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Copyright and the Vagueness Doctrine

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ABSTRACT

The Constitution’s void-for-vagueness doctrine is itself vaguely stated. The law does little to describe at what point vague laws — other than those that are entirely standardless — might be unconstitutionally vague. Rather than explore this territory, the Supreme Court has identified three “collateral factors” that affect its inclination to invalidate a law for vagueness, including (1) whether the law burdens the exercise of constitutional rights, (2) whether the law is punitive in nature, and (3) whether the law overlays a defendant-protective *scienter* requirement. Against this backdrop, it is fair to say that copyright law, in its current configuration, does not meet the vagueness doctrine’s minimum requirements of fair notice to the public. Copyright by its terms restricts free speech: the law’s prolixity frustrates *ex ante* assessment of what speech is lawful. The question whether speech infringes copyright requires reference to a multiplicity of top-level interlocking questions or doctrines — each with its own manifold of subsidiary legal issues. Still more troubling is the uncertainty that inheres in “substantial similarity” and fair use, the very copyright doctrines that are generally held to rescue copyright from charges of First Amendment overbreadth. This Article argues that although a case can be made that copyright is unconstitutionally vague, invalidation of all or any portion of the Copyright Act is unlikely and not constructive. Reforms undertaken specifically to cure copyright’s indeterminacy are not likely to be effective, either. However, a consideration of the vagueness doctrine’s collateral factors and how they apply to copyright suggests an appropriate reform of the law. For cases involving expressive use of copyrighted content, lawmakers should adopt a three-tiered system of civil infringement liability by which strict liability is preserved in cases brought for injunctive relief only, while suits for statutory and actual damages require proof of willful and negligent infringement, respectively.
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COPYRIGHT AND THE VAGUENESS DOCTRINE

Bradley E. Abruzzi

Much ink has been spilled over the years on the question of copyright’s constitutionality, as a speech restriction. Writing most recently on the subject in Eldred v. Ashcroft, the Supreme Court pronounced itself satisfied that the copyright infringement action does not accomplish an unconstitutional regulation of protected speech, so long as Congress does not alter the “traditional contours of copyright protection.” The Eldred Court drew its confidence on this point from the Copyright Act’s “built in First Amendment accommodations” — namely, the affirmative defense of fair use and the distinction that the law draws between expression, which is properly the subject of copyright protection, and ideas, which are not. Eldred’s logic triggered a burst of renewed interest from the scholarly commentariat, all of it given over to a critical examination of the Court’s suggestion that these two core copyright doctrines, fair use

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4 Id. at 219–20.

5 Id. (citing Harper & Row Pub’rs, Inc. v. The Nation Enters., 471 U.S. 539, 560 (1985)).
and the “idea/ expression dichotomy,” as the Court has described it,⁶ rescue the law from any claim of First Amendment overbreadth.⁷ Absent, however, from both the case law and the critical literature is any attention to whether the line copyright marks off between lawful and infringing expression — a line that fair use and idea-expression do substantial constitutional work policing — is drawn clearly enough to rebuff a challenge that copyright is unconstitutionally vague.

It should go without saying that copyright law is “vague,” at least in layman’s terms. The simple, first-order question, whether a given instance of speech infringes another’s copyright, gives rise to a multiplicity of subsidiary legal questions, many of them interrelated, and all of them potentially dispositive of an infringement claim. The Constitution’s void-for-vagueness doctrine commands a greater degree of specificity⁸ — and relatedly, simplicity⁹ — from speech restrictions. Nowhere else does the law present a content regulation remotely as complex or prolix as the copyright infringement action.

It only compounds the problem that the two rescue doctrines identified by the Eldred Court are themselves fraught with indeterminacy. One cannot dispute that the

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⁶ Harper & Row, 471 U.S. at 556.
“idea/ expression dichotomy,” as the Supreme Court has described it, and its effectuation in copyright’s familiar “substantial similarity” test for infringement, are “necessarily” vaguely stated, ex ante. Judge Learned Hand wrote:

The test for infringement of a copyright is of necessity vague. In the case of verbal “works” it is well settled that although the “proprietor’s” monopoly extends beyond an exact reproduction of the words, there can be no copyright in the “ideas” disclosed but only in their “expression.” Obviously, no principle can be stated as to when an imitator has gone beyond copying the “idea,” and has borrowed its “expression.” Decisions must therefore inevitably be ad hoc.

The defense of fair use, too, is rather poorly sketched out in the copyright statutes, left to the courts to elaborate in case-specific applications that offer little guidance to speakers. Indeed, we often celebrate fair use for its “flexibility” and “open-ended” quality. The vagueness that inheres in the substantial similarity test and the fair use defense has significant implications for speakers. These are not obscure details relegated to the Copyright Act’s cobwebby corners — they are bedrock copyright principles. Taking the Court at its word, fair use and idea v. expression/ substantial similarity may well ensure that copyright does not proscribe or punish protected speech, thereby immunizing the law against any claim of overbreadth. And yet in order to accomplish these results — and herein lies the rub — they probably cannot be written with greater precision or give more advance notice to speakers than they do.

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10 Harper & Row, 471 U.S. at 556.
11 Perris v. Hexamer, 99 U.S. 674, 675–76 (1878) (“It follows that to infringe [copy]right a substantial copy of the whole or of a material part must be produced.”); Castle Rock Entertainment, Inc. v. Carol Pub’g Group, Inc., 150 F.3d 132 (2d Cir. 1998) (reciting that a plaintiff must prove that “copying was improper or unlawful by showing that the second work bears ‘substantial similarity’ to [the plaintiff’s] protected expression”).
12 Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
13 See infra Section III.B.
Granting copyright’s singularity as a complex and convoluted regulatory scheme, and recognizing the irony that its First Amendment rescue doctrines themselves admit substantial uncertainty into the question of infringement, it remains to consider whether copyright is vague, as a constitutional matter. As a practical matter, this Article does not propose that any court should (or will) invoke the void-for-vagueness doctrine to invalidate the Copyright Act.\textsuperscript{14} Notwithstanding that fact, I argue that copyright’s uncertainty raises significant due process and First Amendment concerns for speakers, and reference to the vagueness doctrine — and specifically certain factors “collateral” to vagueness that courts routinely apply in assessing the constitutionality of indeterminate laws — supplies a useful approach to managing this problem. A review of the Supreme Court’s vagueness jurisprudence, such as it is, and application of its principles to the Copyright Act point the way to positive reforms of the law that will (less importantly) fortify the copyright infringement action against constitutional vagueness challenge and (more importantly) mitigate copyright’s ongoing chilling effect on speech.

Part I of this Article explores the void-for-vagueness doctrine. It describes the “hallmarks” of a vague law; belabors the difficulty distinguishing between a “colloquially vague” law (that is, law that is vague per the plain meaning of the word) and a law so vague that it offends the Constitution; and distills from the law three factors that are material to a court’s void-for-vagueness review. I denominate these factors — the severity of the law’s penalty provisions, whether the law restricts constitutionally

\textsuperscript{14} As I discuss below, see infra Section III.A. one court has decided a vagueness challenge to copyright, and it ruled against the challenger. \textit{See} \textit{Aharonian v. Gonzales}, Civ. No. 04-5190 MHP, 2006 WL 13067, at *7 (N.D. Cal. 2006) (declining to enter a declaratory judgment that would hold copyright law unconstitutionally vague as applied to computer code).
protected rights, and whether the law incorporates a *mens rea* or *scienter* requirement — as “collateral factors,” insofar as they do not specifically relate to the law’s vagueness. In this Part, I also discuss the attention recent Supreme Court decisions involving political speech have given to the vagueness issues presented by case-by-case or factor-intensive review of expression, issues that are especially relevant to the copyright infringement action.

Part II of this Article turns to copyright law. At the outset I discuss the holdings in *Eldred* and *Harper & Row Publishers, Inc. v. The Nation Enterprises*, which the Supreme Court has offered in support of the view that the Copyright Act’s incursions on speech rights do not violate the First Amendment — noting, however, that these holdings settle the question of overbreadth, but not vagueness. I then discuss copyright’s susceptibility to a vagueness challenge, with specific attention to the doctrines of idea v. expression/substantial similarity and fair use. This Part concludes that copyright does not provide adequate *ex ante* notice of what expression rises to the level of infringement, with the result that copyright chills lawful speech and is therefore vulnerable to a vagueness challenge. Moreover, application of the collateral factors to copyright appears to amplify the constitutional crisis, as copyright emerges as just the sort of law from which the vagueness doctrine commands a high level of written precision.

In Part III of the Article, I consider possible resolutions of this constitutional problem. After accepting, first, that outright invalidation of the Copyright Act is unlikely (and for that matter, counterproductive) and second, that little can be done to cure the actual vagueness that inheres in the copyright infringement claim, I argue that reference

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to the “collateral factors” described above can suggest appropriate, constitutionally
curative reforms to the law. The reforms I propose include adoption of a three-tier
structure for civil infringement claims involving uses of copyrighted content that are
expressive in nature. This three-tier structure would be keyed to the defendant’s state of
mind as to infringement. Thus, in cases involving expressive uses of content, strict
liability would remain an appropriate basis for granting injunctive relief, but a plaintiff
could not obtain damages without first demonstrating that the defendant acted negligently
in infringing his or copyright, and an election of statutory damages would require a
further showing of willfulness on the defendant’s part. The Copyright Act’s present
damages structure would remain in effect when a court has determined that the alleged
infringement is not expressive in nature.

I. THE VOID-FOR-VAGUENESS DOCTRINE, EXAMINED

   A. ”Hallmarks” of Vague Laws

       The void-for-vagueness doctrine is, at its root, a matter of due process. The
notion that courts might invalidate criminal laws that do not adequately parse permissible
from prohibited conduct is uncontroversial.16 Vague laws offend one or the other Due

16 The Supreme Court has written:

       That the terms of a penal statute creating a new offense must be
sufficiently explicit to inform those who are subject to it what conduct on
their part will render them liable to its penalties is a well-recognized
requirement, consonant alike with ordinary notions of fair play and the
settled rules of law; and a statute which either forbids or requires the doing
of an act in terms so vague that men of common intelligence must
necessarily guess at its meaning and differ as to its application violates the
first essential of due process of law.

Kentucky, 234 U.S. 216, 221 (1914), and Collins v. Kentucky, 234 U.S. 634, 638 (1914)).
Process Clause when they give inadequate or defective notice of what is forbidden and therefore “may trap the innocent by not providing fair warning.”

Another hallmark of a vague law is that it fails in the constitutional requirement “that a legislature establish minimal guidelines to govern law enforcement.” The Supreme Court regards this “aspect” of the vagueness doctrine as “more important” than the issue of notice. A vague law “impermissibly delegates” an excess of interpretative and enforcement authority to prosecutors, police and judges, and this in turn raises the prospect of arbitrary or selective enforcement. Courts have expressed concern that a vaguely written law will create an inordinately large class of violators, such that state actors charged with enforcing the law are better positioned, and for that matter required if they choose to enforce the law at all, to single out certain offenders above others for prosecution. Considerations ancillary to the nature and severity of the offense — and possibly improper considerations — can leak into these judgments. And indeed a vague

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17 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see also City of Chicago v. Morales, 527 U.S. 41, 58 (1998) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (internal quotation marks omitted))).
19 See id. (citing Goguen, 415 U.S. at 574).
22 Grayned, 408 U.S. at 108–09; see also Kolender, 461 U.S. at 360 (faulting a statute as unconstitutionally vague in part because it devolved “lawmaking to the moment-to-moment judgment of the policeman on his beat” and thereby supplied “a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure” (internal quotation marks omitted)).
law will invest the judiciary, too, with an excess of discretion, when it comes time for a court to apply the law.\textsuperscript{23}

Finally, a vague law is constitutionally offensive because “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”\textsuperscript{24} A vague law therefore deprives the citizen of liberty. Like any other law, a vaguely written law leaves the individual at his or her liberty to engage in the conduct it does not proscribe. When a risk-averse individual cannot confidently discern what is and is not permitted, he or she may well abandon certain conduct that a court, interpreting the law authoritatively but after the fact, would find lawful. Although the law would not imprison or fine the individual or find him or her in forfeit of property, the threat or prospect of these consequences, or even legal proceedings, infringes the individual’s liberty by constraining his or her action. This sort of incursion on liberty is particularly insidious because it eludes review by the courts, which have no occasion to pass on the accuracy of a risk-averse interpretation of law. It is for this reason that courts allow facial challenges to vague laws that implicate

\textsuperscript{23} It is noteworthy that the concerns the Supreme Court has raised about a vague law’s delegation of authority to courts relate more to the separation of powers than to any suggestion that judges are susceptible to the sort of bias and other human failings that plague police and prosecutors. \textit{Compare United States v. Reese}, 92 U.S. 214, 221 (1875) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.”), \textit{with, e.g., Goguen}, 415 U.S. at 566 (finding a “flag contempt” statute to be of “such a standardless sweep” as to “allow[] policemen, prosecutors and juries to pursue their personal predilections”).

\textsuperscript{24} \textit{Grayned v. City of Rockford}, 408 U.S. 104, 108–09 (1972). This rationale might at first appear inconsistent with the Court’s earlier-expressed concern that vague laws will “trap the innocent” — or at least rooted in a diametrically opposed view of human nature — but of course there is no irreconcilable contradiction embedded in the notion that a poorly-written law might affect risk-seeking and risk-averse persons differently, but adversely all the same.
constitutional rights: the subject of an enforcement action in effect sues on behalf of the chilled speakers who themselves steered clear of controversy at the expense of exercising protected freedoms.\textsuperscript{25}

\textbf{B. The Vagueness Doctrine and “Prolix Laws”}

An emerging aspect of vagueness review merits special mention. In its recent campaign finance reform decisions, \textit{Citizens United v. Federal Election Commission}\textsuperscript{26} and \textit{Federal Election Commission v. Wisconsin Right to Life, Inc.}\textsuperscript{27} the Supreme Court has looked askance at political speech restrictions that incorporate factor-intensive legal standards or otherwise call for case-by-case application. In the course of rejecting a “saving” interpretation of the federal statutory restriction on certain “electioneering communications,” the \textit{Citizens United} Court placed considerable emphasis on the transaction costs of obtaining clarity of compliance. The proposed interpretation was an “amorphous regulatory interpretation,” problematic because it would introduce unacceptable “costs and burdens of litigation” right alongside exposure to a risk of criminal sanctions under the statute.\textsuperscript{28} The Court wrote: “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most

\begin{footnotesize}
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\item 130 S. Ct. 876 (2010).
\item 551 U.S. 449 (2007).
\item Citizens United, 130 S. Ct. at 889. \textit{Cf.} Polygram Holding, Inc. v. Fed. Trade Comm’n, 416 F.3d 29, 34 (D.C. Cir. 2005) (“Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.”) (quoting Frank H. Easterbrook, \textit{The Limits of Antitrust}, 63 TEX. L. REV. 1, 12–13 (1984)).
\end{enumerate}
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salient political issues of our day.”  

