market out of creative expression. So far, the incentives-access balance has been struck (thus commercial rewards reaped) by creative industries purportedly because they assume that scarcity is "fundamentally necessary in order to stimulate future production and progress."[59] As a result, mainstream copyright has struggled to maintain normative support from users for a commodity market that is rooted in artificial scarcity, which is increasingly irrelevant in face of the abundance the Internet has been able to deliver. Thus, much to the chagrin of rights holders who are afforded exclusivity over their works, the abundance in expression the Internet has introduced to the consumer market has radically undermined rights holders' control over the levers that govern the access element of the formulation. Filesharing software enabling unauthorized P2P filesharing networks, websites featuring user-generated uploads of copyrighted material, social media from the mid-2000s onward, and more generally, the Internet, have presented a novel problem to the recording industry and copyright owners in general. Essentially, a user wishing to access a particular musical work now has a choice: He or she can either legally purchase it or download it for free off the Internet. Uninhibited access, in this sense, has struck a major blow to the incentives and rewards side of the doctrinal scale. While not all users will choose to infringe—be it for moral reasons, a desire to follow the law, or some other factor—a significant number will undoubtedly (and rationally) assess the costs and benefits between the two choices and subsequently choose to "freeload." This is because copyright infringement is easy to commit for users, while difficult to detect by rights holders.

56. Lessig, *Free Culture*, at 67.
57. *Id.*
58. *Id.*
59. Suzor, *Rethinking Exclusivity in Copyright*, at 314.

The MPAA has estimated that it loses around $3 billion annually to worldwide piracy, and the recording industry as a whole loses about $4.6 billion every year to physical piracy.[60] Thus, major trade associations, including the RIAA and MPAA, which are comprised of major players in the recording industry, have gone on the offensive. In 2003, for example, the RIAA sued 261 individuals. One of them included a 12-year-old girl who was living in public housing, who ended up spending her life savings to settle the case. As Lessig puts it, "[a]s these scapegoats discovered, it will always cost more to defend against these suits than it would cost to simply settle."[61] While the content industry is not necessarily wrong in pursuing enforcement of its rights, its strategy—once unspooled and critically examined—is rife with issues. Namely, its biggest challenge lies in overcoming an undeniable fact: Music is more abundant than ever before, and the demand for it remains huge. The lawsuit against LimeWire in 2010 is quite illustrative the content industry's rather affirmative and offensive strategy. Thirteen labels filed a lawsuit against the file-sharing website and sought $75 trillion in damages—a calculation based on collective damages for every case of infringement. To them, each time someone downloaded or uploaded a file onto LimeWire constituted an offense.[62] It should be noted that the figure is much greater than the number of legal record sales during the same period.[63] Perhaps, then, this particular case reads more like a story—one of an outmoded industry bitterly putting up a fight against the threat of New Media, a new player that has harnessed the power to make available a wider variety of music at a higher order of magnitude than ever before.

On top of selective filing lawsuits against individual infringers (or scapegoats, as Lessig contends), the content industry has also vectored its efforts and energies towards curtailing the creation of technologies that enable third-party dissemination of copyrighted materials (e.g., through proposing legislation such as the "Induce Act," targeted at shutting down P2P file sharing services allowing third-party copyright infringement).[64] This was the case in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, LTD.*, in which plaintiffs Metro-Goldwyn-Mayer Studios (better known as MGM Studios) and 28 of the largest entertainment companies wanted to make file-sharing technology makers liable for their users' copyright infringement.[65] Justice Souter, reflecting a judicial intention to reexamine the seminal holding reached in *Sony Corp. v. Universal Studios*, noted:

> "When a widely shared service or product issued to commit infringement, it may be impossible to enforce these rights in protected work effectively against all direct infringers, the only practical alternative being to go against the distributor

60. Lessig, *Free Culture*, at 63.
61. *Id.* at 200.
62 James Plafke, "LimeWire is Being Sued for up to $75 Trillion Dollars, Judge 'Thinks It's 'Absurd,'" *Geekosystem*, March 23, 2011. Accessed Nov. 1, 2015.
63. Cummings, *Democracy of Sound*, at 200.
64. Suzor, Rethinking Exclusivity in Copyright, at 307.
65. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

> of the copying device for secondary liability on a theory of contributory or vicarious infringement."[66]

