Civil Procedures for a World of Shared and User-Generated Content

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CIVIL PROCEDURES FOR A WORLD OF SHARED AND USER-GENERATED CONTENT

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I. INTRODUCTION ........................................................................... 912

II. THE SUBSTANCE-PROCEDURE-SUBSTANCE FEEDBACK LOOP ..916
   A. The Interplay of Substance and Procedure............................... 917
   B. The Feedback Loop .............................................................. 918
   C. Descriptive Framework ........................................................ 921

III. FLAWED COPYRIGHT ENFORCEMENT PROCEDURES .......... 922
   A. Direct Enforcement .............................................................. 923
      1. Registration and Statutory Damages: Helping Owners .......... 923
      2. Registration and Statutory Damages: Terrorizing Users ....... 925
   B. Indirect Enforcement ............................................................ 928
      1. Incentives for Overreaching Takedowns .............................. 931
      2. Disincentives for Meritorious Put-Backs ............................. 934
   C. Automated Enforcement ....................................................... 936
      1. Risk of Wholesale Censorship ............................................ 938
      2. Potential for “Fairer” Use ................................................. 940

IV. PATHS TO BETTER COPYRIGHT ENFORCEMENT PROCEDURES .... 945
   A. Procedural Values ............................................................... 945
   B. Normative Framework ........................................................ 947
      1. Participation ...................................................................... 948
      2. Transparency .................................................................... 952
      3. Balanced Accuracy ......................................................... 955

V. CONCLUSION ............................................................................. 957
Scholars often focus on the substance of copyrights as opposed to the procedures used to enforce them. Yet copyright enforcement procedures are at the root of significant overreach and deserve greater attention in academic literature. This Article explores three types of private enforcement procedures: direct enforcement (cease-and-desist practice); indirect enforcement (DMCA takedowns); and automated enforcement (YouTube’s Content ID filtering program). Such procedures can produce a “substance-procedure-substance” feedback loop that causes significant de facto overextensions of copyrights, particularly against those creating and sharing User-Generated Content (UGC). To avoid this feedback, the Article proposes descriptive and normative frameworks aimed towards the creation of better procedures. Looking to the relevant actors, the source of procedures, and the functions of enforcement (the descriptive framework), the Article suggests principles of participation, transparency, and “balanced accuracy” (the normative framework) that might lead to private enforcement procedures that accommodate the reasonable cost and efficiency needs of copyright owners without trampling on UGC.

I. INTRODUCTION

Although my primary research interest is Intellectual Property (IP), I also teach Civil Procedure. As law professors know, what you teach often shapes how you think more broadly about the law. Accordingly, I often find myself looking at IP through a procedural lens. I was therefore struck by two comments, one recent and the other made decades ago. The first was by Professor John Cross, describing the conference that prompted this Article. He said: “So you have an IP right—now what happens?” The comments helped tremendously in the drafting of this Article. I also owe many thanks to my research assistant Drew Sietsma for his speedy and diligent assistance. Any errors or omissions are mine alone.
second was an often-quoted bit of wisdom by Representative John Dingell regarding substance and procedure: “I’ll let you write the substance of a statute, and you let me write the procedure, and I’ll screw you every time.”

In the context of copyright and the internet, these comments resonate deeply. Just as a right without a remedy is empty, Professor Cross’s comment recognizes that a right without enforcement procedures can have little value. Representative Dingell’s comment adds a cautionary note: substantive rights can be enhanced, or undermined, by the procedures attendant to those rights. The same can be said about copyright: the procedures attendant to copyright rights have a huge impact on the effective scope of those rights, making it essential to consider the interplay of substance and procedure as a whole.

Unsurprisingly, some of the hardest-fought legislative battles in copyright have been over private extra-litigation copyright procedures, such as the library and archive exception in Section 108 of the Copyright Act, and the notice-and-takedown procedures in Section 512. Both concern extensive sets of procedures to be followed by private actors such as libraries, archives, and internet service providers (ISPs) regarding copying done by or through these entities. So long as the procedures are followed, substantive rights can be enhanced, or undermined, by the procedures attendant to those rights. The same can be said about copyright: the procedures attendant to copyright rights have a huge impact on the effective scope of those rights, making it essential to consider the interplay of substance and procedure as a whole.