In the Court’s view, the constitutional offense worked by complex, fact- and factor-intensive laws ultimately burdens speech in much the same way as a standardless law might: “Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”

The *Citizens United* Court went on to reject another statute-saving interpretation on the ground that it, too, would invite “intricate case-by-case determinations to verify whether political speech is banned,” and “archetypal political speech would be chilled in the meantime.” Finally, the Court noted that the statute’s provision for issuance of advisory opinions to political speakers in effect operated as a prior restraint:

> When the FEC issues advisory opinions that prohibit speech, ‘[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech — harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”

The Court’s language in *Citizens United* is significant for its recognition that legal standards calling for case-by-case adjudication of the legality of speech are themselves constitutionally problematic — at least in the context of political expression.

The Court’s insights in *Citizens United* elaborated its recent pronouncement, in *Wisconsin Right to Life* (“WRTL”), that a speech restriction “must eschew ‘the open-ended rough-and-tumble of factors,’ which ‘invit[es] complex argument in a trial court

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29 *Citizens United*, 130 S. Ct. at 889.
30 *Id.* (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (Sutherland, J.)).
31 *Id.* at 892.
32 *Id.* at 896 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).
and a virtually inevitable appeal.” Applying WRTL to a speech regulation, applicability of which turned on how a “reasonable person” would receive a communication “in light of four ‘contextual factors,’” the Fourth Circuit recently wrote: “This sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech.” The Citizens United/WRTL problem — that “factor”-intensive speech regulations calling for case-by-case determinations through complex, costly litigation chill expression and raise First Amendment concerns — adheres whether or not a court would ultimately hold that the expression in question did not violate the law.

The Court in Citizen United treats “prolix” laws as conceptually distinct from “vague” laws, presumably on the ground that a prolix law confounds the populace with its complexity, whereas, strictly speaking, it is the very lack of elaboration in a vague law that is confounding. But this distinction is ultimately immaterial. As the Court observes, whatever the cause of uncertainty, its effect is the same: it chills speech. Moreover, a prolix law carries all the hallmarks of the classically vague law. Accordingly, this

34 Id. at 451 (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).
38 Id.
39 See supra Section I.A.
Article proposes to treat “prolixity” of the sort the Court critiqued in *Citizens United* as a species of vagueness.\(^{40}\)

The law is, of course, thick with conditions under which legal liability may attach based on the application of fact-and-factor-intensive standards,\(^{41}\) but to this point the Supreme Court’s emerging vague-by-prolixity doctrine is confined to laws that burden speech — and political speech, at that. This approach is not inconsistent with classical vagueness jurisprudence, which has tended to cluster around speech cases, given the Court’s view that the doctrine bears more heavily when an indefinite law burdens the exercise of constitutional rights.\(^{42}\) But even if the Court ultimately elects not to export this line of jurisprudence outside the First Amendment setting, the inklings given in *Citizens United* and *WRTL* of the overly complicated or “prolix” law as a new species of constitutionally problematic vagueness — or at least a cognate of the standardless law — are significant for speech regulations generally and, as I explain below, for copyright specifically.

**C. How Vague Is “Unconstitutionally Vague?”**

When one seeks to apply the vagueness doctrine to law, it is a problem that all laws are, to some extent, vague. Language is by its nature imprecise, and therefore

\(^{40}\) *See Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 604 (1967) (“Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.”).


\(^{42}\) *See infra* Section I.D. 1.
always subject to down-the line interpretation.\textsuperscript{43} Any suggestion of a law presumes the formulation \textit{ex ante} of a general rule: the \textit{post hoc} exercise of reviewing specific conduct against the rule necessarily admits uncertainty. These might seem to be a philosopher’s — or a sophist’s — objections. After all, if lawmakers take due care in crafting statutory language, they may well ensure that a law applies uncontrovertially to a “core” of proscribed conduct that is their target.\textsuperscript{44} Although the law may reach potential applications that are unanticipated or incidental to lawmakers’ intentions, to reject any law, on the ground that its applicability is vague at the margins, would throw the baby out with the bathwater.

By necessity, then, the Constitution must tolerate some level of vagueness in the law. But it remains the unenviable task of the courts to decide at what point a law’s prescriptions are so imprecise as to be \textit{unconstitutionally} vague.\textsuperscript{45} Application of the vagueness doctrine, at its heart, turns on a question of degree: granting the objection that any law admits at least some uncertainty, how much uncertainty should the Constitution tolerate? This is a question on which the Supreme Court offers little guidance. The Justices’ discussion over the years of what it means to be unconstitutionally vague is for the most part unhelpful: the rendered and repeated language on vagueness consists almost

\textsuperscript{43} \textit{E.g.}, \textit{Grayned v. City of Rockford}, 408 U.S. 104, 110 (1972) (“Condemned to the use of words, we can never expect mathematical certainty from our language.”).

\textsuperscript{44} \textit{See, e.g.}, \textit{Smith v. Goguen}, 415 U.S. 566, 577–78 (1974) (“To be sure, there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain.”); \textit{see also, e.g.}, \textit{Parker v. Levy}, 417 U.S. 733, 755–56 (1974) (quoting \textit{Goguen} and holding that the defendant, whose conduct was core conduct clearly in violation of the statute, lacked standing to mount a facial void-for-vagueness challenge).

\textsuperscript{45} \textit{Aharonian v. Gonzales}, Civ. No. 4-5190 MHP, 2006 WL 13067, at *7 (N.D. Cal. 2006) (emphasizing the distinction between “somewhat vague” and “unconstitutionally vague” or “fatally vague”).
entirely of descriptions of the “aspects” or “hallmarks” of vagueness discussed above — namely, notice failure, overdelegation of authority to law enforcement, and the chilling of (potentially) lawful conduct — and these do not so much describe elements of a legal standard as they elaborate the objectionable qualities of a vague law. Again, though, every law admits some degree of uncertainty, and it follows that every law fails to some extent to give notice to the public, every law gives some measure of free rein to law enforcement, and every law will place a degree of act-checking doubt in the mind of the risk-averse individual. The question of degree recurs: how much notice failure, how much free rein, how much chilled conduct is constitutionally acceptable?

Given the state of the Court’s jurisprudence on vagueness, it would not be reckless to declare that the void-for-vagueness doctrine is for the most part standardless, and itself vague and susceptible to arbitrary or selective application by the courts. To the extent any test for unconstitutional vagueness exists, it was given in Connally v. General Construction Co.\textsuperscript{46} by Justice Sutherland, who pronounced that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”\textsuperscript{47} Not just vague, then, but “so vague that men of common intelligence” are utterly flummoxed or will at least disagree on questions of the law’s application — Justice Sutherland’s oft-quoted rendition of the doctrine seems to supply a useful differentiation between the plain old vague law and the vague law that offends due process. But there remains a great deal of room for disagreement even within the Connally formulation, to be sure. Fortunately, the courts have supplied

\textsuperscript{46} 269 U.S. 385 (1926).
\textsuperscript{47} \textit{Id.} at 391.
themselves with an out. They incorporate into vagueness review three factors — each entirely collateral to the indeterminacy of a given law — that, once reviewed, do much of the work of tipping a law to one side or the other of the constitutional fence.

**D. “Collateral Factors” That Affect Void-for-Vagueness Determinations**

Although the Supreme Court has largely failed to fashion a useful, predictive, legal standard to apply in vagueness cases, the case law does describe circumstances that call for more searching judicial review of laws that draw uncertain boundaries. These circumstances, which I call “collateral factors,” often prove decisive of the question whether a vague law violates the Constitution. This is the case principally because they take the measure of the constraining effect the law’s uncertainty exerts on public liberty, but collateral factors may be dispositive of cases also because for their part, they are easy to assess, and they allow courts to opt out of answering the *how vague is too vague?* question. That is, the collateral factors take the otherwise airy art of assessing a law’s vagueness and render it more grounded and scientific. The three collateral factors are as follows: first, courts require more definition of a law that impairs the exercise of constitutionally protected rights. Second, a statute’s likelihood to be adjudged unconstitutionally vague increases with the extent to which it deters lawful conduct; thus a law that is enforced criminally or carries heavy civil penalties must be written with greater precision than a civil law that imposes a modest fine or simply compensates a private party for actual damages. Third, a law that does not incorporate a *sciente* or *mens rea* requirement is more susceptible to a void-for-vagueness determination.

1. **Does the Law Restrict the Exercise of ConstitutionallyProtected Rights?** — A first, and “perhaps the most important factor affecting the clarity that the Constitution demands of a law,” is “whether it threatens to inhibit the exercise of constitutionally
protected rights.”  

A law that in its possible applications might reach protected rights will be subjected to greater scrutiny — in other words, it must mark a clearer boundary between lawful and unlawful conduct — than a “purely economic regulation.” And so vague laws that affect, inter alia, abortion and free speech rights fall into the category of laws as to which the Constitution requires greater definition and precision.

A vague content-based speech regulation “raises special First Amendment concerns because of its obvious chilling effect on free speech” and cries out for “a more stringent vagueness test.” “Because First Amendment freedoms need breathing space to survive,” the Supreme Court has written, “government may regulate in the area only with narrow specificity.” This does not mean that governments must write speech-incident laws with perfect precision, or that anything short of airtight notice to a speaker will sink a law on vagueness grounds; one should not expect it to be any easier, after all, to skirt

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48 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); Women’s Med. Professional Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997) (quoting Hoffman Estates); see also Cole v. Richardson, 405 U.S. 676, 681 (1972) (“Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath’s meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath.”).

49 Goguen, 415 U.S. at 573 & n.10 (contrasting application of the vagueness doctrine in Grayned v. City of Rockford, 408 U.S. 104 (1972), an expression case, with “the less stringent requirements of the modern vagueness cases dealing with purely economic regulation,” as in United States v. National Dairy Products Corp., 372 U.S. 29 (1963)).


54 N.A.A.C.P. v. Button, 371 U.S. 415, 432–33 (1963); see also id. at 438 (“Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”).
the denotative deficiencies of language and limits of legislative foresight when drafting laws that restrict (or might restrict) speech. Nevertheless, lawmakers must work harder at drawing boundaries when their laws run up against expressive rights.

2. **What Penalties Are Available Against the Law’s Violators?** — When one considers whether a “colloquially vague” law (that is, a law one would describe as “vague” per the lay meaning of the word) is “constitutionally vague,” one important consideration is the risk one undertakes in confronting it. “The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair enforcement — depends in part on the nature of the enactment.” Thus, although civil and criminal laws alike are subject to void-for-vagueness review, a criminal statute is generally more susceptible to vagueness challenge than a purely civil regulation, because “[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images,” whereas in the civil case, “the consequences of imprecision are qualitatively less severe.” That said, the

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55 *Thomas*, 862 F.2d at 195.
56 *E.g.*, *id.* at 194–95 (observing that it will suffice to “mark out the rough area of prohibited conduct” in “contexts other than the First Amendment,” whereas laws implicating speech rights must be drawn with at least “reasonable specificity”).
Supreme Court has written that where a law “exact[s] obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all,” it is immaterial whether the law is enforced criminally or civilly.\(^61\)

The cases ultimately describe a notched kind of sliding-scale jurisprudence, such that the greater the consequences of violation, the more exacting vagueness scrutiny will be.\(^62\) Courts will look beneath a law’s “civil” or “criminal” veneer and consider its specific provisions. Thus a statute promising penalties that, “although civil in description, are penal in character,” will be treated as a “quasi-criminal” law that calls for “stricter vagueness review.”\(^63\)

3. Does the Law Contain a Scienter or Mens Rea Requirement? — Third, the Supreme Court “has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.”\(^64\) “[A] scienter requirement may mitigate a law’s vagueness, especially with

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\(^{61}\) *A.B. Small Co.*, 267 U.S. at 239. Later decisions — *Boutilier*, most notably — read *A.B. Small Co.*’s language as the legal standard for invalidating civil regulations on vagueness grounds, but it is not clear that the *A.B. Small Co.* Court was not describing merely a sufficient (but not necessary) condition for invalidation. *See Boutilier*, 387 U.S. at 123 (quoting *A.B. Small Co.*); *Advance Pharmaceutical*, 391 F.3d at 396 (citing *Boutilier*); *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000) (citing *Boutilier*).

\(^{62}\) *See Advance Pharmaceutical*, 391 F.3d at 396 (“The degree of statutory imprecision that due process will tolerate “varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement.” (quoting *Ass’n of Int’l Auto. Mfrs. v. Abrams*, 84 F.3d 602, 614 (2d Cir. 1996)).

\(^{63}\) *Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 396 (2d Cir. 2004) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500 (1982), and *United States v. Clinical Leasing Serv.*, 925 F.2d 120, 122 & n.2 (5th Cir. 1991) (applying closer vagueness scrutiny of a statute authorizing significant civil penalties)).

respect to the adequacy of notice to the complainant that his conduct is proscribed.” 65

This is a sensible allowance, to be sure. The constitutional problem of penalizing any
person who crosses a law’s unmarked boundary is obvious. Such a law “is a trap for
those who act in good faith.” 66 But if the same law overlays a mens rea or scienter
requirement, said liability only attaches when the defendant can be faulted for the
transgression, perhaps for acting negligently, recklessly, willfully, or with full knowledge
that he or she was well within the forbidden zone. 67

Although the Court did not invoke the vagueness doctrine per se, its holding in
New York Times Co. v. Sullivan 68 applied similar considerations to the private, civil cause
of action for defamation. The Sullivan Court’s ruling was predicated on a view that in
addition to regulating unprotected speech (i.e., false speech that defames an individual 69),
libel laws risk chilling lawful expression, to the extent they would impose strict liability
for the publication of a false statement. 70 The Sullivan Court’s introduction of the “actual

65 Hoffman Estates, 455 U.S. at 499 & n.14 (citing Colautti); see also, e.g., Reproductive
Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 428 F.3d 1139,
1143 (8th Cir. 2005); United States v. Hsu, 364 F.3d 192, 197 (4th Cir. 2004) (upholding a
criminal conviction notwithstanding a vagueness challenge, when the offense carried a
scienter element that the jury concluded was satisfied); Cal. Teachers Ass’n v. State Bd.
of Educ., 271 F.3d 1141, 1154–55 (9th Cir. 2001) (rejecting a First Amendment
vagueness challenge on the ground that the law required a defendant to have acted
“willfully and repeatedly” in violation of its provisions).
66 Colautti, 439 U.S. at 395 (quoting United States v. Ragen, 314 U.S. 513, 524 (1942)
(internal quotation marks omitted)).
67 E.g., Gonzales v. Carhart, 550 U.S. 124, 148 (2007) (reciting “the general principle
that where scienter is required no crime is committed absent the requisite state of mind”
citing 1 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1 (2003)).
is no constitutional value in false statements of fact”).
70 Sullivan, 376 U.S. at 300–01 (Goldberg, J., concurring) (“The opinion of the Court
conclusively demonstrates the chilling effect of the Alabama libel laws on First
Amendment freedoms in the area of race relations.”).
malice” standard, which requires a plaintiff public official in a defamation case to show that the defendant uttered a falsehood either “with knowledge that it was false or with reckless disregard for whether it was false or not,”\(^7\) rescued a tort that, although not vague in its elements, might surely be at least colloquially vague in the application of those elements to a given set of facts, as a speaker cannot always know with certainty the boundary between truth and falsehood.\(^7\) The Sullivan Court observed that the Alabama libel law at issue imposed an actual malice requirement for an award of punitive damages, but this was not enough to save the law. The lack of a fault requirement as to truth and falsehood was constitutionally problematic even in the context of the simple civil remedy of compensatory damages.\(^7\) The Court later held, in Gertz v. Robert Welch, Inc.,\(^7\) that a state libel action may introduce a lesser fault requirement for statements regarding persons who are not public officials or public figures, but the First Amendment commands that there be some fault requirement in these cases just the same.\(^7\)

None of the above means to suggest that any imprecise law must, as a constitutional matter, carry a scienter or fault requirement.\(^7\) However, the imposition of

\(^7\) Id. at 279–80.
\(^7\) “Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.” Gertz, 418 U.S. at 340.
\(^7\) Sullivan, 376 U.S. at 283–84.
\(^7\) 418 U.S. 323 (1974).
\(^7\) Id. at 347.
\(^7\) E.g., Colautti v. Franklin, 439 U.S. 379, 398 (1979) (“We need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability.”).
just such a requirement can be critical in negating a void-for-vagueness challenge, particularly when the law regulates speech, and there may come a point where a law is so imprecise that only the overlay of scienter will save it.