Before *Grokster*, in 2001, A&M Records sued Napster, one of the most well known P2P filesharing networks. This was the first major case in which copyright infringement principles were applied to P2P file sharing. Here, the 9th circuit affirmed the lower court's ruling, holding that Napster could be held liable for contributory infringement and vicarious infringement of copyrighted materials.[67] Remarkably, when Napster informed the district court that it had developed a technology to block the transfer of 99.4 percent of identified infringing material, the district court said that was not good enough. Napster had to push the infringements "down to zero."[68]

Likewise, in *Grokster*, the Supreme Court unanimously held that Grokster and Streamcast, both companies that distributed software enabling P2P sharing and infringement, could be sued for copyright infringement for acts taken in the course of marketing file-sharing software.[69] *Grokster* is often referred by copyright scholars as the case that reexamined the long-standing holding in *Sony Corp. v. Universal Studios*.[70] In *Sony*, the Supreme Court held that VCR manufacturers were shielded from liability for contributory infringement, reasoning that distribution of a technology "capable of commercially significant noninfringing uses" could not give rise to such liability unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge.[71] The question to be answered in *Grokster* was under what circumstances a distributor of a product capable of both lawful and unlawful use is liable for acts of copyright by third parties using the product.[72] Justice Souter, in delivering the majority opinion, acknowledged the harms that stemmed from the copynorms existing at that time:

> "MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the . . . networks each month, the probable scope of copyright infringement is staggering."[73]

In addition to ample evidence of expressly marketing the illegal uses of their software services, Grokster and Streamcast were found to have employed business models whose principal object was use of their software to download copyrighted materials. Justice Souter distinguished the holding in this case from that of *Sony*, reasoning that:

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66. *Grokster, Ltd.*, 545 U.S. at 929.
67. *A&M Records, Inc. v. Napster, Inc.* 239 F .3d 1004 (2001).
68. Lessig, *Free Culture*, at 73.
69. *Grokster*, 545 U.S. at 913.
70. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
71. *Sony*, 464 U.S. at 442.
72. *Grokster, Ltd.*, 545 U.S. at 918.
73. *Id.* at 918.

> "Sony dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course. The case struck a balance between the interest of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others . . . Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement."[74]

Thus, in doing so, he distinguished the harms flowing from the copynorms (mass P2P filesharing) present here from the harms flowing from copynorms that existed when *Sony* took place (e.g., VCR recording). Although MGM studios and other entertainment companies prevailed, the holding was still a narrow one. Grokster and Streamcast, like Sony, were sued for providing services that enabled both noninfringing and infringing sharing, but it was primarily their affirmative marketing strategies aimed at fostering illegal infringement that led them to being liable for third-party infringement—thus leaving the principles of *Sony* intact. It should be noted that the holding in *Napster* seemed to be at odds with the balance of competing interests identified and furthered in *Sony*. Requiring Napster to develop technologies that blocked the transfer of 100 percent, despite the fact that its technologies already enjoyed a success rate of 99.4 percent, could be considered draconian to some extent—a war waged against file-sharing technologies, rather than one against copyright infringement.

It is hard to say whether litigation like the sort seen in the cases above has been able to expunge widespread infringement of copyright that continues takes place on filesharing networks. Sites like YouTube find protection under the DMCA's Safe Harbor Clause (the Online Copyright Infringement Liability Limitation Act), which exempts Internet intermediaries from copyright infringement liability as long as they follow certain rules.[75] Moreover, while the DMCA's anti-circumvention provision creates civil and criminal remedies against those who skirt around technological measures used by copyright holders to control access to their works, sites like The Pirate Bay, which rely on user-uploads of copyrighted material, continue to operate within U.S. borders with ease. On top of that, although IP enforcement is excessive at times, it is wildly inconsistent: Generally, major IP litigation seems to occur only when there is enough money at stake, which means that the defendants are usually solvent and well known.[76] The inconsistency in enforcement actually furthers subversive copynorms, since most small-scale, less well known collage artists are able to escape litigation altogether because their works do not generate enough profit to raise red flags to representatives of the content industry. As such, scores of

74. *Id.* at 942.
75. Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 206 (2005); *See also* Viacom Intern. Inc. v. YouTube, Inc. 940 F .Supp.3d 110 (2010).
76. Dembers, *Steal This Music*, at 113.

musicians choose to risk the type of lawsuit that destroyed, say, Biz Markie's career.[77] At this juncture, in the midst of all this litigious and adversarial muck, one might rightfully question whether "Progress" of the arts is actually being promoted by copyright. As such, some commentators have urged a total reframing of the constitutional meaning of "Progress", noting that "[i]f sharing is a more effective method of dissemination than selling copies, then prohibiting sharing to protect the market for copy sales is exactly backward [to 'Progress.']"[78]