Chief Justice Marshall states in Marbury v. Madison, “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.” 5 U.S. (1 Cranch) 137, 147 (1803) (citing 3 William Blackstone, Commentaries *109); see also Sonja B. Starr, Sentence Reduction as a Remedy for Prosecutorial Misconduct, 97 Geo. L.J. 1509, 1532 (2009) (“At least since Marbury v. Madison, U.S. constitutional cases have often invoked the maxim that there is no right without a remedy.”).

See Sternlight, supra note 3, at 15 (“Substance without procedure can be useless. The best laws in the world are meaningless unless they can be meaningfully enforced.”).


copyright liability is eliminated or minimized. Although each of these statutes directly affects the scope of substantive copyright rights, they also provide detailed procedures and practices that guide conduct far beyond the courtroom.

This Article focuses on a key subset of extra-litigation procedures, i.e., practices that govern matters outside of a courtroom, but nonetheless have a significant impact on the scope of substantive rights. Such issues are important, and bear more attention in scholarship. Rochelle Dreyfuss points out a gap between those studying IP and procedure: “Both civil procedure and intellectual property involve highly complex bodies of law, known mainly by very specialized and largely separate constituencies.”

Lorelei Ritchie notes that even courts “have tended to overlook . . . synergies” between IP and civil procedure, resulting in “missed opportunities” and “judicial mistakes.” Edward Lee notes that IP scholars tend to ignore “informal practices” that serve as gap-fillers in copyright.

These admonitions are well-taken. This Article suggests that many of the problems faced by online users stem not just from overly broad substantive copyright rights, but also by flawed private enforcement procedures that disproportionately impact those who create and share user-generated content (UGC).

UGC consists of a huge variety of online content created and posted online by users of video sites like YouTube, photo-sharing sites like Flickr, and social-networking sites like Facebook. Not constitute infringement); id. § 512 (providing safe harbors where service providers are not monetarily liable for copyright infringement).


11 Edward Lee, Warming Up to User-Generated Content, 2008 U. ILL. L. REV. 1459, 1468–69. Lee’s article is to some extent the flip side of issues discussed here. Whereas this Article focuses primarily on enforcement procedures used by the copyright owner, Lee’s focus is primarily on the gap-filling role served by third-party uses that lack permission via law or express license. See id. at 1472–73.

12 See, e.g., id. at 1538–39 (noting that “[t]oo much copyright scholarship has focused on formal copyright law,” and that “informal practices” are “all but ignored in copyright scholarship”).


14 UGC is an increasingly active area of scholarly commentary. See, e.g., Daniel Gervais, The Tangled Web of UGC: Making Copyright Sense of User-Generated Content, 11 VAND. J. ENT. & TECH. L. 841, 857–60 (2009) (proposing taxonomy for UGC); Steven Hetcher, User-Generated Content and the Future of Copyright: Part Two – Agreements Between Users and Mega-Sites, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829 (2008) (discussing ownership of UGC); Greg Lastowka, User-Generated Content and Virtual Worlds, 10 VAND. J. ENT. & TECH. L. 893 (2008) (discussing UGC used in virtual worlds); Rebecca Tushnet, User-Generated Discontent: Transformation in Practice, 31
This Article discusses three major types of private enforcement that can have a heavy impact on UGC. The first consists of procedures attendant to the direct enforcement of copyright rights, typically a cease-and-desist letter sent directly to an alleged infringer. Under current copyright law, the act of filing a timely registration permits copyright owners to threaten online actors with up to $150,000 statutory damages per work.\textsuperscript{15} Such demands permit overextensions of substantive copyright law because users may be terrorized into submission without consideration of fair or other noninfringing use.

The second category includes indirect enforcement procedures aimed at intermediaries. For example, the impact of copyright procedures is felt strongly by those whose materials are removed pursuant to a DMCA takedown notice. The Chilling Effects database contains thousands of demands, themselves a fraction of the tsunami of takedowns sent to service providers such as Verizon, YouTube, Google, and others seeking the removal of UGC and other materials.\textsuperscript{16} Few of these takedowns are ever challenged by lawsuit or by a counternotification demanding put-back of the removed materials.\textsuperscript{17}

The third category includes automated enforcement procedures that digitally filter user-submitted content, automatically blocking, monetizing, or tracking such content. A primary example is YouTube’s Content Identification tool, which permits owners to tell YouTube whether or not to block videos that contain copyrighted materials.\textsuperscript{18} Such procedures allow copyright owners to enforce their rights by uploading “fingerprint” files of their works, and by preventing third parties from making unauthorized online use of those works. Unfortunately, such technologies can also be used to censor materials that may fall within the realm of fair use.