II. A VAGUENESS REVIEW OF COPYRIGHT LAW

By its terms, copyright regulates speech. It “protects” expression, and in so doing it withdraws certain renditions of expression from public use and reserves them to that expression’s creators and their licensees. Copyright gives private parties a right of civil action against persons who use copyrighted expression unlawfully. Of course, not all expression is subject to copyright, and it may be that some copyrightable content, while “fixed in a tangible medium of expression,” is not, by its nature, “expressive” in First Amendment terms. Nor is it always the case that another’s infringing use of copyrighted content is expressive. Nonetheless, it is very often the case that a claim of copyright infringement seeks to enjoin expression or punish a speaker, in addition to

77 E.g., Hill v. Colorado, 530 U.S. 703, 732 (2000); United States v. Franklin-El, 554 F.3d 903, 911 (10th Cir. 2009) (“The presence of a scienter inquiry can save an otherwise vague statute.”).
79 Expression is not eligible for copyright protection unless it is “original,” see 17 U.S.C. § 102(a) (specifying that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression” (emphasis added)); Feist Pub’ns, Inc. v. Rural Rel. Serv. Co., 499 U.S. 340, 344–50 (1991) (elaborating on the concept of originality, “the sine qua non of copyright”); the expression of federal government authorities is statutorily denied copyright protection, see 17 U.S.C. § 105; and of course expression of a certain age will shed its copyright protection and lapse into the public domain, see 17 U.S.C. §§ 302–305.
81 For example, architectural works are protected by copyright, see id., but they are not “expression” for purposes of the First Amendment.
82 A defendant who infringes by producing and selling counterfeited works is poorly positioned to argue that his or her conduct is expressive — likewise the user of peer-to-peer file sharing networks who downloads or makes available for download digital copies of entertainment works.
compensating the plaintiff for losses suffered from the speaker’s incursion on the plaintiff’s proprietary rights. Whether or not such a case presents a content-based or content-neutral restriction of speech — and learned commentators are divided on the question\textsuperscript{83} — the infringement action restricts speech and therefore runs up against the First Amendment.

Like most any restriction of expression, copyright proposes to mark off unlawful, and therefore actionable, speech from protected or privileged speech.\textsuperscript{84} As Section A of this Part explains, the Supreme Court is satisfied that copyright draws its boundaries in a manner that does not entrench upon constitutionally-protected speech. Copyright parts ways from most other speech restrictions in that it overlays a number of interlocking legal doctrines to accomplish the boundary-marking. As a result, an exceedingly complex and layered legal analysis, fraught with uncertainty, beleaguer the speaker who would have a simple question answered: \textit{does my speech infringe another’s copyright?} Section B of this Part explores this generalized uncertainty. Section C focuses more specifically on the vagueness that inheres in two of copyright’s constituent doctrines, fair use and idea v. expression/ substantial similarity — notably and ironically, the two doctrines that, in the view of the Supreme Court, rescue copyright from First Amendment overbreadth. In Section D I apply the vagueness doctrine’s “collateral factors” to copyright.

\textsuperscript{83} Compare Lemley & Volokh, \textit{supra} note 78, at 186 (“Copyright liability turns on the content of what is published.”), \textit{with} Netanel, \textit{supra} note 2, at 48 (“To my mind, however, logical and doctrinal consistency strongly favors classifying copyright law as content-neutral, not content-based, regulation.”); \textit{see also} Bohannan, \textit{supra} note 7, at 1107–08.

\textsuperscript{84} Lemley & Volokh, \textit{supra} note 78, at 186.
A. Overbreadth Challenges to Copyright

The Supreme Court has never subjected the Copyright Act to searching First Amendment review. Rather than turn a settled, stable legal paradigm on its head, and perhaps with it entire content-distribution industries that have copyright as their foundation, the Court has instead looked to preexisting checks on proprietary rights to justify copyright’s incursions on the expressive rights of the public. In *Eldred v. Reno* the Supreme Court held that “[c]opyright law contains built-in First Amendment accommodations” — namely the fair use defense and the “idea/expression dichotomy,” by which copyright protects only expression and reserves ideas for public use. The *Eldred* Court rejected the lower court’s suggestion that copyrights might be “categorically immune from challenge under the First Amendment” but noted that close First Amendment review of the Copyright Act will remain unnecessary, so long as the “traditional contours of copyright protection” remain unchanged by Congress. One can argue that the Court blithely fudged a pragmatic answer here — that copyright does not offend the First Amendment — and worked backward to justify it. “The First

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85 See Nimmer, supra note 2, at 1181 (observing that as of 1970, the conflict between copyright and the First Amendment was “largely ignored”); see also Netanel, supra note 2, at 3 (asserting that most courts “have summarily rejected copyright infringement free speech defenses” and that in “almost every instance” they have “assumed that First Amendment values are fully and adequately protected by limitations on copyright owner rights within copyright doctrine itself”).
87 Id. at 219–20 (citing *Harper & Row Pub’rs v. The Nation Enters.*, 471 U.S. 539, 556–60 (1985)).
88 Id. at 221 (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001) (internal quotation marks omitted)).
89 Id.; see also *Golan v. Holder*, 609 F.3d 1076, 1091 & n.9 (10th Cir. 2010) (upholding the Uruguay Round Agreements Act’s amendment to the Copyright Act, which withdrew certain foreign works from the public domain, against First Amendment challenge in part on the ground that the amendment “does not disturb the[] traditional, built-in protections” of fair use and idea v. expression).
Amendment securely protects the freedom to make — or decline to make — one’s own speech,” the *Eldred* Court pronounced; “it bears less heavily when speakers assert the right to make other people’s speeches.”90

In *Harper & Row Publishers v. The Nation Enterprises*,91 an earlier case in which the Supreme Court considered constitutional objections to a copyright infringement action, the Court subscribed to the proposition that “copyright’s idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”92 For its part, *Harper & Row* did not, as the *Eldred* Court later would, assign any similar constitutional importance to fair use, which it characterized instead as a common-law privilege and “equitable rule of reason.”93 Although the *Harper & Row* and *Eldred* Courts reach their conclusions in so many words, the curtness with which the decisions disposed of the copyright-as-speech-restriction issue suggests a view of the Justices that copyright by its terms, at least in its present configuration, is not overbroad.94 That is, it reserves to the public any and all expression that the First Amendment would otherwise protect.

90 *Eldred*, 537 U.S. at 221.
92 *Id.* at 557 (quoting *Harper & Row Pub’rs, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983) (internal quotation marks omitted)).
93 *Id.* at 550–51, 558.
94 Whether or not this is actually true — that the Copyright Act is not vulnerable to a First Amendment challenge of overbreadth — is a question outside the scope of this Article, but worth considering nonetheless. Indeed, the very question is a problematic one, given copyright’s particular susceptibility to judicial elaboration, on the several doctrines of substantial similarity, fair use, and so on. *See* Netanel, *supra* note 2, at 11–12 (observing that “sands have shifted” since Nimmer’s first pronouncement about copyright’s built-in-safeguards, with the result that fair use, idea/expression, and copyright duration “provide far weaker constraints on copyright holder prerogatives than they did in 1970”); *cf.*
B. The “Insanely Vague and Complex Rules” of Copyright, Generally

The copyright infringement action differs from the run-of-the-mill content restriction in that it operates along a number of analytical axes. For example, ordinarily the applicability of a content restriction turns on only two variables: the content of the expression subject to enforcement and the susceptibility of the applicable provision of law to interpretation. In copyright, a third variable — the protected content — complicates the analysis, and it is this complication that has prompted some commentators to challenge characterizations of copyright as a content regulation, strictly speaking. And although, at the most basic level, the infringement analysis simply compares the defendant’s content to the plaintiff’s, the outcome of a case may well turn on other “metadata” associated with the plaintiff’s content: e.g., its own originality, its date of creation, the identity of its author, and perhaps even the date of the author’s death.

Eldred, 537 U.S. at 221 (hinting that legislative alterations to the “traditional contours of copyright protection” might require further constitutional scrutiny). With every decision issued on these questions, the courts erase and redraw the line between infringing and noninfringing expression. Absent specific attention to the infringement action’s First Amendment implications at these decision points, it seems plausible that a court might draw a boundary that allows copyright to encroach on free speech. It should be no surprise, then, that the Courts in Harper & Row and Eldred sought refuge in the virtual tautology that what infringes copyright is by definition expression that the First Amendment does not protect.

Take, for example, Cohen v. California, 403 U.S. 15 (1971), in which the question of criminal liability required a review of the defendant’s speech — a profane inscription about the draft on his jacket — against a general purpose state law prohibition against “disturbances of the peace.” Putting aside for the moment the First Amendment defense at the heart of the Supreme Court’s decision, prima facie liability requires that two variables be fixed: one must interpret the law to define the zone of unlawful conduct, and one must determine whether the defendant’s conduct lies within or without that zone. See Netanel, supra note 2, at 48–50. Professor Netanel describes copyright as a “content-sensitive,” but not “content-based” restriction, because in the zone of copyright, government is not concerned with the “communicative impact” of the speech on listeners, but with its “deleterious impact on the copyright incentive.” Id. at 49. Accordingly, the lawfulness of the speech depends on the further variable of the existence of preexisting, similar expression. See also supra note 83.
Assuming we can conclude, after fixing these three variables at the point of litigation, that the defendant’s content infringes the plaintiff’s, there remains the question of statutory privileges, including fair use, that the Copyright Act reserves to the public.97

To elaborate, when a court considers a claim of copyright infringement, four “top-level” questions arise: first, whether the work allegedly infringed is eligible for copyright protection; second, whether the plaintiff has standing to sue to enforce the copyright; third, whether with regard to the work the alleged infringer has exercised any of the exclusive rights reserved to the plaintiff; and fourth, whether the defendant’s use of the content is privileged by law. To answer any one of these four fundamental questions, a court may be required to apply one or more subsidiary legal doctrines. As to the first, is the allegedly infringed work original?98 Is it “fixed in a tangible medium of expression”?99 Has the work entered the public domain?100 On the second top-level question, is the plaintiff the author of the allegedly infringed work?101 Is the work a “work made for hire”?102 If not the owner at the instant of creation, has the plaintiff

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97 When courts sustain a challenge of First Amendment overbreadth, they read the Constitution to impose public privileges from outside the law. Copyright’s affirmative defense of fair use, which recently acquired a kind of constitutional significance, does the same work.


101 17 U.S.C. § 201(a) (providing that copyright “vests initially in the author or authors of the work”).

validly acquired the rights by written assignment\textsuperscript{103} or obtained an exclusive license that confers standing to sue for infringement?\textsuperscript{104} On the third top-level question, if the defendant did not exactly copy the work, is it “substantially similar” to the plaintiff’s copyrighted expression?\textsuperscript{105} As to the fourth, did the defendant make “fair use” of the plaintiff’s content?\textsuperscript{106} Does the defendants’ use fall within any of the several specifically stated privileges in the Copyright Act?\textsuperscript{107} All of these second-level questions are material to (and the answer to any one could well be dispositive of) what sort of expression the Copyright Act allows, and for one reason or another — extensive judicial elaboration of the legal standards at hand, further complexity baked within the very copyright statutes, or some combination of the two — like the first-order questions that precede them, not many of these issues are easily resolved.

Add to this that there is substantial interplay between certain of the questions, and the copyright scheme becomes all the more convoluted in its structure. For example, originality and the idea/expression dichotomy are relevant to ownership. A purported joint owner of a copyright must have contributed some quantum of copyrightable content to the work.\textsuperscript{108} That quantum of content must satisfy the law’s requirement of originality.

\textsuperscript{103} 17 U.S.C. § 204(a).
\textsuperscript{104} Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1146 (9th Cir. 2008) (holding that a non-exclusive licensee lacks standing to sue to enforce the licensed copyright); United States v. Chalupnik, 514 F.3d 748, 753 (8th Cir. 2008) (observing that only rightsholders or exclusive licensees can sue for infringement).
\textsuperscript{105} See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.).
\textsuperscript{106} See 17 U.S.C. § 107; see infra Section II.C. 2.
\textsuperscript{107} See, e.g., \textit{id.} § 108 (reproduction privileges of libraries and archives); \textit{id.} § 110(1) (face-to-face teaching exception); \textit{id.} § 110(3) (limited performance privilege “in the course of services at a place of worship or religious assembly”).
\textsuperscript{108} E.g., Gaiman v. McFarlane, 360 F.3d 644, 658 (7th Cir. 2004) (“There has to be some original expression contributed by anyone who claims to be a co-author, and the rule . . .
and what is more, it cannot be simply an original idea — it must be original expression. Likewise, the “substantial similarity” test for infringement, which I discuss in greater detail below, requires not just that the works be similar, but that the defendant’s work must demonstrate substantial similarity to protected elements within the original work.