Content providers have labored (without much success[79]) to convince a generation that has been raised on ripping, burning, and downloading that the use of P2P filesharing software or service is the "moral equivalent of shoplifting a CD."[80] Ironically, the almost "apocalyptic rhetoric" employed by the RIAA in its lobbying efforts and public relations "may [actually] do more harm than good," since advertising campaigns (e.g., MPAA's Respect Copyright media campaign) that decry the widespread immorality of copyright infringement sends the message to the public that everyone is doing it, therefore it is *normal* behavior.[81] Essentially, the effectiveness of copyright law is heavily dependent on *voluntary* compliance.[82] So, attempts to influence private decision-making among a huge number of people in situations where there is little or no threat of immediate punishment for wrongdoing remains a formidable challenge for the industry.

While copynorms that permeate the community reflect widespread attitudes shared by music-listening users with respect to unauthorized sharing, those norms have also informed the actions of creators—that too, very notable and influential ones. Thus, not only are copyright law and its enforcement out of sync with copynorms among listeners, but also with musicians who create sonic collages. Such creators as Ice Cube, DJ Spooky, and John Oswald were all artists whose careers were inspired by their bold circumvention of licensing and copyright rules.[83] Put differently, copyright laws and enforcement are the reasons behind the development of careers and compositional choices of many artists who either allude to or duplicate other compositions in their own work. For example, independent artists like DJ Spooky avoid costly licensing costs by sampling obscure music or by editing samples beyond the point of

77. *Id.*
78. Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT L.J. 1, 29 (2004); *See also* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 305-07 (2002).
79. Yuval Feldman, *Expressive Law and File Sharing Norms*. Public Law & Legal Theory Research Paper Series, Northwestern University School of Law, 8-9, Sept. 2005 (Citing that "78% of Internet users who download music do not consider it stealing. Among the general public, opinions split – half said downloading is morally permissible, and half said it is not. In this sense, the sharing of digital music files might be viewed in the same way as speeding—it is viewed as morally acceptable if done in moderation.")
80. Solum, *The Future of Copyright*, at 1148.
81. Dembers, *Steal This Music*, at 11.
82. Suzor, *Rethinking Exclusivity in Copyright*, at 301.
83. Dembers, *Steal This Music*, at 8.

recognition.[84] Others, like John Oswald and Negativland, outright defy the copyright regime by making infringement a chief concern of their work. In fact, John Oswald and Negativland are famous for their anti-copyright sentiment. Oswald refers to his works as "'plunderphonics'—pieces whose components are stolen (not simply borrowed) from well-known works."[85] Negativland, a Bay Area-based group, paired a track by the band U2 with segments of Casey Kasem's *American Top 40* radio show to create a work entitled "U2."[86] In 1991, Island Records and Warner-Chappell Music sued the group for unauthorized use of U2's song. Although the claims for damages were ultimately abandoned, Negativland's distributor sought to recoup the $90,000 it had lost in legal fees and damages by sourcing it from the band's proceeds. Reflecting the band's distaste towards the copyright regime, its website actually regards the merits of unlicensed appropriations of music as *necessary* to a thriving creative culture.[87] In fact, many organizations share the sentiment and enthusiasm for the free appropriation of music. Such organizations include: MACOS (Musicians Against the Copyrighting of Samples) and VirComm (Viral Communications), which are two consortiums whose members allow their music to be sampled freely sans permission.[88] These organizations as well as artists such as Oswald and Negativland have, through subversive musical works and attendant PR-decisions, nudged music communities towards embracing what is called "transformative appropriation." The way copyright law has developed—that is, skewing incentives and rewards against access—has led to the doctrinal conflation of all types of infringement in legal interpretation, grouping together "*transformative appropriation* (e.g., when a rap artist samples a song without permission) with *plagiarism* (e.g., copying a Beethoven symphony and claiming it as one's own) and *music piracy* (e.g., burning a compact disc and sharing it with thousands of other network users)."[89]

Thus, these artists' actions shed light on a very significant issue that mires current copyright law: It has largely failed to distinguish between potentially benign uses and malicious uses of copyrighted material. Instead, it rejects any form of infringement in an uncritical, wholesale manner, and instead almost exclusively interprets it as malicious piracy. This is because:

> "The culture of piracy has been too protean, too varied, and too multifaceted for critics of copyright to easily define some uses as good (sampling in hip-hop) or bad (commercial piracy), or for supporters of property rights to defend their deferred position that all copying is always bad."[90]

84. *Id.* at 10.
85. *Id.* at 127.
86. *Id.* at 128.
87. *Id.* at 129.
88. *Id.*
89. *Id.* at 7.
90. Cummings, *Democracy of Sound,* at 206.