\textsuperscript{15}See 17 U.S.C.A. § 412 (West, Westlaw through P.L. 111-264 (excluding P.L. 111-259) approved Oct. 10, 2010) (registration prerequisite to award of statutory damages and attorneys’ fees); \textit{id.} § 504(c)(2) (willful infringement merits potential boost of statutory damages up to $150,000 per work infringed); see also infra Part II.A (discussing direct enforcement procedures).


In all cases, the procedures here occur outside the courtroom, i.e., they are private extra-litigation procedures. But they are rooted in the substance of copyright law. Ironically, although de jure substantive copyright law prompted these enforcement procedures, those procedures can lead to expanded de facto substantive rights. This “substance-procedure-substance” feedback loop is a major problem in copyright. Accordingly, this Article makes proposals towards reforming some of these procedures. In considering the feedback loop, it proposes descriptive and normative frameworks aimed towards creating better procedures. Thus, the use of “civil” in this Article’s title is not a reference to the Federal Rules of Civil Procedure, but instead the more fundamental value of civility in private copyright enforcement, itself a form of civil procedure.

Part II notes how the interplay between copyright substance and procedure can lead to a substance-procedure-substance feedback loop. It also lays out a descriptive framework for copyright procedure derived from the actors, sources, and functions of those procedures. Part III examines three major types of private enforcement procedures, namely direct, indirect, and automated copyright enforcement, and considers how they foster feedback loops. It also makes a number of suggestions aimed at improving the balance between owners and users. Part IV considers the values attendant to procedural justice in copyright enforcement, and sets forth a normative framework that looks to principles of participation, transparency, and “balanced accuracy” that might lead to private enforcement procedures that better accommodate the reasonable cost and efficiency needs of copyright owners without trampling on UGC.

II. THE SUBSTANCE-PROCEDURE-SUBSTANCE FEEDBACK LOOP

Bad copyright procedures have led to bad substantive results by permitting copyright owners to extend their rights far beyond what is appropriate under substantive copyright law.19 This is a substance-procedure-substance feedback loop.20 Put differently, the private copyright


20 Others have similarly written about feedback loops and copyright law. See James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 YALE L.J. 882 (2007) (discussing widespread licensing as an example of a “doctrinal feedback” that may lead to diminishment of fair use); Michael J. Madison, Legal-Ware: Contract and Copyright in the Digital Age, 67 FORDHAM L. REV. 1025, 1083 (1998) (“Conventions form an important part of a jurisprudential feedback loop: the ‘system’ provides the parameters that define the scope of disputes while the resolution of these disputes refines the parameters of the ‘system.’”); Michael S. Sawyer, Note, Filters,
enforcement procedures discussed in this Article exist because de jure copyright law either prescribes them or provides incentives for their creation.21 However, the feedback loop does more than merely subvert the accurate application of copyright law: it also subverts important values attendant to procedural justice. This Part first discusses how the interplay of substance and procedure leads to a feedback loop, and then lays out a descriptive framework for analyzing the three main types of private copyright enforcement.

A. The Interplay of Substance and Procedure

It goes without saying that substantive copyright law is important. Most recent Supreme Court copyright decisions focus on substantive matters such as subject matter,22 length of protection,23 and scope of fair use.24 Nonetheless, procedure also plays an important role in shaping the scope of copyright, a role that is easily forgotten. For example, during oral arguments in a recent copyright case, Chief Justice Roberts was surprised to learn that the Federal Rules of Civil Procedure have included sample forms for copyright infringement lawsuits since the 1930s.25 Upon being reminded that the forms were promulgated by the Supreme Court, Roberts graciously noted “Live and learn.”26 Fittingly, that case concerned a procedural matter: whether copyright registration is jurisdictional.27