The provisions of law in 17 U.S.C. §§ 302 to 305, relating to copyright duration, comprise a thicket of their own. The intricacy of the copyright duration provisions, and the multiplicity of statutory categories of works subject to terms of differing length, is the result of several legislative undertakings to amend and reform the duration scheme, most of which did not have retroactive application. Although precisely written, in terms that are for the most part not open to substantial interpretation, the copyright term provisions call for an analytical parsing so intricate and involved as to be daunting to the layman — and tiresome for a lawyer. Moreover, several of the critical facts pertinent to public

is that his contribution must be independently copyrightable.”); Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98, 107–08 (2d Cir. 2002).
109 E.g., Gaiman, 360 F.3d at 658; Medforms, 290 F.3d at 108.
110 See infra Section II.C. 1.
113 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.01 (“Successive lengthening of the period of protection leaves works subject to disparate terms, depending on when they were created in relation to the schemes later adopted during the period of their protection.”).
114 Andrew Chin, Foreword, 11 N.C. J.L. & TECH. 401, 401 (2010) (acknowledging Professor Laura Gasaway for her publication of a chart that “untangles the intricate interplay among various copyright term provisions in the 1909 and 1976 Copyright Acts, the Berne Convention Implementation Act, and the Copyright Term Extension Act”);
domain determination are often not easily ascertained by research. Some examples include (1) the dates of a work’s creation and first publication,\(^\text{115}\) (2) whether a work was made for hire,\(^\text{116}\) (3) whether the author is alive (and if not, when he or she died),\(^\text{117}\) (4) whether a rightsholder was eligible to renew the copyright term,\(^\text{118}\) and (5) if so, whether he or she accomplished the formalities requisite for renewal.\(^\text{119}\) As a result, it is no easy task to discern whether and when a given work has lapsed into the public domain.\(^\text{120}\) To be sure, the notice failure here does not necessarily inhere in the law: the root of the problem in making a public domain determination is that the facts required to apply the

\(^\text{115}\) See 17 U.S.C. § 302 (applying to works created on or after January 1, 1978); id. §§ 303, 304 (applying to works created before January 1, 1978).

\(^\text{116}\) See id. §§ 302(c); 303(a)(1)(B)(2) (specifying copyright terms for works made for hire).

\(^\text{117}\) See id. § 302(a)–(b) (providing a copyright term of life of the author(s) plus seventy years, for works created after January 1, 1978).

\(^\text{118}\) See id. § 304(a) (specifying a copyright term for works eligible for term renewals as of January 1, 1978).

\(^\text{119}\) See 9 NIMMER & NIMMER, supra note 113, § 9.05 (observing that for pre-1978 works, a failure to file a timely renewal registration prior to expiration of the initial 28-year term would cause a work to lapse into the public domain by default).

\(^\text{120}\) There is hope that the Internet and digital media will supply opportunities to alleviate this problem, through database management and increased collaboration. See, e.g., The Determinator: Behind the Scenes at the Stanford Copyright Renewal Database, available at <http://fairuse.stanford.edu/commentary_and_analysis/2007_08_calter.html> (visited Dec. 11, 2010) (discussing Stanford University’s effort to compile variously formatted Copyright Office registration and renewal records into a single online database); WorldCat Copyright Evidence Registry, available at <http://www.worldcat.org/copyrightevidence/registry/about> (visited Dec. 11, 2010) (describing WorldCat’s collaborative platform for sharing information pertinent to the copyright status of books and noting that while the Registry’s purpose is to facilitate investigations into copyright status, it does not itself “provide conclusions or assertions”). Some certainties emerge: most notably, a work published before 1923 is \emph{per se} in the public domain. \textit{Société Civile Succession Guino v. Renoir}, 549 F.3d 1182, 1189 (9th Cir. 2008).
law in a given instance are too often lost to history. That said, although the law on copyright duration is not unclear, it is baroque in its presentation and terribly complex.

The preceding discussion of copyright’s vagaries is of course far from exhaustive. It should be sufficient simply to note the following: that any attempt to answer the simple yes/no question of infringement triggers a cascade of subsidiary legal questions. The very metaphor of the ordinary content-based speech restriction — that the law “draws a boundary” between lawful and unlawful expression — is inapposite to copyright. Certain of the subsidiary copyright doctrines, e.g., substantial similarity and fair use, may be said to draw dividing lines (certainly or uncertainly). But writ large, the copyright infringement tort raises vagueness questions not because it is standardless or because its legal standards are set forth too imprecisely, but because it is so overloaded with interlocking standards. Questions of infringement are difficult and costly to settle at the point of litigation: it stands to reason that at the point of expression, when a speaker is poised to utter expression that is similar to another person’s, copyright’s “insanely complex and vague rules,” as Professor Lessig has described them,121 may well chill the speaker from delivering lawful speech.122

121 LAWRENCE LESSIG, FREE CULTURE 19 (2004).
122 Id. at 185 (“The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open.”); Randall P. Bezanson & Joseph M. Miller, Scholarship and Fair Use, 33 COLUM. J.L. & THE ARTS 409, 445 (2010) (“When . . . problems [ascertaining the boundaries of fair use] are compounded for the scholar by practical questions about copyrightability, the length of the copyright term, competing claimants, risk aversion, conflicts of interest and significant financial costs of litigation, the scholarly enterprise can be, and indeed often is, crippled.”); cf. Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 889 (2010) (observing that “[p]rolix laws,” like vague laws, “chill speech” (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).
As I noted above, in the context of political speech, the Supreme Court has rejected substantially less complex regulatory schemes on the ground that their prolixity would offend the Constitution. Copyright, at least as it applies to expressive uses of owned content, cries out for similar treatment. It might be objected here that the recent Supreme Court cases involved political speech, which merits the highest level of First Amendment protection, whereas the Court wrote in *Eldred* that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.” But the extent of protection owed to the underlying speech is to some extent immaterial, because the chilling dynamic is the same: a law that regulates that speech based on reference to a multiplicity of factors incorporates substantial *ex ante* uncertainty and therefore chills protected speech. The Court might well regard chilled political speech as more constitutionally consequential, but for that matter, the *Eldred* Court failed to consider that “other people’s speeches” might surely be deployed for all sorts of constitutionally important purposes, including political argument and commentary.

**C. The Vagueness of Copyright’s First Amendment Rescue Doctrines**

At the micro-level, too, copyright law is fraught with vagueness. Nowhere is the uncertainty more pronounced — or for that matter, more significant — than in the two

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123 See supra Section I.B.
126 See generally Tushnet, supra note 7; see also Bohannan, supra note 7, at 1086 (“Unfortunately, the Court’s simplistic distinction between speaking and ‘making other people’s speeches’ cannot support the analytical weight it is being forced to bear. The use of copyrighted material has substantial speech value to both the user and the public, whether or not it is copied.”); *id.* at 1091 (noting that in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court did not discount the First Amendment interests of the *New York Times* in reprinting the Pentagon Papers).
doctrines that purport to rescue copyright from a constitutional claim of overbreadth, substantial similarity and fair use.

1. Substantial Similarity. — The concept of “substantial similarity” is fundamental to copyright. We accept as black-letter law that a defendant’s work need not be identical to a plaintiff’s work in order to be infringing — “[i]t is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations”\(^{127}\) — and we further accept that a similar but nonidentical work will infringe

\(^{127}\) Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.); see also T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 112 (1\(^{st}\) Cir. 2006) (observing that “two works need not be exact copies to be substantially similar” and that “the mere existence of differences is insufficient to end the matter in the defendant’s favor”); Wildlife Exp. Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 511 (7\(^{th}\) Cir. 1994).

In their review of copyright claims factfinders may have occasion to apply two distinct tests of similarity. To prove copyright infringement, a plaintiff must establish first, that the defendant “actually copied” his or her copyrighted content, and second, that the defendant’s content is substantially similar to the copyright-protected elements of the plaintiff’s work. Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 57, 63 (2d Cir. 2010); Situation Mgmt. Sys., Inc. v. ASP Consulting LLC, 560 F.3d 53, 58 (1\(^{st}\) Cir 2009) (citing Feist Pub’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). The plaintiff may prove the “actual copying” element by showing — short of offering direct evidence that the defendant intentionally copied the plaintiff’s work — that the defendant had access to the copyrighted work, and that the works overall are substantially similar. See, e.g., Baby Buddies v. Toys ‘R’ Us, Inc., 611 F.3d 1308, 1315 (11\(^{th}\) Cir. 2010); JCW Investments, Inc. v. Novelty, Inc., 482 F.3d 910, 915 (7\(^{th}\) Cir. 2007). Where the plaintiff is unable to prove access, he or she may nonetheless meet the requirement of showing actual copying by showing that the defendant’s content is “strikingly similar” to the plaintiff’s, such that it was exceedingly unlikely that the defendant could have composed the content independently. See, e.g., Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169–70 (7\(^{th}\) Cir. 1997).

In most cases, direct evidence of copying is not available, and so the access + overall substantial similarity avenue of proof is the order of the day, with the result that the infringement action calls for two successive, discrete substantial similarity tests. There is potential for confusion here, and the Second Circuit has proposed to label the first test — the test of similarity that, along with access, is probative of “actual copying” — as the
if the similarity to another work’s protected elements is “substantial.” And yet beyond these recitals, decades of application of the substantial similarity “test” have brought precious little clarity to the law. Nimmer does not court controversy when he writes that “[t]he determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.”

The case law commonly recites that works are substantially similar only if they are substantially similar in both their ideas and expression. That a defendant simply copied the plaintiff’s idea is not enough to prove infringement, and in this respect the requirement to prove substantial similarity of expression gives forensic effect to copyright’s “expression, not-idea” concept. In the “abstractions” passage of his decision in *Nichols v. Universal Pictures Corp.*, Judge Learned Hand famously observed that there is a point at which two works, although similar, sufficiently diverge in their expression as to support a finding of noninfringement, on the ground that the defendant only copied ideas:

“probative similarity” test. *Repp v. Webber*, 132 F.3d 882, 889 & n.1 (2d Cir. 1997) (citing *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992)); see also *T-Peg*, 459 F.3d at 112. Although these two tests are undertaken for different purposes, one “merges somewhat” with the other. *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 67 n.3 (1st Cir. 2009); *T-Peg, Inc.*, 459 F.3d at 112.


129 45 F.2d 119 (2d Cir. 1930).

130 45 F.2d 119 (2d Cir. 1930).
Upon any work, \ldots a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.\textsuperscript{132}

The problem courts continue to face is in specifying, in a manner that will permit useful guidance to speakers \textit{ex ante}, precisely where that flexion point lies, beyond which copied ideas become copied expression and permissibly similar expression becomes substantially similar expression. Judge Hand himself wrote despairingly in the \textit{Nichols} case: “Nobody has ever been able to fix that boundary, and nobody ever can.”\textsuperscript{133} “[A]s soon as literal appropriation ceases to be the test,” Judge Hand added, “the whole matter is necessarily at large, so that \ldots the decisions cannot help much in a new case.”\textsuperscript{134}

Thirty years later, he was no more hopeful: “Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be \textit{ad hoc}.”\textsuperscript{135}

More recent decisions applying substantial similarity strive to give content to the test, but at the same time these decisions, too, express their misgivings about the

\textsuperscript{132} \textit{Id.} at 121.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} (citing \textit{Fendler v. Morosco}, 171 N.E. 56, 60 (N.Y. 1930) (“In determining the effect of the use of [copyrighted] material, we can derive little aid from a restatement of the decisions arrived at by the courts in the reported cases, for each case was decided upon its own facts.”)).
\textsuperscript{135} \textit{Peter Pan Fabrics, Inc. v. Martin Weiner Corp.}, 274 F.2d 487, 489 (2d Cir. 1960); see also, \textit{e.g.}, Rubenfeld, \textit{supra} note 2, at 14 (“Distinguishing ideas from expression is notoriously tricky.”); Stephen McJohn, \textit{Scary Patents}, 7 NW. J. TECH. \& INTELLECTUAL PROPERTY 343, 347 (2009) (characterizing copyright’s idea/ expression distinction as “illusory”).
feasibility of the project. In many cases courts simply overlay analytical frameworks that do little to elaborate the doctrine — reciting, for example, that substantial similarity is to be assessed from the perspective of the “ordinary observer.” The “ordinary observer test” disposes of the infringement question based on whether said observer would be “disposed to overlook the differences between the works.” Articulated in this way, the standard approaches tautology — as courts seeking to elaborate substantial similarity so often do. Citing Judge Hand and Nimmer, the Second Circuit observes

136 See, e.g., BUC Int’l Corp. v. Int’l Yacht Council Ltd., 489 F.3d 1129, 1148 (11th Cir. 2007) (observing that substantial similarity “occupies a non-quantifiable value on the legal spectrum between no similarity and identicalness”); Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990) (“It is thus impossible to articulate a definitive demarcation that measures when the similarity between works involves copying of protected expression.”); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907–08 (3rd Cir. 1975) (“A review of copyright infringement decisions confirms the observation that most cases are decided on an ad hoc basis.”); Jarvis v. A & M Records, 827 F. Supp. 282, 290 (D.N.J. 1993) (“As courts and commentators have repeatedly noted, the test for substantial similarity is difficult to define and vague to apply . . . .”).

137 Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 67 (1st Cir. 2009); Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007, 1011 (7th Cir. 2005).

138 The invocation of the “ordinary observer” participates in the “reasonable man” tradition of tort law, which has long been subject to criticism of its indeterminacy. Robert J. Rhee, Tort Arbitrage, 60 FLA. L. REV. 125 (2008) (quoting, inter alia, OLIVER WENDELL HOLMES, THE COMMON LAW 88–89 (1881) (“vague test”)). Indeed, the “ordinary observer” standard even invites comparison with the “men of common intelligence must necessarily guess at its meaning” test for vagueness, Connally v. General Construction Co., 269 U.S. 385, 391 (1926), which, as standards go, hardly draws a useful boundary between the constitutional and unconstitutional law. See text accompanying notes 46–47. Reference to these fictional personifications of objectivity becomes ever more constitutionally problematic when one proposes to apply them to speech restrictions.

139 Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 57, 66 (2d Cir. 2010); Coquico, 562 F.3d at 67.

140 See, e.g., Sid & Marty Krofft Television Prods. v. McDonald’s Corp., 562 F.2d 1157, 1165 (9th Cir. 1977) (“To constitute an infringement, the copying must reach the point of “unlawful appropriation,” or the copying of the protected expression itself.”); see also Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 373 (5th Cir. 2004) (recounting the plaintiff’s argument that jury instructions on substantial similarity were “merely tautological, essentially stating nothing more than that two works are
that the question “typically presents an extremely close question of fact” that is generally
not appropriate for summary judgment.\textsuperscript{141} Presumably, then, the ordinary observer
approach to substantial similarity is uncertain enough that reasonable minds can disagree
on whether a given instance of expression is unlawful.\textsuperscript{142} That sort of uncertainty surely
chills speech.