This issue also finds itself right in the midst of copyright's fair use doctrine, since one of the factors weighed in a fair-use inquiry is the *purpose* of the use. While the fair use provision in the Copyright Act of 1976 originally functioned limit the power of copyright in order to promote cultural production and use by the public, it is unclear as to what "fair" means.[91] The Act and several subsequent court decisions have interpreted "fair" purposes of the use to generally include those involving non-profit activities or borrowing for educational or parody purposes—consistently bypassing inclusion of *commercial* purposes into fair use. However, most recorded music, including collaged musical works, is intended for commercial sale.[92] Also, because major changes in the copyright regime for the most part have amounted to expansions of the lifespan or scope of protection for copyrights, lawmakers have largely ignored new modes of cultural production—e.g., innovative collage-styles of expression popular in many contemporary genres ranging from electronic dance music to hip-hop—that challenge assumptions about what constitutes infringement. In 1790—back when copyright doctrine was much more aligned with its constitutional justifications and limits—unauthorized transformative appropriation of American music was legal and did not require licensing permissions. By contrast, today it is generally permitted only when appropriators pay licensing fees. And, unauthorized transformative appropriations are prosecuted with the same regulations and penalties that also address piracy.[93] Although some court decisions in the 1990s reflected a slow willingness to reconsider the connection between appropriating and appropriated works on a case-by-case basis, this upcoming trend in legal thinking was stopped in its tracks by the *Bridgeport* court decision in 2004. In *Bridgeport Music v. Dimension Films*, in which Bridgeport Music sued the rap group N.W.A. for illegal sampling, the Sixth Circuit held that "a sound recording owner has the exclusive right to 'sample' his own recording . . . Get a license or do not sample. We do not see this as stifling creativity in any significant way . . . The market will control the license price and keep it within bounds."[94] Further, a district court judge in New York categorically likened the sampling in DJ Danger Mouse's *Grey Album* (a mash-up of the Beatles' *White Album* and Jay-Z's *Black Album*) to theft by broadly invoking the Seventh Commandment's prohibition against stealing. He ridiculed the defense's argument that sampling was an established practice among rappers. Unfortunately, these kinds of decisions effectively foreclose a future in which copyright doctrine could distinguish between good and bad uses of copyrighted works, a future in which copyright would acknowledge evolving copynorms and duly "balanc[e] property rights with musical genres such as hip-hop that allude to preexisting materials."[95]

In sum, not only is exclusivity in copyright as well as copyright enforcement out of sync with copynorms among the general public, it also inhibits musicians from experimenting with new modes of

91. Dembers, *Steal This Music*, at 120.
92. *Id.*
93. *Id.* at 24.
94. *Bridgeport Music v. Dimension Films*, 410 F .3d 792, 801 (2005).
95. Dembers, *Steal This Music*, at 7.

creative expression, especially who wish to construct sonic collages—forms of music that are wildly popular among several communities of music-listeners. Moreover, the very existence of certain laws largely affects private behavior and decision-making, even though such laws may never be enforced through litigation. Legal scholars, Robert H Mnookin and Lewis Kornhauser, have referred to this phenomenon as the "'shadow' of law exerting an indirect influence on bargaining and decision making."[96] Recall that copyright law is silent on how a musician might choose to give the public notice of a divestiture of any of his or her exclusive rights. The law itself is therefore a barrier not only for collage-artists such as Girl Talk who want to access others' tracks for sampling, but also for artists who wish to enable the sampling and collaging of his or her work by others. Lastly, the content industry's conflation of incentives with rewards (as discussed in previous sections) in justifying control over access to copyrighted materials is at odds with current times, which is characterized by a digital abundance in access. Nor has copyright law taken currently relevant and popular modes of musical expression into account. Thus, perhaps the existence of disgruntled artists like DJ Spooky, Negativland, John Oswald and more, should urge one to seriously question whether such a system has kept copyright doctrine true to its purpose, that is, the "Progress" of the useful arts.