The distinction between substance and procedure in the law, and in copyright, can be slippery. As noted by Justice Reed in his concurrence in
Erie, the line between substance and procedure is “hazy.”28 But this Article is not concerned with the vagaries of the Erie doctrine. Instead, the focus is on the effect of private, out-of-court procedures on the de facto scope of copyright law. These procedures include the practices by which copyright owners enforce their rights, whether directly, indirectly, or via technology.29

Enforcement practices merit greater attention in legal scholarship. As noted by Jay Tidmarsh in another context, those focused on substantive simply “assume procedural enforcement is possible,” treating procedure as an “academic backwater.”30 But procedures are necessary to enforce substantive rights. As Lawrence Solum states, “substance cannot effectively guide primary conduct without the aid of procedure.”31 Thomas Main suggests that “the construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced.”32 This requires an appropriate fit between copyright and the procedures used to enforce it. Main further notes that the effects of substance and procedure run in both directions.33 Because of this, enforcement outside of expected procedures can lead to either “over- or under-enforcement.”34

B. The Feedback Loop

The core thesis of this Article is that substance and procedure are inextricably intertwined, so much so that bad private enforcement procedures can subvert the norms embedded in substantive copyright law, as well as other norms of procedural justice. Flawed procedures can subvert the procedural norm of accuracy, which operates by avoiding correct application of substantive copyright law.35 This is the primary harm of the substance-procedure-substance feedback loop: bad procedures subvert the

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28 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring in part) (arguing that “[t]he line between procedural and substantive law is hazy”).

29 Litigation conduct occurs not just in the courtroom, but also in “clerks’ offices, conference rooms where depositions are taken, [and] lawyers’ offices where pleadings are drafted.” Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 204 (2004).

30 Tidmarsh, supra note 3, at 516.

31 Solum, supra note 29, at 320.


33 See id. (“To complement the argument that procedure is inherently substantive, I suggest that the converse is also true.”); see also Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) (holding that a federal rule does not violate the Rules Enabling Act even if it “incidentally affect[s] litigants’ substantive rights . . . if reasonably necessary to maintain the integrity of that system of rules”).

34 Main, supra note 32, at 803.

35 Cf. Jenny S. Martinez, Process and Substance in the “War on Terror,” 108 Colum. L. Rev. 1013, 1031 (2008) (defining “process as avoidance” as when “process is intentionally used to avoid difficult substantive questions”).
accurate application of substantive copyright law, leading to results that
would not occur in a court proceeding. The de facto scope of copyright can
become extended far beyond the scope of what de jure copyright law
permits.\[36\] Put differently, de jure substance prompts enforcement
procedures, which in turn lead to de facto substance. Problems in the
procedures can lead to overly broad de facto rights, which feed back into
the procedures, and so forth. Thus, as shown in Figure 1, the primary
feedback is not between de jure and de facto rights, but rather between
procedures and de facto rights. My descriptive claim is therefore narrow:
unlike others such as James Gibson,\[37\] I am not asking whether feedback
causes a change to de jure copyright law, but rather arguing that the de
facto success of overreaching procedures encourages their expanded use,
permitting the bypassing of the doctrinal norms of copyright law. Since
most copyright enforcement takes place out of court, the feedback loops
that have the potential to do the most harm are those that occur privately.\[38\]

Figure 1 – Substance-Procedure-Substance Feedback Loop

The feedback loop leads to additional troubling results by elevating
some procedural values over others. This requires examination of the
characteristics of good procedure. In his classic article on the history of the
Erie case, John Hart Ely suggested that “[w]e have, I think, some
moderately clear notion of what a procedural rule is—one designed to make
the process of litigation a fair and efficient mechanism for the resolution of
disputes.”\[39\] As put by one court, “‘[t]he purpose of [procedural] rules is to
achieve accuracy, efficiency, and fair play in litigation.’”\[40\]

\[36\] “[A]s time passes and legal advice translates the substance-affecting procedural decision rules for those
whose conduct is at issue, rules of procedure may become de facto rules of conduct.” Solom, supra note 29, at
201.

\[37\] Others have argued that feedback loops in copyright may lead to a change in doctrinal copyright, such
as the diminution of fair use through the role played by new licensing schemes. As James Gibson argues,
feedback loops can lead to a recession of public privilege: “Lather, rinse, repeat.” Gibson, supra note 20, at 894;

\[38\] Cf. Gibson, supra note 20, at 900 (arguing that “courts and legislatures . . . play at best a secondary role”
in feedback loops that narrow copyright privileges).