The Ninth Circuit appears to be the court most determined to develop a working
\textit{ex ante} standard for substantial similarity, with the result that perhaps no other court has
made quite such a hash of things. Ninth Circuit law requires factfinders assessing
substantial similarity to apply “extrinsic” and “intrinsic” tests.\textsuperscript{143} The extrinsic test,
which calls for “analytic dissection” and often “expert testimony,”\textsuperscript{144} seeks out similarity
in “the type of artwork involved, the materials used, the subject matter, and the setting for
the subject.”\textsuperscript{145} In the case of literary works, the extrinsic test calls for objective

\begin{footnotes}
\item[141] Gaito Architecture, 602 F.3d at 63 (quoting Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (“[S]ummary judgment has traditionally been frowned upon in copyright litigation.”)).
\item[142] Fed. R. Civ. P. 56.
\item[143] Benay v. Warner Bros. Entertainment, Inc., 607 F.3d 620, 624 (9th Cir. 2010); Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990).
\item[144] Shaw, 919 F.2d at 1356.
\item[145] Krofft Television Productions, 562 F.2d at 1164. It is by virtue of the extrinsic test, with its gestures toward objective analysis, that the Ninth Circuit is perhaps more amenable than its sister circuits to ruling on substantial similarity as a matter of law. See Benay, 607 F.3d at 624 (observing that substantial similarity is a “fact-intensive” inquiry, but one as to which the Ninth Circuit has “frequently” been in a position to affirm entry of summary judgment for copyright defendants); Funky Films, Inc. v. Time Warner Entertainment Co., 462 F.3d 1072, 1077 (9th Cir. 2006) (“A plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.” (internal quotation marks omitted)).
\end{footnotes}
comparison of the works’ respective plots, themes, dialogue, mood, setting, pace, and sequence. By contrast, the intrinsic test reprises the “ordinary observer” test discussed above, and at least one court has described its application, critically, as “virtually devoid of analysis,” the exercise of “a mere subjective judgment as to whether two literary works are or are not similar.” And so the Ninth Circuit’s model of substantial similarity admits speech-averse uncertainty coming and going. One test is multifactorial, intricate and complex — just the sort of analysis that the WRTL Court rejected in the context of speech restrictions, on the ground that a speaker cannot expect to settle the extent of his or her expressive rights without resort to costly litigation — and the other disposes of an infringement question based on the gut-feel of the factfinder. Perhaps the two tests can be said to be complementary, each compensating for the deficiency of the other, and indeed, the fact that the plaintiff must satisfy both tests may be a boon to free expression. But the practical effect of the Ninth Circuit’s approach is to heap one vague legal standard on top of another. This model may be defensible to the extent that it systematizes the manner in which courts address infringement questions. It does not, however, provide fair notice to speakers, and the essential problem of substantial similarity’s vagueness remains unresolved for all the courts’ efforts.

146 Shaw, 919 F.2d at 1356–57; Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984).
147 See, e.g., Benay, 607 F.3d at 624 (explaining that the intrinsic test “focuses on ‘whether the ordinary, reasonable audience’ would find the works substantially similar in the ‘total concept and feel of the works’” (quoting Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002))).
148 Shaw, 919 F.2d at 1357.
150 William Patry writes generally of the subjectivity of the substantial similarity test: “Right now copyright law exists at the crude level of Potter Stewart’s ‘I know it when I see it.’” See Patry, supra note 128.
2. **Fair Use.** — A fair use of copyrighted content is not an actionable infringement of copyright.\(^{151}\) By definition, then, fair use distinguishes lawful use from unlawful use, and as applied to expressive uses,\(^{152}\) fair use at least in theory draws a line between what can and cannot be spoken. And indeed, as we have noted, the law relies on fair use to carve out adequate space from copyright for free expression. The Supreme Court’s holdings on this score, which maintain that fair use accomplishes this task sufficiently well to settle any constitutional quarrel with the copyright regime,\(^{153}\) have been received with skepticism by commentators.\(^{154}\) The concerns expressed in the literature relate to the positioning of the line fair use draws; that is, they wonder whether fair use falls short of privileging otherwise infringing uses of content that should be First Amendment-protected. These concerns relate to overbreadth.

Whether fair use actually draws any sort of line at all is a question that bears on copyright’s constitutionality under the vagueness doctrine. This question is one that is more easily and immediately answered: it does not. The statutory language in 17 U.S.C. § 107 is assuredly vague on its face: “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”\(^{155}\) To its credit, the law offers examples of appropriate purposes — core fair use values — to which ends one might make use of copyrighted


\(^{152}\) Just as not all uses of content are expressive, see supra note 82, not all fair uses are expressive, either. See, e.g., Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1325 (Fed. Cir. 2003) (reverse engineering of software as fair use); Field v. Google, 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006) (indexing of web content for use in a search engine as fair use).


\(^{154}\) See, e.g., Tushnet, supra note 7, at 547–48; Netanel, supra note 2, at 20–23.

content. But as Congress has written § 107, use of content even for these purposes is not per se lawful: the use must also be “fair.” Whether this is right or wrong, from the standpoint of balancing creators’ rights against public privileges, an opportunity to supply some clarity is lost as a result. Likewise, § 107’s list of approved purposes, introduced as it is by “such as,” is not exclusive.\textsuperscript{156} The fact that fair use of copyrighted content might be projected toward all manner of unlisted purposes may go a long way toward overcoming complaints about copyright’s overbreadth, but in this respect, too, the statute displays a hostility to definition.

To be sure, § 107 does provide guidance above and beyond its simple statement that “fair” use is lawful use. It codifies the four principal factors that courts have historically considered in making fair use determinations.\textsuperscript{157} These factors may give structure to a court’s post hoc fair use analysis, but there is no denying that a speech law characterized by an “open-ended rough-and-tumble of factors” will chill lawful expression.\textsuperscript{158} It bears mentioning, however, that the statute does not tie down a court’s

\textsuperscript{156} \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569, 577–78 (1994) (interpreting § 107’s “such as” language to be “illuminative and not limitative”); \textit{Blanch v. Koons}, 467 F.3d 244, 251 (2d Cir. 2006) (quoting \textit{Campbell}).

\textsuperscript{157} The four statutory factors are, of course, the following:

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.

review even to these four factors.\textsuperscript{159} At least one commentator has described § 107 as “entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant . . . .”\textsuperscript{160} In this respect the law — standing alone, without the additional gloss supplied by the cases — surely falls short of the bare-minimum requirement that courts impose in vagueness cases; that is, § 107 is “so vague and indefinite as really to be no rule or standard at all.”\textsuperscript{161}

Ultimately, though, the fair use doctrine is comprised almost entirely of judge-made law. The fair use inquiry, with all its factors — whether statutorily imposed or applied \textit{ad hoc} in litigation — reduces to an “equitable rule of reason.”\textsuperscript{162} It was and is a creature of the common law, requiring for case-by-case adjudication,\textsuperscript{163} and yet fair use (like substantial similarity) stands out in the common law for the failure of its decisions to supply any real predictive guidance to down-the-line content users.\textsuperscript{164} Some general principles may be distilled from the case law, but in the end the law cannot hope to capture \textit{ex ante} even a fraction of the uses one can make of copyrighted content, and so every case is a distinctive snowflake.

\textsuperscript{159} \textit{Petter Letterese \\& Assocs., Inc. v. World Inst. of Scientology Enters., Int’l}, 533 F.3d 1287, 1307–08 (11th Cir. 2008); \textit{Am. Geophysical Union v. Texaco, Inc.}, 60 F.3d 913, 939 (2d Cir. 1994) (“[T]he statutory list is not exhaustive or exclusive.”) (citing \textit{Harper \\& Row Pub’rs, Inc. v. The Nation Enters.}, 471 U.S. 539, 549 (1985)).

\textsuperscript{160} Michael J. Madison, \textit{A Pattern-Oriented Approach to Fair Use}, 45 WM. \\& MARY L. REV. 1525, 1564 (2004).

\textsuperscript{161} \textit{See supra} note 61.


\textsuperscript{164} \textit{E.g.}, Michael W. Carroll, \textit{Fixing Fair Use}, 85 N.C. L. REV. 1087, 1106 (2007) (“[L]eading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair.”).
Small wonder, then, that Professor Rubenfeld should pronounce fair use “notoriously opaque,”¹⁶⁵ or that other commentators might label it “resistant to generalization,” “unpredictable,” and “subjective.”¹⁶⁶ The subjectivity is, of course, derivative of these other defects: an altogether unanswerable question, posed to different authorities, will of course yield different answers. Judge Leval writes in commentary that the fair use doctrine admits subjectivity even in its core applications:

Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges.¹⁶⁷

It has been suggested that fair use’s “open-endedness,” joined with the prospect of reversal by an appeal court, make ruling on the defense “an intimidating experience” for trial court judges.¹⁶⁸ If the very essence of a vague law is that “men of common intelligence must necessarily guess at its meaning and differ as to its application,”¹⁶⁹ it should raise a red flag that learned judges find the fair use doctrine so unsettling. After all, a judge who guesses wrong will receive only a chastening decision from the Court of

¹⁶⁵ Rubenfeld, supra note 2, at 16–17. Professor Rubenfeld notes in passing that the “vagueness of the fair use doctrine is . . . a First Amendment problem.” Id. at 17 n.75.
¹⁶⁷ Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1132 (1990); see also id. at 1135 (“Writers, publishers, and other would-be fair-users lack a reliable guide on how to govern their conduct.”).
¹⁶⁸ William F. Patry & Shira Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 CARDOZO ARTS & ENT. L.J. 667, 670 (1993). On this point Patry quotes Judge Leval’s candid admission that “[i]t has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami.” Id. at 670 n.18 (quoting Pierre N. Leval, Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture, 36 J. COPR. SOC’Y 167, 168 (1989)).
Appeals. A speaker whose *ex ante* assessment of his case differs from a court’s faces the prospect of statutory damages.

Access to legal counsel does not improve matters. Some time ago Professor Fisher observed, in the wake of the Supreme Court’s decision in *Harper & Row*, that attorneys advising scholars on use of copyrighted content — again, a core application of the fair use doctrine — all but encouraged their clients to steer clear of the defense.\(^{170}\) Professor Fisher went on to write that “the disarray of the doctrine impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly.”\(^{171}\)

And so, for all the work they do to reconcile copyright and the First Amendment, substantial similarity and fair use give with one hand and take with the other. Of their nature, they define what expression infringes copyright, but the two rescue doctrines are not themselves susceptible to *ex ante* definition. It is a rather severe irony that these two doctrines are assigned the constitutional business of carving out space for protected speech, but in the process they give so very little fair notice to speakers as to what speech falls within and without that protected zone.


\(^{171}\) *Id.* at 1693; see also Randall P. Bezanson & Joseph M. Miller, *Scholarship and Fair Use*, 33 COLUM. J.L. & THE ARTS 409, 445 (2010) (“The strictly legal problems presented for fair use scholarly claims are themselves complex, usually indeterminate and sufficiently real to force a busy scholar without large resources and a risk-averse publisher to back down, if challenged, or simply to avoid any risk, even if there is no real likelihood of it ripening into a claim.”).
D. Application of the Vagueness Doctrine’s Collateral Factors to Copyright

In order to assess the full extent of the constitutional problem of copyright’s vagueness, the law must be reviewed against the vagueness doctrine’s three collateral factors. That review reveals that copyright law burdens constitutionally protected rights, that the infringement action contains a quasi-criminal remedy in the right of plaintiffs to select statutory damages, and that the law lacks a meaningful scirent requirement.

1. Copyright Restricts the Exercise of Constitutionally Protected Rights. — As I have noted above, it is uncontroversial that, in most of its applications, copyright restricts expression and therefore finds itself in tension with First Amendment values.172

2. Copyright Law Contains Criminal and Quasi-Criminal Remedies. —

Copyrights may be enforced civilly or criminally. 17 U.S.C. § 506 provides a criminal charge against certain willful infringers of copyright; 18 U.S.C. § 2319 specifies the penalties for criminal infringers, who may be imprisoned for up to ten years for their conduct. The mens rea requirement of willfulness greatly alleviates any concern about constitutional vagueness, because criminal liability will only attach when the defendant “intentional[ly] violat[es] a known legal duty.”173 It is significant, too, that the criminal provisions are directed at only a subset of infringing conduct: i.e., infringement “for purposes of commercial advantage or private financial gain,” reproduction or distribution of works totaling over $1,000 in retail value, and digital distribution of works “being prepared for commercial distribution.”174 Although one can imagine circumstances in

172 See text accompanying notes 78–83.
which § 506 criminalizes a defendant’s own expression, the law for the most part regulates acts of infringement that are not in themselves expressive: namely, trafficking in pirated and counterfeited works and copying works in bulk quantity. With the added overlay of the willfulness requirement to protect a defendant from blundering into liability, copyright’s expressly criminal provisions ultimately present a vagueness problem less consequential than the civil infringement remedies do.

The far more common mode of copyright enforcement is, however, a civil action for injunctive relief and or damages. Injunctive relief reduces in essence to an instruction to discontinue infringing and is difficult to characterize as punitive in nature, notwithstanding that in certain applications (for example, an injunction calling for removal of a publication from the market) a defendant can incur significant losses. An award of a plaintiff’s actual damages is by definition compensatory and therefore civil in nature. These remedies are therefore less offensive, although not entirely inconsequential, in the vagueness analysis.

A plaintiff’s right to elect statutory damages, however, is more problematic. Statutory damages do not just requite a plaintiff for his or her losses; they “sanction and vindicate the statutory policy of discouraging infringement” and are therefore both “compensatory and punitive” in character. The Second Circuit writes that “[t]he purpose of punitive damages — to punish and prevent malicious conduct — is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which

175 17 U.S.C. §§ 502 (injunctions), 504 (damages). The law also authorizes a court to order the confiscation and/or destruction of infringing articles. See id. § 503.
177 Dream Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 992 (9th Cir. 2009) (quoting L.A. New Serv. v. Reuters Television Int’l, 149 F.3d 987, 996 (9th Cir. 1998)) (internal quotation marks omitted).
allow increases to an award of statutory damages in cases of willful infringement.”

It bears emphasis that statutory damages do more than “punish and prevent malicious conduct.” They punish neutral and even innocent conduct. The Copyright Act erects three tiers of statutory damages awards: one for willful infringers (ranging from $750 to $150,000), one for innocent infringers ($200 to $30,000), and a generally applicable range for infringers who fall into neither category ($750 to $30,000). In a given case, the measure of damages adequate to compensate a rightsholder for copyright infringement case may fall well short of the minimum figure in the applicable statutory damages range. Where this occurs, the civil infringement action takes on a punitive character and ought to be recognized as “quasi-criminal,” in the Supreme Court’s vagueness usage.

\[179\] 17 U.S.C. § 504(c); see infra Section II.D. 3.
\[180\] For example, in Sony BMG Music Enter. v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010), a recent case involving a challenge to a statutory damages award, the court estimated that a jury’s award of statutory damages of $22,500 per instance of willful infringement amounted to at least a 1500:1 ratio of punitive to compensatory damages. Id. at 112 (suggesting that the figure could rise as high as 32,143:1, based on market pricing of the infringed works). Assuming arguendo that Mr. Tenenbaum was neither willful nor innocent in his infringement, the minimum statutory damages of $750 per infringement would prescribe at least a 50:1 ratio. The $200 minimum award for innocent infringement would have punished Mr. Tenenbaum at more than 13 times the rate of damages actually caused to the plaintiffs.
\[181\] See Alan E. Garfield, The Case for First Amendment Limits on Copyright Law, 35 HOFSTRA L. REV. 1169, 1206 (2007) (describing “high statutory damages awards” as “punitive-like” and suggesting that the prospect of such awards may chill free speech); Celia Goldwag, Note, Copyright Infringement and the First Amendment, 79 COLUM. L. REV. 320, 336 (1979) (“When statutory damages exceed what would be necessary to compensate the copyright holder, they have the effect of penalizing the infringer's speech.”).
\[182\] Where it does not occur, then the appropriate award, and the one a plaintiff should favor, is one for actual damages.
The availability of statutory damages in civil copyright infringement actions presents the worst of both worlds, from a vagueness perspective, as the law imposes an extracompensatory and therefore punitive remedy without supplying the many procedural protections due to criminal defendants. One who would run the risk of criminal penalties of between $750 and $30,000 must ultimately be proved guilty of the pertinent offense beyond a reasonable doubt, whereas statutory damages in copyright suits are available on a more-probable-than-not standard of proof. Moreover, a criminal defendant would have to catch the attention of a prosecutor, who does not him- or herself benefit financially from the windfall of an extracompensatory remedy. The rightsholder can bring a civil suit at his or her own initiative and will likely be more motivated to do so.