IV. The Copyleft Movement: Creative Commons as a Viable Solution and Alternative

A. Emergence of Alternative Frameworks: A Brief Introduction

Previous sections of this paper bring to light the fact that copyright law is brimming with problems, especially in the last ten to fifteen years. In this heady atmosphere, it is unsurprising that reform and change are widely being contemplated. As such, several alternative models to copyright have been put forth as new candidates for the copyright ecology by activists, scholars, stakeholders and more. As Professor Lawrence Solum poetically puts it:

> "Sometimes technological change is so profound that it rocks the foundations of an entire body of law. Peer-to-peer (P2P) filesharing systems—Napster, Gnutella, KaZaA, Grokster, and Freenet—are mere symptoms of a set of technological innovations that have set in motion an ongoing process of fundamental changes in copyright law . . . As a consequence, the future of copyright is up for grabs . . . Many alternate copyfutures shimmer on the horizon . . ."[97]

That being said, it should be noted that the emergence of alternate models did not develop in isolation. The 1980s and 1990s, for example, were characterized by a unifying desire among bootleggers, activists, and hackers for a free or communal approach to culture.[98] The band Grateful Dead famously endorsed copying and sharing by fans in 1985. That same year, programmer and activist Richard Stallman founded

96. *Id.* at 10.
97. Solum, *The Future of Copyright*, at 1138.
98. Cummings, *Democracy of Sound*, at 160.

the Free Software Foundation. In 1989, Stallman introduced the GPL to permit software developers to distribute programs outside the limits of copyright law—anyone could use, copy and alter the software as long as they agreed to adhere to certain limitations defined by the original creator.[99] Thus, this longstanding open, noncommercial spirit of copyright-skepticism that has been brewing since the early 2000s, coupled with the public's vast filesharing capabilities, has led to the blossoming of numerous likeminded organizations, including the Electronic Frontier Foundation, MACOS, VIRCOMM, Illegal Art, Creative Commons, the Wikimedia Foundation (e.g., Wikimedia Commons) and more.

In the multi-front war that is copyright reform, several ideas and alternatives have been proposed, but they vary widely. On the one hand, the likes of Richard Posner and William Landes support indefinitely renewable copyright. On the other, idea slingers such as Neil Netanel, William Fisher, and others have proposed to legalize P2P filesharing and replace the lost revenues with a tax on hardware and Internet service. [100] Others have proposed cross-subsidization models as well as peer-production and crowdfunding regimes (e.g., the band Nine Inch Nails raised $1.6 million for their new album overnight; Amanda Palmer raised nearly $1.2 million on Kickstarter for a new album).[101] Professor Joseph P. Liu proposes that the scope of fair use should grow over time to subsume benign uses of copyrighted works.[102] On that point, many critics of the current copyright regime have urged a return to the original spirit of the Copyright Act's fair use doctrine; they argue that it is too narrow in its current form and operates as a shaky affirmative defense at best, the burden of which is thrust upon the defendant artist. They contend that an artist's right to create musical collages is guaranteed by the fair use provision of the Copyright Act of 1976, believing that the framers of the Act saw fit to legitimize such uses through fair use.[103] Just like with copyright law, however, it is crucial that one assesses whether a proposed alterative model would track closely with the copynorms in place at that time.

Of all the proposed alternatives, the alternative-licensing scheme furnished by Creative Commons seems to provide the most sophisticated means of enabling a loosely regulated ecosystem of sharing, distribution and use of creative works. Presently, it seems to be the most viable solution towards bridging the ever-widening gap between copynorms and the law for a variety of reasons. The next subsection of the paper will endeavor to weigh the advantages and disadvantages proffered by the Creative Commons model from a policy perspective.

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99. Ira V. Heffan, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 STAN. L. REV. 1487, 1490 (1997).

100. Solum, *The Future of Copyright*, at 1138.
101. Suzor, *Rethinking Exclusivity in Copyright*, at 313.
102. Solum, *The Future of Copyright*, at 1138.
103. Dembers, *Steal This Music*, at 181-121; *See* Brian T. Yeh, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, Congressional Research Service, Sept. 2015.

B. An Analysis of the Creative Commons Model

Creative Commons finds itself at the forefront of what is known as the Copyleft Movement. Founded by Lawrence Lessig in 2001, the organization has since promoted the use of free alternative licenses, allowing artists and companies to opt out of *total* exclusivity in copyright law by permitting others to use their works in a number of carefully defined commercial and noncommercial ways.[104] What Creative Commons has done, essentially, is accept exclusivity and its attendant consequences in copyright law as an unfortunate reality, and instead focus on mitigating the information costs associated with securing a license for legal uses of a copyrighted work.[105] In doing so, it has carved out a possible avenue for narrowing copyright entitlements while broadening the scope of individual experimentation and creativity, which otherwise might very well have been construed as illegal copyright infringement.