\[39\] John Hart Ely, The Irrepressible Myth Of Erie, 87 HARV. L. REV. 603, 724 (1974); see also Martin H. Redish
& Dennis Murashko, The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation, 93

\[40\] Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 882 (10th Cir. 2006) (quoting Michael Lewis Wells, The
Thus, enforcement procedures ought to embrace values beyond the accurate application of law. For example, efficiency and low cost are important procedural values: a right that is too expensive to enforce is an empty shell.41 However, efficiency and cost are often elevated at the expense of accuracy and other values of procedural justice such as transparency and participation. Bad private procedures subvert transparency by hiding the creation, form, or implementation of procedures from the public, whether because of private human enforcement or unknown, automated filtering algorithms. Similarly, procedural justice demands participation by the parties to a dispute, and sometimes by the public as well.42 Party participants, such as those posting UGC, can be hurt when their works are removed by service providers without prior notice. Public users of UGC are also harmed. Plus, to the extent that copyright procedures are implemented privately and quietly, they can become far more difficult for the public to identify and protest.

By necessity, an approach to procedural justice rooted in the dangers of procedural feedbacks cannot be one that elevates procedure over substance or vice-versa. The focus cannot be mere “proceduralism, the notion that good procedures are presumptive evidence of good results.”43 Good process does not guarantee good results. Just as Justice’s blindfold may “enable better judgment,” it can also “signify a failure to see the truth.”44 It also cannot merely be “normativism, the notion that good results (substantive justice) are presumptive evidence of good procedures.”45 Instead, we must try to find a balance between the two.

Several caveats must be noted to the core thesis of feedbacks and their effects on accuracy and other values. First, although the main focus of this Article is on overextensions of copyright, feedback loops might also lead to underenforcement. When a particular enforcement mechanism is found to be ineffective, owners may abandon it, either moving to a new procedure or

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41 See Solum, supra note 29, at 201 (“A claim that cannot be successfully pled is, in one sense, no claim at all.”).
42 “While procedural justice is concerned with the benefits of accuracy and the costs of adjudication, . . . a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.” Solum, supra note 29, at 183.
44 Dennis E. Curtis & Judith Resnik, Images of Justice, 96 Yale L.J. 1727, 1755–56 (1987); see also Eskridge, supra note 43, at 973 (noting that “normativism is pessimistic that just results will necessarily flow from good procedures”).
45 Eskridge, supra note 43, at 964.
instead choosing to tolerate the user conduct.\textsuperscript{46} Second, I do not suggest that de facto accuracy is an achievable goal. Doctrines such as idea/expression, substantial similarity, and fair use make copyright highly indeterminate.\textsuperscript{47} However, some cases will involve clear noninfringement. In such cases, feedback loops that subvert correct results are objectionable. Regarding “gray” cases where fair use might exist, it is also wrong for copyright owners to use procedure in a way that treats those cases as clear infringement. I do not mean to suggest that copyright owners should not attempt to assert their rights. My claim is more narrow and subtle. Enforcement procedures should not tempt owners to exaggerate or leverage weak claims, and in addition, should permit users breathing room in the gray cases.

\textbf{C. Descriptive Framework}

Before discussing the effects of bad copyright procedures, it would be helpful to determine their characteristics. Copyright uses many procedures. An obvious example is the Federal Rules of Civil Procedure, rules intended to be transsubstantive, i.e., rules that apply generally to all federal court litigation regardless of the underlying substantive law. Other procedures are tailored specifically to copyright, such as the much-criticized subpoena power under Section 512(h) of the Copyright Act, which allows copyright owners to issue subpoenas to ISPs demanding identification of users engaging in certain types of infringement without ever having to file a lawsuit.\textsuperscript{48} Yet copyright procedures exist in other forms as well, such as the robots exclusion protocol, a coding standard that permits website owners to prevent search engine indexing.\textsuperscript{49} Thus, the procedures discussed here are not intended to provide an exhaustive litany of copyright procedure. In that light, it may be helpful to start by attempting to build a descriptive framework of copyright procedure:

\textsuperscript{46} Lee, \textit{supra} note 11, at 1544–45 (arguing that “bandwagon” user conduct that is not opposed by copyright owners may lead to “warming” rather than “chilling” of speech; Tim Wu, \textit{Tolerated Use}, 31 COLUM. J.L. & ARTS 617 (2008) (discussing “tolerated use”).