3. A Civil Action for Copyright Infringement Does Not Require Proof of Scienter. — Although criminal copyright infringement requires proof of willfulness, copyright infringement is a strict liability action: liability attaches regardless of the infringer’s knowledge or intent. To be sure, the law provides stronger civil remedies

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183 Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964) (describing the measure of damages available under a state civil libel law; noting that “ordinary criminal law safeguards” like “an indictment and proof beyond a reasonable doubt” were not available to the civil defendant; and ultimately characterizing the law as “a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law” (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (internal quotation marks omitted)).


for willful infringement, but all the same, an award of statutory damages is available absent proof of willfulness and even against innocent infringers.

The Copyright Act does make some gestures in the direction of protecting defendants who have acted in good faith. For example, a court may reduce an award of statutory damages to as low as $200 per instance of infringement, if the defendant infringer can establish that he or she “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” Yet this provision sits several removes from a scienter requirement as an element of infringement. The defendant bears the burden of proving innocent infringement of this sort; liability attaches notwithstanding an innocent infringer finding, and the court retains the discretion not to reduce the damages award, whatever evidence the defendant offers on this point. Moreover, the Copyright Act empowers a rightsholder to overcome an innocent infringer defense simply by posting a copyright notice on published content to which the defendant

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187 See 17 U.S.C. § 504(c)(2) (setting a $150,000 ceiling for statutory damage awards in cases where the plaintiff has proved willful infringement); id. § 506 (authorizing criminal prosecution of willful infringement, under certain conditions).
188 Id. § 504(c).
189 Id. § 504(c)(2).
191 Repp, 132 F.3d at 889 (“The fact that infringement is ‘subconscious’ or ‘innocent’ does not affect liability, although it may have some bearing on remedies.”); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998–99 (2d Cir. 1983) (observing that “innocent copying can nevertheless constitute an infringement” (internal quotation marks omitted)).
192 17 U.S.C. § 504(c)(2); Columbia Pictures Indus., Inc. v. Garcia, 966 F. Supp. 770, 772 (N.D. Ill. 1998) (writing that the court would exercise its discretion not to reduce a statutory damages award, “even if Garcia could ‘sustain the burden of proving’ that his infringement was innocent”).
is proved to have had access. \[193\] Courts hold that a plaintiff satisfies the “access” requirement merely by showing that it published a work with the notice affixed to it; the plaintiff need not prove that the defendant personally encountered the notice. \[194\]

Remarkably, a plaintiff’s copyright notice will defeat any sort of innocent infringer defense — even one in which the defendant concedes an awareness that the content was copyrighted and instead interposes a good faith belief that his or her use was fair or not substantially similar to the noticed content. \[195\]

Copyright incorporates a more robust good faith defense that requires a court to remit an award of statutory damages completely, but its availability is substantially more limited: the defendant must have relied on fair use (as opposed to simply believing, say, that his or her work was not substantially similar to the plaintiff’s, or that the plaintiff’s work was in the public domain), and that reliance must have been objectively reasonable. \[196\] Even so, only two categories of infringer are entitled to statutory remittitur on these grounds. First, “an employee or agent of a nonprofit educational institution, library or archives” has the benefit of remittitur, but only when, working in the scope of employment, he or she has infringed by reproducing the plaintiff’s work. \[197\] Second, “a public broadcasting entity” or person “acting as a regular part of the nonprofit activities

\[194\] See Maverick Recording Co. v. Harper, 598 F.3d 193, 198–99 (5th Cir. 2010) (holding that § 402(d) “gives publishers the option to trade the extra burden of providing copyright notice for absolute protection against the innocent infringer defense”); BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005). The “extra burden” described by the Maverick court is, of course, negligible.
\[195\] Alan E. Garfield, Calibrating Copyright Statutory Damages To Promote Speech, 38 Fla. St. L. Rev. 1, 43–44 (2010) (identifying this problem and proposing an appropriate amendment to 17 U.S.C. § 504(c)(2)).
\[196\] 17 U.S.C. § 504(c)(2).
\[197\] Id. § 504(c)(2)(i).
of a public broadcasting entity” can obtain remittitur of damages for infringement by performing or reproducing a transmission of “a published nondramatic literary work.” 198

There is not a reported case that has applied this provision of the Copyright Act to remit statutory damages.

Finally, the infringement action calls for the plaintiff to prove, by evidence direct or circumstantial, that the defendant “actually copied” his or her work. 199 Although inadvertent and even unconscious 200 copying is actionable, the law does hold that an “independently created” work, however similar it might be to copyrighted content, is not infringing. 201 The actual copying element insures the defendant against a situation in which he or she renders expression without any awareness that the plaintiff had done so first. It is of no use to the defendant who acted in good faith but strayed into the infringement zone for other reasons.

Thus, although copyright is not entirely insensitive to the concept of the good faith or innocent infringer, that sensitivity is reflected in an odd patchwork of very limited exceptions to the general rule of strict infringement liability. These indulgences

198 Id. § 504(c)(2)(ii).
199 E.g., Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 57, 63 (2d Cir. 2010); Situation Mgmt. Sys., Inc. v. ASP Consulting LLC, 560 F.3d 53, 58 (1st Cir 2009) (citing Feist Pub’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). See also supra note 127 (discussing the “access + substantial similarity” avenue to proof of actual copying by circumstantial evidence).
200 ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998–99 (2d Cir. 1983) (affirming a liability finding against the defendant songwriter et al. notwithstanding a claim that the infringing song’s substantial similarity to a preexisting work was “subconscious”) (citing, inter alia, 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.08 (1983) (“Innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personalty.”)).
201 E.g., Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169 (7th Cir. 1997) (“The Copyright Act forbids only copying; if independent creation results in an identical work, the creator of that work is free to sell it.”); Grubb v. KMS Patriots, L.P., 88 F.3d 1, 3 (1st Cir. 1996).
ought to be unsatisfying to a court looking for a *scienter* requirement to rebuff a constitutional vagueness challenge.

III. **VAGUENESS REVIEW AS A PATHWAY TO COPYRIGHT REFORM**

If we accept that copyright law (that is, the Copyright Act, taken together with its supporting common law doctrines and judicial interpretations) does not provide adequate notice to speakers; that it may often chill speech; indeed, that it is at least “colloquially vague” — the next question is, of course, what to do about it. I argue in Section A of this Part that courts are not likely to invalidate the Copyright Act for its vagueness. Nor is this necessarily an attractive or constructive result. Moreover, in Section B I explain that there is little that lawmakers can do to cure the notice failure that inheres in the copyright infringement action, generally, or for that matter in the rescue doctrines — fair use and substantial similarity/idea v. expression — that do the work of resolving copyright’s First Amendment overbreadth problem.

All that said, the vagueness doctrine, taken in its entirety, with reference to the collateral factors that courts routinely apply in the course of their constitutional review — may nonetheless point the way to meaningful reform of the copyright laws. Although application of these collateral factors to copyright law only amplifies the constitutional concerns I have raised above, the factors also point the way to meaningful reforms (discussed in Section C) that will reduce the consequences of notice failure for speakers and thereby mitigate copyright’s chilling effects on lawful speech.

**A. The Unlikely Prospect of Voiding Copyright Law for Vagueness.**

Invalidating the Copyright Act, or even severing any of its especially problematic components, is an unlikely step for any court to take. The one judge that has been asked
to consider the question, Judge Patel in *Aharonian v. Gonzales*,\(^\text{202}\) refused to take it up. In *Aharonian*, the *pro se* plaintiff, a self-styled “champion [of] the American public’s interests in improving the quality of . . . copyrights,” petitioned the district court to excise computer code from the corpus of content subject to protection under the Copyright Act.\(^\text{203}\) Aharonian argued that § 102(b) of the Copyright Act, which distinguishes copyrightable “expression” from “ideas,” was unconstitutionally vague as applied to software.\(^\text{204}\) Aharonian quoted Judge Hand’s observation that “the test for infringement . . . is of necessity vague,”\(^\text{205}\) and he wrote as well that the copyright laws implicate free expression and in some instances even criminalize speech.\(^\text{206}\)

For her part, Judge Patel found an “out” in the *Aharonian* case: she took refuge in the vagueness that inheres in the void-for-vagueness doctrine itself. Describing Aharonian’s argument as “strange,” Judge Patel pronounced that “[t]he fact that the test is necessarily somewhat vague does not mean that it is unconstitutionally so.”\(^\text{207}\) In support of that conclusion Judge Patel relied on the proposition — very often cited in cases where courts sustain laws against a void-for-vagueness challenge\(^\text{208}\) — that all laws are to some


\(^{203}\) See *id.* at *1.*

\(^{204}\) *Id.* at *6.*

\(^{205}\) *Id.* at *7* (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (internal quotation marks omitted)).

\(^{206}\) *Id.* at *6–*7 (citing 17 U.S.C. § 506 (criminal liability), and *Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003) (reconciling copyright values to the First Amendment)).

\(^{207}\) *Id.*

Against Aharonian’s arguments about copyright’s particular susceptibility to case-by-case application, Judge Patel wrote that uncertainty in the law “is a bedrock assumption of our common law system.” Of course, no one can dispute that all laws carry some inherent vagueness, or that the Constitution should admit the possibility of “a certain degree” of after-the-fact judicial interpretation. The question is whether, in light of the fact that copyright burdens free expression — a fact that considerably narrows the ability of lawmakers to cede application and interpretation to post hoc litigation — the amount of post hoc interpretation it admits goes beyond that “certain degree.” Judge Patel ruled, without any real discussion of why, that it does not.

Judge Patel did write, in support of copyright, that it “works in tandem with the First Amendment to further expression.” If we accept that copyright serves as an “engine of free expression” even as it restricts it, then the applicability of the “burdens a constitutionally protected right” collateral factor is surely reduced. This fact may indeed call for a court to put a thumb on the scale in favor of upholding the law. More to the point, it may allow a court to tolerate a greater degree of ex ante uncertainty in its vagueness review than it otherwise might. This assumes, however, that the court is in a position to apply a meaningful vagueness standard to a colloquially or “somewhat” vague extent vague.

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210 Id.

211 See supra Section I.D. 1. It is noteworthy that the several examples of “necessarily broad” terms that Judge Patel invoked in support of allowing post hoc interpretation — “due process of law,” “obvious,” and “restraint of trade,” Aharonian, 2006 WL 13067, at *6 (citing U.S. CONST. amend. V, 35 U.S.C. § 103(a) (patents), and 15 U.S.C. § 1 (Sherman Act), respectively), do not generally have applications that will chill expression.


law in the first place. It assumes that higher courts have supplied the sort of guidance that will allow it to reach a principled answer. In this respect, Judge Patel cannot be faulted for simply deciding the case, without offering doctrinally satisfying review under the void-for vagueness doctrine. To be sure, the Supreme Court cannot be faulted for having fashioned the doctrine in a way that, collateral factors aside, cannot give substantial advance guidance regarding at what point “somewhat vague” becomes too vague.\footnote{Aharonian, 2006 WL 13067, at *6.} Crafting a test of this sort, for application to myriad uncontemplated down-the-line laws, is rather as difficult as determining \textit{ex ante} at what point “similar” works become “substantially similar” — and for the same reasons.\footnote{See supra Section II.C. 1.} As with any doctrine of jurisprudence, legal standards and precedent take a judge only so far. There comes a point where the judge must grit her teeth and decide a case. On this score, the vagueness doctrine (like copyright’s substantial similarity test) is remarkable only for the sheer amount of discretion left to a judge, after he or she steps out from the cover of prior judicial amplification of the legal standard.

Of course, these truths about the vagueness doctrine only explain why Judge Patel’s decision is not satisfying, as a jurisprudential matter. Why she ruled as she did, when she might as easily have come down on the other side of the question, bears a moment of further discussion. At first blush, the reasons for Judge Patel’s decision are apparent. First, Aharonian did not present a compelling constitutional case. The conduct Aharonian described in his declaratory judgment complaint, “the wholesale copying of source code,” fell amply within the zone of conduct any reasonable person would regard
as infringing. Perhaps more importantly, from a constitutional perspective, the conduct alleged by Aharonian was not expressive in nature. In short, Aharonian sought to mount a facial vagueness challenge on the question of copyright’s application to a species of nonexpressive conduct. Second — and the judge herself made note of this — vague as they may be, the copyright laws have considerable historical momentum behind them. Courts have been aware of, and have tolerated, copyright’s notice defects for decades. Although the declaration Aharonian sought was (relatively) narrow in scope — he had only asked the court to rule copyright vague and therefore invalid as applied to software code — the logic he deployed was no less applicable to the several other subjects of copyright. If Judge Patel had accepted Aharonian’s vagueness argument, there would be no basis to distinguish a more general vagueness challenge to copyright. Holding any provision of copyright law void for vagueness would be a grand, disruptive step with significant consequences for the content industries constructed on the current rights

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216 See Aharonian v. Gonzales, Civ. No. 4-5190 MHP, 2006 WL 13067, at *7 (“While it may be that certain prohibitions by the copyright laws are in tension with the First Amendment, the conduct alleged by plaintiff — the wholesale copying of source code — lies at the core of what copyright law seeks to protect. Thus there is no problem of vagueness or lack of notice in this case.”).


218 Aharonian, 2006 WL 13067, at *7 (referring to the “complexity” of the idea/expression dichotomy as “a commonplace of copyright jurisprudence”).

219 E.g., Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 57, 63 (2d Cir. 2010); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

framework. A court would not take such a step without good reason, and Aharonian, for his part, did not supply one.

Even assuming a set of facts more friendly to a constitutional challenge — say, a defendant’s documented good-faith reliance on a fair use defense, against infringement claims brought by a plaintiff whose apparent motive in suing was to suppress the defendant’s political speech — it is unlikely that any court would rule any differently than Judge Patel did. A judge taking due consideration of the politics that attend the question of copyright’s constitutionality will be inclined to rule conservatively, and the case law will provide all the cover he or she needs to reject a vagueness challenge, however well-argued, and whatever the equities of the case may be. This much is apparent from the Eldred case, wherein the Court declined to engage in any serious review of the plaintiff’s argument of overbreadth. Given the likely reluctance of courts to invalidate all or even some of the Copyright Act’s vague prescriptions — and accepting as well that their reluctance would reflect a well-reasoned view that invalidation would indeed be an extreme and not very constructive (but surely

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221 Christopher Sprigman, Reform(aliz)ing Copyright, 57 STAN. L. REV. 485, 534 (2004) (arguing that “political considerations” have distracted Congress and the courts from taking a more utilitarian approach to copyright law) (citing WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 403–19 (2003)).
222 Id. at 536 (“[I]t may be difficult just now, considering the result in Eldred, to see exactly how the increasing detachment of U.S. copyright law from its constitutional underpinnings could lead to judicial intervention and invalidation of elements of the law.”).
eyecatching) gesture at solving the vagueness problem — this Article proposes instead to examine the possibility of reform.