Each of its licenses has three layers to its anatomy that support Creative Commons model's validity: A Legal Code, containing technical language best understood by lawyers; a Human-Readable format, which summarizes the most important terms and conditions in a way that easily understandable to the lay public; and the Machine-Readable format, which allows for the easy incorporation of search engine optimization into several forms of technology.[106] The Machine-Readable format enables the existence of a functional database, which is assessable to the public at large. In fact, several major online music-streaming services such as YouTube and Soundcloud and digital media databases such as Wikimedia Commons have already introduced CC licensing onto their websites, making it easier for users to search for works tagged with various licensing designations. This yielded positive effects, including the increase in ease and likelihood of copyright compliance. Plus, each of the licenses is adorned with a set of unique icons, which signify key terms and conditions contained in the license, making it relatively easy for a user to determine what kind of terms and conditions are attached to a particular work, especially for works that are not registered. Thus, the user-friendliness inherent in the CC licensing system does a good job of lowering the otherwise high and onerous search and information costs associated with licensing non-tangible, copyrighted materials. So now, when a user encounters a choice to either infringe a copyrighted work for free or comply with copyright through CC licensing, he or she might be more inclined to pick the latter. The opportunity costs of complying with CC licensing to users, who are likely long accustomed to piracy as a social norm, are markedly lower than those associated with compliance under a copyright regime that is characterized by exclusivity and artificial scarcity.

In addition to the tri-layered anatomy of CC licenses detailed above, there are four conditions that define the type of license offered: Attribution, ShareAlike, NonCommercial, and NoDerivative. These

104. Adrienne K. Goss, *Codifying A Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI.-KENT L. REV. 963, 978 (2007).
105. Elkin-Koren, *Exploring Creative Commons*, at 3.
106. *See* Creative Commons, *About The Licenses*, at https://creativecommons.org/licenses/; *see also* Allen Kronenberger, "The Copyleft Tradition," *The Music Business Journal*. May 2013.

conditions can be combined to create six unique licenses that fit an artist's needs and motivations with regard to his or her work: Attribution (CC BY), Attribution-ShareAlike (CC BY-SA), Attribution-NoDerivs (CC BY-ND), Attribution-NonCommercial (CC BY-NC), Attribution-NonCommercial-ShareAlike (CC BY-NC-SA), and Attribution-NonCommercial-NoDerivs (CC BY-NC-ND).[107] The Attribution license is by far the most accommodating licenses out of the set. Essentially, these license options save artists from having to choose either complete retention of exclusivity over a work or forfeiture of the work to the public domain. Founder Lessig describes Creative Commons as a nonprofit that provides copyright licenses (marked "CC") "to artists who can directly control what freedom they wish their work to have."[108] Plus, creators can also collect royalties when they see appropriate, leaving the door open for potential collaboration with market players. Essentially, CC licensing provides a way for an artist to divest *some* of his or her exclusive rights to the public without either side having to bother with prohibitively high costs associated with individual licensing. Most notably, the CC licensing scheme allows for the *commercial* use of a derivative of an original work—venturing beyond the capabilities of the Copyright Act's fair use provision. In its current form, the fair use doctrine as applied does not acknowledge commercially benign purposes of use of a copyrighted work as being "fair" within the meaning of the statute.[109] In this sense, Creative Commons' licensing platform could plausibly solve that dilemma to a large extent; though this initially would depend, of course, on whether enough artists opt in.

That is not to imply, however, that the Creative Commons model is entirely flawless; there are some key concerns that deserve due consideration. First, its legal strategy makes a pioneering use of traditional common law concepts, property and contracts,[110] and its user-friendly licensing system heavily relies on a propriety regime as a means to reduce the cost of licensing and make licensing more accessible to individual users. Yet doing so may strengthen the pervasiveness of user-friendly copyright in everyday life, which "may reinforce social practices that are associated with consumption and production of information goods."[111] In this sense, treating creative expression as commodities that are protected by