\textsuperscript{47} Gibson, \textit{supra} note 20, at 889–91; Lee, \textit{supra} note 11, at 1480.

\textsuperscript{48} 17 U.S.C.A. § 512(h) (West, Westlaw through P.L. 111-264 (excluding P.L. 111-259) approved Oct. 10, 2010). In the civil context, a copyright owner would otherwise generally have to file a lawsuit and then issue a subpoena pursuant to Rule 45. \textit{See} FED. R. CIV. P. 45.

• **Actors involved**, e.g., human or machine;
• **Source of procedure**, e.g., public or private; and
• **Function of the procedure**, e.g., vesting or controlling rights.

By this framework, the actors are those who participate in the formation, execution, and resolution of copyright procedures. They include copyright owners, those posting UGC, and intermediaries such as YouTube. The actors can even include computer code, such as the automated filters used by YouTube’s Content ID program. In that program, owners upload “fingerprint” files of audio or video content to YouTube and instruct it whether to block videos; the rights are later automatically enforced by YouTube when users upload videos that contain matching content.  

The source of a copyright procedure consists of where the procedure originates. That source may be statutes, court rules, case law, or private practices, alone or in some combination. These procedures are always formed expressly by or against the backdrop of substantive copyright law. For example, DMCA takedowns are made possible via a Congressional statute, but are asserted privately by copyright owners to online service providers who host content for their subscribers, with the purpose of obtaining content removal.

Finally, the functions of copyright procedures can vary. They can be used to vest rights, such as registration, or to control uses of the work, such as access controls, copy controls, automated licenses, or revenue mechanisms. Of primary concern here, copyright controls also include processes used to privately enforce copyrights. The next Part discusses three examples of private copyright enforcement and explores how they cause feedback problems.

### III. FLAWED COPYRIGHT ENFORCEMENT PROCEDURES

This Part discusses three major private enforcement procedures. In all three, the procedures were prompted by substantive copyright law, but their flaws permit owners to seek bad substantive results, such as by directly

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50 See YouTube Copyright Policy: Video Identification Tool, YOUTUBE, http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=83766 [last visited June 1, 2010] [hereinafter YOUTUBE, Copyright Policy].

51 In his own framework, Lawrence Solum makes a distinction between the form and function of a legal rule. Thus, some laws may have a procedural form but a substantive function. Solum, supra note 29, at 214. Such terminology could well describe much of copyright-enforcement procedure.
bullying users with ruinous statutory damages; by indirectly censoring criticism, commentary, and transformative works through service provider takedowns; and by automatically blocking fair or noninfringing uses via code without a human decision-maker. As noted by William Eskridge, the “law cannot pretend to be neutral by providing homogenized procedures that have a malignant social impact.”

A. Direct Enforcement

Direct enforcement is typically done by private copyright owners who send cease-and-desist letters to users demanding compliance. In terms of the descriptive framework, the source of the procedure is a combination of public and private: substantive copyright law and private letters sent directly to users. Unless the broader public learns of the dispute, the actors are typically limited to the owners (or their lawyers) and the often-unsophisticated users. Finally, the function is to seek compliance.

1. Registration and Statutory Damages: Helping Owners

Many of the feedback problems arising from direct enforcement arise from the in terrorem effects of statutory damages of up to $150,000 per work, which hinge upon copyright registration. There is no requirement for owners to take affirmative steps to “vest” copyright rights. Copyright subsists by operation of law, regardless of whether the owner chooses to register the work with the United States Copyright Office. Rights arise as soon as an original work of authorship, such as a poem, is “fixed in any tangible medium of expression,” such as a piece of paper.