**B. The Incurability of Copyright’s Notice Failure**

The most obvious and straightforward approach to correcting copyright’s vagueness problem would be to write more and better definition into the law. And yet it is difficult to see how copyright law could provide more notice to speakers than it does. The copyright infringement action cannot be simplified without shearing off a great number of the law’s top-level, potentially dispositive doctrines. Work-for-hire, originality, copyright duration, the registration requirement, the several use privileges reserved to the public in §§ 108–110 — all of these are instrumental to the copyright scheme. To mark any or all of them for deletion would sacrifice important policy values to make copyright only marginally less vague.

Likewise, little constructive work can be done to ameliorate the inherent vagueness of the rescue doctrines, substantial similarity and fair use. Judge Hand observed not just that the “test for infringement” was vague; he wrote that it was “of necessity vague.” As I have noted, efforts to impose some definition and predictiveness upon substantial similarity have been self-defeating. The cause of this should be obvious: the substantial similarity test is written generally to apply to every claim of infringement of every copyrighted work — thus the range of the rule’s applications is so broad that one must step back to an absurd level of abstraction to capture it all. From that panoramic point of abstraction, little can be said to elaborate

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224 *Peter Pan Fabrics*, 274 F.2d at 489.
substantial similarity other than the bland generalities deferring the question to an ordinary observer’s gut feel. In truth, the only effective way to resolve substantial similarity’s vagueness would be to abandon the doctrine outright in favor of a bright-line rule confining the infringement action to instances in which the defendant exactly copies the plaintiff’s protected work. This approach begs an important question — how to handle the hypothetical case Judge Hand proposes in *Nichols*, wherein a “plagiarist” seeks to “escape” liability by introducing “immaterial variations?”

Courts have interposed the possibility of proof by substantial similarity precisely to address the concern that infringers might game the system in this way. A requirement that the defendant have rendered a literal, perfect copy of a work would accomplish a radical reorientation of proprietary rights and public privileges — again exchanging longstanding policy values, to address just one of copyright’s several pockets of vagueness.

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*Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223, 228 (2006) (“In this respect, copyright infringement cases are unique, for it is impossible to say how much taking is too much without reference to the specific works at issue.”).

226 *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

227 See, e.g., *id.*, 4 NIMMER & NIMMER, supra note 113, § 13.03; *see also Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 n.25 (11th Cir. 1996); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1234 (3d Cir. 1986).

228 Theoretically, a court might extend an infringement claim to the plaintiff who shows only *de minimis* differences and establishes by a preponderance of the evidence that the variations were introduced simply to provide a litigation buffer between the two works. But this model is *Nichols* all over again. The mere fact that a defendant sought to construct such a buffer, to make his or her work noninfringing, should not be enough to incur liability, without a further showing that the defendant otherwise misappropriated the plaintiff’s work. Absent recourse to a standard for liability that turns on the defendant’s intentions as to the plaintiff’s work — and this is not featured in the civil infringement action, as presently configured, *see supra* Section II.D. 3. — we can only draw our conclusions about misappropriation based on the extent of similarity between the works in question.
Any attempt to bring greater definition to fair use would not be constructive, either, in the respect that it would likely only trade a vagueness problem for overbreadth. Viewed from one perspective, fair use’s vagueness is speech-supportive. Rather than settle into law an array of specific, approved uses of copyrighted content, as most foreign jurisdictions have done, U.S. law accepts the possibility that the public might identify reasonable uses of copyrighted content that lawmakers had not contemplated and approved. But of course, the flipside of this open-endedness is vagueness. We do not know what uncontemplated uses are fair until a court has ratified them. As to uses that the law clearly does contemplate — “criticism, comment, news reporting, teaching . . . , scholarship, and research” — the nature and extent of the use passable as fair is necessarily context-dependent. It is not surprising that efforts to generate extrajudicial guidelines in these contemplated areas have been only limitedly successful. Guidelines may fall short of serviceable due to their failure to obtain buy-in from both publishers and

233 Balganesh, supra note 231, at 1616–17 (“Incentives tend to vary from one inventor or creator to another or one area of application to another, necessitating significant contextual fine-tuning.”); Frank Pasquale, Copyright in an Era of Information Overload: Toward the Privileging of Categorizers, 60 VAND. L. REV. 135, 153 n.78 (2007) (“The fair use test codified in 17 U.S.C. § 107 is more a standard than a rule, left deliberately open-ended in order to permit contextual judgment to trump mechanical pigeonholing of cases.”).
users,\textsuperscript{234} and — more to the point — because the very concept of specific guidance is irreconcilable with the law’s formative and persistent understanding of fair use as an “equitable rule of reason.”\textsuperscript{235}

This is not to suggest that more cannot be done to bring clarity to the fair use defense. Efforts by commentators to systematize the doctrine from the jumble of cases in the Federal Reporters allow us to distill principles from the precedent and extrapolate from them.\textsuperscript{236} And of course the law designates certain uses of content as \textit{per se} reasonable and defensible.\textsuperscript{237} It is important to note, however, that these \textit{per se} privileged uses are not themselves denominated as “fair,” and so although they offer the relief of the bright-line rule and express something about Congress’s intention to balance proprietary rights and public privileges, ultimately they do very little to inform us about the fair use defense in particular.\textsuperscript{238} And finally, Congress could always go the further step of

\textsuperscript{234} See, \textit{e.g.}, \textsc{The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use} (1999) (setting forth the findings of a joint undertaking by publisher and user constituencies to devise agreed guidelines for educational fair use of published content — and describing several areas in which the parties failed to reach agreement); \textit{see also} Jason Mazzone, \textit{Administering Fair Use}, 51 \textsc{Wm \& Mary L. Rev.} 395, 423 (2009) (describing unilateral efforts by librarians and documentary filmmakers to articulate fair use guidelines, without publishers’ input).


\textsuperscript{236} \textit{See generally} \textsc{William Patry, Patry on Fair Use} (2010); Pamela Samuelson, \textit{Unbundling Fair Uses}, 77 \textsc{Fordham L. Rev.} 2537 (2009).

\textsuperscript{237} \textit{See, e.g.}, statutes cited \textit{supra} note 107.

\textsuperscript{238} \textit{E.g.}, 17 \textsc{U.S.C.} \textsection 108(f) (limited preservation and distribution rights of libraries and archives) (“Nothing in this section . . . in any way affects the right of fair use as provided by section 107 . . . .”).
codifying certain core uses it deems fair and reasonable, regarding of whether content industry and user interest constituencies can themselves reach agreement on these questions. Notwithstanding these opportunities, whatever commentators and Congress do to describe a heartland of fair use values, an open-ended fair use defense will by definition remain indeterminate at the margins, with the result that the boundary between fair and infringing uses of copyrighted content will remain altogether unmarked.

In short, copyright law accepts as a fundamental premise, in a way that other, category-based content regulations do not, that its restrictions will be applied flexibly, on a case-by-case basis, and with due attendance to circumstances. Introducing bright-line rules to supply greater advance notice to speakers would subvert many of copyright’s objectives.

C. Copyright’s Answer to a Vagueness Challenge: A Three-Tiered Remedies Model Keyed to Level of Fault.

Based on the analysis set forth above, we can draw the following conclusions about the copyright infringement action, with respect to the void-for vagueness doctrine: (1) copyright infringement claims are fraught with complexity and uncertainty, even — and arguably, especially — in the aspects of law that are said to salvage copyright from

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240 See supra note 234.

241 Balganesh, supra note 231, at 1616–17 (suggesting that the “innumerable vague standards” of copyright are “largely beneficial,” because “[s]tandards enable courts to calibrate the scope of the entitlement to its underlying purpose and function”); McJohn, supra note 135, at 347 (arguing that the “very vagueness of the test” for infringement allows courts to write law that “balances a number of competing policies”).

242 To be sure, there are areas of copyright law in which some greater clarity could be more easily achieved. Most notably, lawmakers could write reform provisions that settle what works are in the public domain.
challenges of First Amendment overbreadth; (2) copyright regulates expression; (3) the civil infringement claim\textsuperscript{243} is quasi-criminal in nature; and (4) defendants do not have the benefit of a \textit{scienter} buffer to insulate them from civil liability when they act in good faith. It is clear that something has to give. Given that little can be done to alleviate pathologies (1) and (2), lawmakers may best address copyright’s vagueness problem by turning their attention to statutory damages and the lack of a \textit{scienter} requirement for infringement.

Accordingly, this Article proposes that copyright law adopt a three-tiered remedy structure for cases in which the subject of an infringement action is the defendant’s expression, leaving the current remedy structure in place for all other infringement suits. The law would differentiate between cases brought against pure nonexpressive conduct — for example, reproduction of software, trafficking in counterfeited works or the wholesale copying of entertainment works purely for consumptive purposes — and cases in which the allegedly infringing conduct carries some quantum, however small, of the defendant’s own expression. Concededly, a suggestion that we might bifurcate remedies schemes around the question of expression/ nonexpression opens up a further litigation point in an already complicated area of law. That said, such a model promises a net gain, from a vagueness perspective, as the reformed law would take steps to mitigate the effects of copyright’s indeterminacy where they are most consequential — \textit{i.e.}, where they burden speech, rather than “purely economic” activity.\textsuperscript{244}

\textsuperscript{243} As I have noted, copyright’s criminal provisions are enforceable only against willful infringers, \textit{see} 17 U.S.C. § 506; 18 U.S.C. § 2319, and so likely do not offend due process. \textit{See} cases cited \textit{supra} note 65.

\textsuperscript{244} \textit{E.g.}, \textit{Smith v. Goguen}, 415 U.S. 566, 573 & n.10 (1974).
The proposed remedies structure for infringement claims brought against a defendant’s expression is as follows:

First, strict liability will remain the standard for obtaining injunctive relief. Second a plaintiff must establish some amount of culpability, likely negligence, in order to recover any damages at all in an infringement action. Third, a plaintiff may not elect statutory damages without first showing willfulness.

1. **Strict Liability for Injunctive Relief.** — The Copyright Act authorizes courts to “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”245 Such relief, in and of itself, is not a matter of concern, from the standpoint of the vagueness doctrine. In an injunction case, the defendant who has strayed quite by accident into the enforcement zone will encounter only an instruction from the court ordering that he or she take appropriate steps to cease and desist from the conduct deemed to be infringing. So long as the injunction itself (violation of which may of course subject the defendant to penalties) is not vague,246 the legal risk that copyright’s uncertainty shifts onto speakers has negligible vagueness doctrine significance. The injunction does not deprive the defendant of a liberty interest

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246 See, e.g., *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001) (quoting Federal Rule of Civil Procedure 65(d)’s requirement that “[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained”); *Met. Opera Ass’n, Inc. v. Local 100, Hotel Employees & Restaurant Employees Int’l Union*, 239 F.3d 172, 178–79 (2d Cir. 2001) (dissolving a preliminary injunction on vagueness grounds).
he or she otherwise had; nor does he or she forfeit property as a result of the law’s vagueness.\textsuperscript{247} 

Put another way, an injunction is not remotely the sort of criminal or quasi-criminal remedy that commands the closest vagueness scrutiny; nor is it even as consequential, for purposes of the vagueness doctrine, as a civil claim for actual damages.\textsuperscript{248} The constitutionally offensive “hallmarks” of a vague law, which I have discussed above,\textsuperscript{249} do not obtain where the remedy for a violation is a go-no-further injunction. There is no notice failure, and a law does not “trap the innocent for not providing fair warning”\textsuperscript{250} — the injunction supplies said notice and accomplishes the warning. Nor can the prospect of an injunction, standing alone, be said to have a chilling effect on speech, as the court’s entry of the injunction supplies a defendant with a final opportunity to turn back before he or she incurs any real penalty. At least where the remedy is exclusively injunctive relief, the defendant is eligible for a “mulligan.” All that

\textsuperscript{247} To be sure, a defendant may incur reliance costs by guessing wrong — for example, by sinking costs into the print edition of a work that is subsequently enjoined. But these costs are circumstantial and attenuated by at least one remove from the actual remedy, which cannot be said in and of itself to deprive the defendant of a property interest.\textsuperscript{248} I do not mean to understate the dangers that injunctions pose to free speech; indeed, in its holding in the Pentagon Papers case the Supreme Court suggested that a prior restraint poses a greater danger to First Amendment values than the threat of criminal prosecution — or even the realization of that threat. \textit{New York Times Co. v. United States}, 403 U.S. 713 (1971) (holding that the government could not invoke the espionage laws to effect a prior restraint on publication of the Pentagon Papers, while concurring justices suggested that post-publication prosecution of the \textit{Times} remained a viable option). And one can easily imagine instances in which a copyright infringement plaintiff obtains an injunction to achieve a censorious purpose. I only mean to argue that in cases like these the injunctions are objectionable, from a free speech standpoint, for reasons other than that they issued under a vague law, and recourse to the vagueness doctrine is not the appropriate means for addressing the problem.\textsuperscript{249} See supra Section I.A.\textsuperscript{250} \textit{Grayned v. City of Rockford}, 408 U.S. 104, 108 (1972); see also \textit{City of Chicago v. Morales}, 527 U.S. 41, 58 (1998).
said, a vague law that authorizes injunctive relief arguably delegates an excess of
authority to courts, who are given substantial latitude to create case-specific law.\textsuperscript{251} For
their part, however, judges tend to think rather highly of their colleagues’ capacity to
exercise broad discretion appropriately.\textsuperscript{252}

2. \textit{Fault Requirement/ Negligence for Actual Damages.} — When a plaintiff
seeks compensation for damages as a result of infringement, he or she should be required
to show that the defendant acted at least negligently with regard to the plaintiff’s
proprietary rights. Such an approach would have the virtue of introducing free speech
protections equivalent to what the Supreme Court fashioned for defendants in \textit{New York
Times Co. v. Sullivan}\textsuperscript{253} and \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{254}, its landmark cases on
defamation and the First Amendment.\textsuperscript{255} After all, among regulations of expressive
content, the copyright infringement action is most similar in nature to a defamation
action: both laws are enforced civilly by private litigants to vindicate injured private
interests. And yet in marked contrast to copyright’s tradition of strict liability,

\textsuperscript{251} \textit{See Walker v. City of Birmingham}, 388 U.S. 307, 316 (1967) (expressing vagueness
concerns about a municipal ordinance, on the basis of which the city obtained an
injunction against demonstrations).

\textsuperscript{252} \textit{Id.} at 318 (rejecting petitioners’ attempts to overturn criminal contempt findings for
violating the injunction, in part on the ground that the injunction issued \textit{ex parte}, and “if
the court had been presented with the petitioners’ contentions, it might well have
dissolved or at least modified its order in some respects”); \textit{see also supra} note 23.