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107. *Id.* (The Attribution License lets others "distribute, remix, tweak and build upon [a creator's] work, even commercially, as long as [they] credit [the creator] for the original creation." The Attribution-ShareAlike license allows others to "remix, tweak and build upon [a creator's] work, even for commercial purposes, as long as [they] credit [the creator] and license their new creations under identical terms." Often, this license is compared to "copyleft" free and open source software licenses. Attribution-NoDerivs allows for "redistribution, commercial and non-commercial [uses], as long as it is passed along unchanged and in whole, with credit to [the creator]." The Attribution-NonCommercial license lets others "remix, tweak and build upon [a creator's] work non-commercially, and although their new works must also acknowledge [the creator] and non-commercial, they don't have to license their derivative works on the same terms." Attribution-NonCommercial-ShareAlike licenses lets others "remix, tweak and build upon [a creator's] work non-commercially, as long as [they] credit [the creator] and license their new creations under the identical terms." Lastly, the Attribution-NonCommercial-NoDerivs is the most restrictive license out of the six; it only allows others to "download [a creator's] work and share them with others as long as they credit [the creator] . . . they can't change them in any way or use them commercially.")
108. Lawrence Lessig, "ASCAP's attack on Creative Commons," *Huffington Post*, July 13, 2010.
109. Debers, *Steal This Music*, at 120.
110. Lynn M. Forsythe, *Creative Commons: For the Common Good?*, 30 U. La Verne L. Rev. 346, 366 (2015) [hereinafter Forsythe, *Creative Commons*].
111. Elkin-Koren, *Exploring Creative Commons*, at 13.

property rights will not necessarily promote access to works. Elkin-Koren, a critic of the Creative Commons model, elaborates on this point: "The more we engage in securing a license to use the works of others, the stronger we may feel about licensing our own works. The creation process may increasingly resemble commercial production, seeking to minimize the cost of input and inevitably striving to increase the commercial value of the output."[112] Her point is not without merit, as it is plausible that making everyday licensing accessible to the public might lead to a so-called commodification of creative works. But, when mapped onto the larger context of copyright, her concern does not seem to outweigh the actual, formidable barriers to access to cultural works that copyright today imposes onto the public.

Second, Creative Commons licenses provide the option of allowing a commercial use of a work, but it does not define the term "commercial" (this is also true of the Copyright Act's fair use provision). Nor do they define what constitutes a "derivative" work. Because non-commercial and non-derivative designations are important attributes to its licenses, the lack of a definition for either term inserts a great deal of uncertainty. One might rightfully doubt whether the licenses will hold up in court. In the FAQ section found in Creative Commons' website, the organization states that its licenses have never been held to be unenforceable or invalid. That being said, each license contains a "severability" clause, which allows a court to eliminate any provision it deems unenforceable and enforce the remainder provisions of the license.[113] It seems, then, that a wholesome, normally expected level of enforceability is not a certainty. The "severability" clause and the vague, undefined licensing designations are sound reasons for reluctance among artists to adopt CC licenses. Moreover, while CC licenses fall within the purview of state common law, the Copyright Act provides that federal copyright preempts state law.[114] Consequently, the right of a creator to assign various uses of her work under CC licenses that would normally be exclusive within the realm of copyright may turn out to not be legitimate.

Another challenge with respect to enforceability crops up in the Share Alike license, whose provisions seek to establish rights against third parties and guarantee that "creators of any subsequent work that is based on the original licensed work would be subject to the same contractual terms."[115] Creative Commons is thus tasked with ensuring that these provisions are indeed enforceable against third parties, since enforceability solely against immediate contracting parties would decidedly not be enough. Third parties, far along the user-to-user chain, who have gained access to a work without directly contracting with the original creator, can potentially use the work in a way that might be undesired by the original creator. These third parties could easily discard license requirements by reasoning that CC

112. *Id.*
113. *See* Creative Commons, *"Frequently Asked Questions"*, *"Are Creative Commons licenses enforceable in a court of law?",* https://wiki.creativecommons.org/wiki/Frequently_Asked_Questions#Are_Creative_Commons_licenses_enforceable_in_a_court_of_law.3F
114. Forsythe, *Creative Commons*, at 364.
115. Elkin-Koren, *Exploring Creative Commons*, at 15.