\textsuperscript{253} 376 U.S. 254 (1964).

\textsuperscript{254} 418 U.S. 323 (1974).

\textsuperscript{255} \textit{Compare Buck}, 283 U.S. at 198–99 (“Intention to infringe is not essential under the
[Copyright A]ct.”), \textit{with, e.g., Gertz}, 418 U.S. at 347 (holding that state tort law
provisions for defamation may “not impose liability without fault”).
defamation liability does not adhere unless the plaintiff can prove some measure of fault on the part of the defendant in uttering his or her false statement.\footnote{256}

To be sure, the \textit{Sullivan} and \textit{Gertz} Courts did not name-check the vagueness doctrine in announcing their fault requirements, as strictly speaking, defamation’s uncertainty problem does not lie specifically in the elements of the tort. The elements accomplish the line-drawing between protected and prohibited conduct adequately enough; rather, defamation liability raises constitutional concerns because it positions a speaker to stray into the zone of liability based on a mistake of fact as to whether a given statement he or she proposes to make is true.\footnote{257} The overarching concern is, however, the same as in copyright: the defamation action admits the sort of uncertainty that, if strict liability obtains, will chill free expression.\footnote{258} Accordingly, the Supreme Court ruled in \textit{Gertz} that strict defamation liability even for compensatory damages offends the First Amendment. In the case of copyright, where uncertainty is much more substantial and pervasive — infecting the law’s very definition of what is and is not lawful speech — one would expect the Supreme Court’s defamation logic to apply \textit{a fortiori}.\footnote{259}

\footnote{256}The extent of fault required of course varies based on whether the plaintiff is a public figure. \textit{See New York Times, Inc. v. Sullivan}, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment requires a defamation plaintiff who is a public figure to prove “actual malice,” \textit{i.e.}, that the defendant uttered a false statement “with knowledge that it was false or with reckless disregard of whether it was false of not”); \textit{see also Gertz}, 418 U.S. at 347 (allowing the several states to specify their own levels of fault for defamation of nonpublic figures, provided that, at a minimum, they require a showing of negligence).

\footnote{257}In this respect the falsity element of defamation poses the same problem as the question whether a given work is in the public domain. \textit{See supra} text accompanying notes 115–120.

\footnote{258}\textit{E.g.}, \textit{Gertz}, 418 U.S. at 340–41 (“Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”).

\footnote{259}Again, \textit{see supra} note 149, one could argue that defamation law’s concessions to the First Amendment mean principally to protect high-value speech of public interest,
The *Gertz* fault requirement is generally read to require, at a minimum, proof of negligence as to the truth of the defendant’s statement about the plaintiff, and so it falls well short of willfulness or *scienter* on the continuum of culpability. How the ordinary “duty and breach” tort law construct of negligence might apply to the truth element of a defamation claim is not immediately obvious, but the *Restatement (Second) of Torts* suggests two alternative formulations of the tests:

Insofar as the truth or falsity of the defamatory statement is concerned, the question of negligence has sometimes been expressed in terms of the defendant’s state of mind by asking whether he had reasonable grounds for believing that the communication was true. Putting the question in terms of conduct is to ask whether the defendant acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.

Under the “state of mind” model of negligence, a plaintiff in a copyright case could obtain actual damages only by showing that the defendant lacked reasonable grounds for

whereas the Supreme Court has downgraded the First Amendment value of using “other people’s speeches.” *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003). However, the apt analogy to draw between defamation and copyright infringement is not between speech of public interest and other people’s speeches — it is between falsehood and other people’s speeches, either of which may involve matters of public interest. *Compare Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974) (Although the erroneous statement of fact is not worthy of constitutional protection, . . . [t]he First Amendment requires that we protect some falsehood in order to protect speech that matters”), *with Eldred*, 537 U.S. at 191.

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260 2 DAN B. DOBBS, THE LAW OF TORTS § 491, at 1179 (2001) (“The states have overwhelmingly adopted negligence as the standard of fault to be required where a private person sues.”); see also, e.g., *Denver Area Educ. Telecomm. Consortium, Ind. v. Fed. Comm. Comm’n*, 518 U.S. 727, 741 (1996) (describing the *Gertz* holding as “allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (Burger, J., concurring) (“In *Gertz* . . . a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood.”); *Gertz*, 418 U.S. at 353–54 (Blackmun, J., concurring) (“[I]n that the Court now conditions a libel action by a private person upon a showing of negligence, . . . I am willing to join . . . the Court’s opinion and its judgment . . . .

261 *RESTATEMENT (SECOND) OF TORTS* § 580B, cmt. g (“The negligence standard”).
concluding that his or her expression was noninfringing.\textsuperscript{262} The latter, “conduct”-based form of negligence inquiry would have damages liability turn on whether the defendant “acted reasonably” in adjudging whether or not he or she infringed.\textsuperscript{263}

3. Willfulness Requirement for Statutory Damages. — Finally, awards of statutory damages should be confined to cases in which a plaintiff has shown willfulness. The reason for this is straightforward: it is in (1) the award of extracompensatory damages, (2) against instances of defendant expression, (3) without a \textit{scienter} requirement, that copyright’s vagueness is most problematic, constitutionally. All three of the collateral factors point to a constitutional violation. The protections owed to defendants in civil infringement suits for statutory damages, brought on a preponderance of the evidence standard of proof against expressive conduct, must therefore be significant. The concept of willfulness, already integrated into copyright as the state-of-mind predicate for criminal penalties and \textit{increased} statutory damages,\textsuperscript{264} is not alien or inapposite to the infringement action. Courts would simply apply it more broadly in actions for statutory damages.

A willfulness requirement for statutory damages is more difficult to square with copyright’s publication tort analogue, defamation law. The \textit{Gertz} Court did hold that in defamation cases a court cannot constitutionally presume damages (as the plaintiff’s right

\textsuperscript{262} \textit{Cf.}, \textit{e.g.}, \textit{Am. Future Sys., Inc. v. Better Business Bureau of Eastern Pa.}, 923 A.2d 389, 397 (Pa. 2007) (endorsing a negligence test for defamation claims by which the plaintiff must show the defendant had “no reasonable grounds to believe the defamatory matter was true”); \textit{Winn v. United Press Int’l}, 938 F. Supp. 39, 43 (D.D.C. 1996) (“lacked reasonable grounds for such belief”) (applying Virginia law).

\textsuperscript{263} \textit{Cf. Winn}, 938 F. Supp. at 39, 43, 44–46 (holding that the defendant did not act unreasonably in republishing an untrue statement from a reputable source that was not, on its face improbable).

\textsuperscript{264} \textit{See} 17 U.S.C. §§ 504(c)(2), 506; \textit{R.W. Beck, Inc. v. E3 Consulting, LLC}, 577 F.3d 1133, 1148 (10\textsuperscript{th} Cir. 2009).
to elect statutory damages allows) or award punitive damages (as statutory damages typically are, when elected) absent a showing of actual malice — *i.e.*, actual knowledge of untruth or reckless disregard for truth.\(^{265}\) Given this holding, a willfulness requirement for statutory damages, the primary purposes of which are to punish and deter infringement and to spare the plaintiff the difficulty of proving actual damages,\(^ {266}\) seems all the more appropriate in the copyright setting. However, a subsequent Supreme Court decision, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,\(^ {267}\) narrowed the *Gertz* holding, ruling that in cases not involving matters of public concern, an award of presumed or punitive damages does not require proof actual malice.\(^ {268}\)

*Dun & Bradstreet*’s defamation ruling notwithstanding, a specification of willfulness for statutory damages is more consistent with vagueness doctrine values, by which the Constitution commands that greater protections be given to defendants as the consequences of violating the law grow more severe (and specifically, as they cross over from civil to quasi-criminal and criminal). Lawmakers could choose to bring copyright in line with the Supreme Court’s public/private treatment of defamation in *Dun & Bradstreet* and *Gertz*, by requiring a showing of willful infringement, when the content of the defendant’s expression involves a matter of public concern, and accepting simple negligence otherwise. Of course, to obtain complete congruence with defamation law,


\(^{266}\) See text accompanying notes 176–178 (punish and deter); 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1170 (1994) (“Since actual damages and profits frequently are difficult to prove, the Copyright Act provides for minimum and maximum statutory damages.”).


\(^{268}\) Three justices so held in a plurality opinion, *see id.* at 761, and two others wrote separate decisions suggesting that would overruled *Gertz* outright, *see id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).
one would be required to take account of *New York Times Co. v. Sullivan*\(^{269}\) and set down a willfulness standard for any damages in infringement suits targeting expression of public concern. The end result of this parsing would be that willfulness would be required to obtain actual or statutory damages in public concern cases, whereas negligence would supply a sufficient predicate for damages of either sort in all others. The law would draw no principled distinction between cases warranting statutory damages and those for which actual damages are adequate, a result that would nullify the effect of the vagueness doctrine’s “criminal/ quasi-criminal remedies” collateral factor. Thus it would seem most consistent with the vagueness doctrine — and at the same time introduce less confusion and disruption into the civil action for infringement — to abandon the public/private distinction outright and require willfulness for statutory damages and negligence for actual damages.

**D. The Rightsholder’s Complaint**

A rightsholder might protest that the reform proposed above abrogates the longstanding principle that intention is irrelevant to infringement,\(^{270}\) and that, in contrast to review of criminal laws (or civil regulations), the cost of steps taken to resolve the vagueness of a civil claim is borne by private parties — in this case, the rightsholders, who find their grants of exclusivity diluted and devalued.\(^{271}\) After all, whatever an infringer intended, his or her acts are undertaken in derogation of a property right — often (if not always) with economic losses to the rightsholder. But in the reform model set forth above, strict liability would still adhere to the extent the plaintiff would be

\(^{269}\) 376 U.S. 254 (1964).


\(^{271}\) See Balganesh, *supra* note 231, at 1617; *see also supra* note 241.
satisfied with an injunction. Accordingly, the introduction of state-of-mind requirements for compensatory and punitive damages does not require a rightsholder to endure the consequences of ongoing expression that innocently infringes his or her rights. For that matter, given that the current remedies structure would remain in place for instances of counterfeiting, piracy, and consumptive infringement (among other infringing conduct in which defendants cannot claim an expressive stake), rightsholders could tackle the conduct that is of greatest commercial concern on the same terms as they do now.

Of course, reforms undertaken to protect defendant speakers necessarily reduce the value of a plaintiff’s copyright. Indeed, it has been suggested that the chilling effect of copyright’s vague standards is in fact attractive because it supplies a further creative motivation to authors “who need incentives in excess of [copyright’s] curtailed entitlement.”272 However, in the zero-sum game of private rights v. public privileges, these benefits of legal uncertainty accrue to creators at the expense of public expressive rights. While it is true that copyright’s incentive scheme has constitutional status just as free expression does,273 and courts have embraced the view that the grant of proprietary rights in fact promotes free expression,274 it does not follow that the public should absorb the consequences of a vague law, simply because vagueness might serve to support the law’s purpose. Indeterminacy will always serve to amplify the restrictive effect of a speech regulation and thereby advance that law’s purposes. In copyright’s case, the vast majority of freely uttered speech is not “fixed in a tangible medium of expression,” and still less speech is commercially exploited — with the result that the service copyright

272 Balganesh, supra note 231, at 1617.
274 See, e.g., Harper & Row, 471 U.S. at 558.
provides as “engine” of expression is rather limited and probably overemphasized in the case law. More importantly, for our purposes, the Constitution only empowers Congress to enact property-based schemes to “promote the Progress . . . of the Sciences;” the First Amendment commands that Congress refrain from infringing the right of free speech.\footnote{Compare U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have power . . . .”), with id. amend. I (“Congress shall make no law . . . .”).}

IV. CONCLUSION

This Article does not claim to supply a definitive answer to the question whether copyright law is unconstitutionally vague. Given the nature of the void-for-vagueness doctrine, there probably is no definitive answer, other than that to which five or more agreeable Supreme Court Justices subscribe and so extend the force of law. Surely, though, a vagueness challenge to copyright holds a great deal more constitutional substance than Judge Patel was willing to recognize in the \textit{Aharonian} case. Courts and commentators accept that copyright’s speech-protective doctrines, namely, substantial similarity/idea v. expression and fair use, are vague by necessity. It seems fair to argue, further, that copyright is so thickly thatched with complicated, potentially dispositive legal issues as to raise vagueness questions about the infringement action generally.

Whether or not copyright’s vagueness problem lands it on the wrong side of the Constitution, there is indeed a problem, it is constitutional in nature, and the Supreme Court’s teachings on the vagueness doctrine point the way to worthwhile reforms. Concededly, the Court’s writings on vagueness \textit{qua} vagueness have historically been vague. This probably cannot be helped, and the same is largely true of copyright’s vagueness: vagueness persists in the law either because it advances another First Amendment value (as with fair use), or because it has proven to be an unshakeable side
effect of core copyright policy (idea v. expression, substantial similarity). But the Court’s vagueness cases do offer some concrete guidance in the form of the three collateral factors: specifically, the void-for-vagueness doctrine looks askance at laws that burden free speech, are criminal or quasi-criminal, and do not admit a \textit{scienter} requirement. As to all three of these important collateral factors, the civil copyright infringement action, in its current (and longstanding) configuration, comes up wanting.

If, as I argue here, the vagueness itself is so ingrained in copyright that the law cannot be cured of it, it follows that we should look to the collateral factors for ways to mitigate the constitutional consequences of vagueness. A most radical approach to vindicating the vagueness doctrine would do away with copyright’s provision for statutory damages altogether and impose a strict requirement that a plaintiff prove willful infringement in order to establish a right to actual damages. Indeed, the vagueness doctrine — for all we know about how the collateral factors interrelate with a given law’s measure of uncertainty — might well require this result. This Article proposes a more measured approach that does less violence to copyright’s current balancing of private rights and public privileges (right or wrong, as it is) and incorporates as applicable the wisdom of the Supreme Court’s defamation jurisprudence. On these grounds, this approach, which would retain strict liability for claims for injunctive relief while requiring proof of negligence for actual damages and willfulness for statutory damages, is more likely to appeal to lawmakers.

To date the courts have deflected questions about copyright’s constitutionality with the incantation that copyright itself incorporates protections that do the work of reconciling the law’s restrictions on speech to the First Amendment. Even if we take the
courts at their word, there remains the problem that these protections do next to nothing

*ex ante* to clarify what expression copyright protects and forbids. One cannot know

whether the three-tiered infringement action proposed here is constitutionally necessary,
or for that matter whether it would be sufficient to save the civil infringement claim from

the void-for-vagueness doctrine. That said, it would surely be an improvement on the

existing scheme, which confronts a would-be speaker with an impossible tangle of

unsettled legal issues that directly pertain to his or her right to engage in free speech. It is

small consolation that the law promises determinacy through costly and protracted

litigation, after which, if the speaker guesses right, he or she will have avoided the levy of

a self-consciously punitive award of statutory damages.

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