licenses are dictated by the contract law, which ordinarily requires for all transactions an objective "meeting of the minds" or "mutual assent."[116] This argument can potentially apply to other types of CC licenses, too. The obvious harm here is that an owner's licensing permissions in a work can mutate in a way that is undesirable or unforeseeable by him or her, who at the end may be left with no recourse. For example, if a work's license has a non-commercial designation that is enforced against the subsequent user, but is unenforceable against third parties down the chain, the license would effectively be toothless. Paradoxically, if Share Alike licenses *are* enforceable against all third parties, one could argue that, since creative works are used and reused over and over again, "most license permission will [eventually] be lost through the requirement that one cannot violate previous license provisions."[117] Perhaps, then, one could credibly put forth the argument that Share Alike and Non-Derivative designations are inconsistent with Creative Common's fundamental ideology, that creators should be able to draw from past works. Although formidable and well-founded, these concerns with Creative Commons' licensing scheme, however, are ones that probably will be mended in due time as more court decisions hone in on CC license enforceability.

Thus, notwithstanding important concerns with Creative Commons' licensing scheme, the model is still emerges as the most realistic and practical solution available at this time. CC licensing has created a viable digital infrastructure that remarkably is able to coexist with copyright law. It does not require a complete overhaul of copyright legislation. Rather, it serves as a happy medium between stringent copyright enforcement, as exercised by the music industry, on one end and techno-anarchism, which is alive and well on sites like The Pirate Bay and YouTube, on the other. Simply put, it seeks to ameliorate the social ramifications of copyright law and address problematic copynorms in a uniquely practical manner.

V. Conclusion: Policy Analysis and Recommendations

Previous sections of this paper outlined the existence of a growing legal rift between copynorms and copyright law in several key ways: 1) copyright enforcement and legislation embrace exclusivity at the expense of access, effectively signaling a departure from copyright's constitutional origins, goals, and limitations; 2) copyright law does not take into account the diversity of uses and motivations that exist among music-listeners and musicians who are influenced by copynorms; 3) copyright legislation, court decisions and the music industry in general equate incentives with rewards, skewing market power towards copyright owners; in doing so, the overall copyright regime regrettably fails to keep up with technological advancement to its detriment. The Creative Commons model, on the other hand, attempts to

116. Forsythe, *Creative Commons*, at 367.
117. Elkin, *Exploring Creative Commons*, at 9.

further the original goals of copyright law by advocating the exercise of rights in a way that reflects their original meaning as defined by the Constitution. The meaning of "Progress" of the arts has arguably shifted in the context of global technological change and advancement, indicating that it may be time to reconsider and reframe copyright policy altogether: Instead of restricting access, it should be encouraged, and abundance in creative expression should in fact be desired. Ideally, respect for creativity and provision of an entry point for people to contribute their own meaning to collective creativity should be prioritized over exclusivity, which remains a core principle in current copyright policy. On top of that, a reformed copyright regime should seek to bring fans and artists together, rather than pit them against each other in a battle between incentives and access. One notable example embodying an ideal copyright arrangement that comes to mind is jambands—a genre that includes some of the top-grossing touring bands in the industry and is characterized by its reciprocal approach to IP. Jambands allow "fans to record live shows and to copy and distribute the recordings freely . . . [In exchange,] the fan community has developed social norms against copying musical works that the artists designate as 'off limits.'"[118] Creative Commons at least provides a fighting chance towards achieving that kind of copyright-copynorm ideal.

While usage of the Creative Commons model has not yet reached a critical mass, if it one day did, the potential for *meaningful* copyright reform would be tremendous. In the meantime, major commercial players in the music and entertainment industries can continue to invest in ways to influence copynorms that support compliance with copyright law (e.g., support highly visible, legal alternatives to file sharing, while portraying compliance as the norm rather than the exception). This methodology has already been successful to some extent, as online music streaming services like *Spotify* and the *iTunes Music Store* attempt to resolve the conflict between rights owners and filesharing networks. That, coupled with the widespread use of CC licenses in the future, may influence copynorms in a way that sends a powerful message to policymakers in Congress. They, then, might choose to reform copyright by legislating a Creative Commons-like system within copyright law. Or, perhaps they will carefully expand the fair use doctrine to include the important nuances CC licenses carefully carve out (e.g., recognizing benign commercial use of a copyrighted work as a legitimate purpose within the meaning of the doctrine). Access to music is now as abundant as ever, having ushered in an era of consumption that has turned long-standing doctrinal assumptions about copyright right-side up. But innovation and productive discourse will undoubtedly swing back, as developing new business models and legal frameworks have begun to work in concert towards patching up a broken system in order to recalibrate Copyright with her original life path and worthy purpose: Promoting the "Progress of Science and useful Arts."

118. Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law* (2006).