But the consequences that flow from registration are significant. Registration with the United States Copyright Office is a precondition to a civil action for copyright infringement.55 Timely registration also permits enhanced remedies: statutory damages of up to $150,000 per work, as well as the possibility of attorneys’ fees.57 In contrast, for owners who fail to

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52 Eskridge, supra note 43, at 966.
54 See id. § 102(a).
55 Id. § 411(a). Recently, the Supreme Court held that “the registration requirement is a precondition to filing a claim that does not restrict a federal court’s subject-matter jurisdiction.” Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1241 (2010); see also supra notes 25–27 and accompanying text.
56 17 U.S.C.A. § 412 (timely registration required for statutory damages); id. § 504(c)(2) (statutory damages of up to $150,000).
57 Id. § 505 (costs and attorneys’ fees).
register before infringement commences, monetary relief is generally limited to actual damages and additional infringer profits, which may be low in the case of works without market value.\textsuperscript{58} Thus, owners who timely register their copyrights have strong incentives to enforce those copyrights aggressively. This is a paradigmatic example of the substance-procedure-substance feedback loop.

For copyright owners, registration is a generally inexpensive process.\textsuperscript{59} However, the registration form requires careful judgment on matters that may lack clear answers, such as determining the identity of the author where the facts or law are less than clear.\textsuperscript{60} Because registration is required for civil actions, defendants once had tremendous incentives to seek dismissals based on errors in the application, claiming that they invalidated the registration.\textsuperscript{61} However, recent changes have lessened the dangers of erroneous registrations. First, the Copyright Office has created a standardized form that is more user-friendly.\textsuperscript{62} Second, the PRO-IP Act of 2008 reduced the risk of errors, providing that registrations with inaccurate information will suffice unless the inaccuracy was known to the applicant and would have caused a refusal of registration.\textsuperscript{63} This change reduces the risk of innocent or immaterial errors in an application for registration.

Ironically, by excusing errors in copyright registrations, the PRO-IP Act undercuts the value of public records of copyrights. Online copyright records often contain very little useful information, diluting the value of the public record. As a result, the Copyright Office’s database of registration and recordation is not terrifically helpful for persons seeking information on

\textsuperscript{58} Id. § 504(a)(1), (b). Justice Breyer notes that “only about 2% of copyrights between 55 and 75 years old” generate royalties. Eldred v. Ashcroft, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting).

\textsuperscript{59} The cost of registration is not high: currently, $35 for a single work registered online or $50 or more using a form. \textit{See} Fees, U.S. COPYRIGHT OFFICE, \textit{http://www.copyright.gov/docs/fees.html} (last visited June 8, 2010). If one needs expedited handling so that suit may be filed quickly, there is a $760 fee. \textit{Id.}

\textsuperscript{60} For instance, if \(A\) creates a work as a work made for hire for \(B\), then \(B\) is the author. But if \(A\) authors the work and assigns the work to \(B\), then \(A\) is still the author, with \(B\) as the owner by assignment. Unfortunately, the work-made-for-hire doctrine is not the model of clarity. \textit{See} 17 U.S.C.A. § 101 (definition); Cnty. for Creative Non-Violence v. Reid, 490 U.S. 730, 750–52 (1989) (using common-law agency principles as part of definition).

\textsuperscript{61} In \textit{Raquel v. Education Management Corp.}, the Third Circuit dismissed a copyright lawsuit because of a misstatement in the copyright registration. 196 F.3d 171, 181–82 (3d Cir. 1999). On appeal, the Supreme Court granted certiorari, vacated the judgment, and remanded in light of positions taken by the Solicitor General and Copyright Office that the purported errors at issue would not have voided the registration. \textit{Raquel v. Educ. Mgmt. Corp.}, 531 U.S. 952 (2000); \textit{see also} Registration of Claims to Copyright, Statement of Policy, 65 Fed. Reg. 41,508 (July 5, 2000).

\textsuperscript{62} \textit{See} Forms, U.S. COPYRIGHT OFFICE, \textit{http://www.copyright.gov/forms/} (last visited June 8, 2010).

subsisting or expired copyrights.64 That means that copyright owners get a tremendous benefit, enhanced damages, in exchange for public records of dubious value.65 The lack of a useful public record also fuels the “orphan works” problem, i.e., the dilemma faced by third parties who “wish to license a use but cannot locate the copyright owner after a diligent search.”66

2. Registration and Statutory Damages: Terrorizing Users

Also troubling is the relationship between registration, enhanced remedies, and direct enforcement. Because registration fails to provide a meaningful public record, it is puzzling why it remains the condition precedent to attorneys’ fees and statutory damages of up to $150,000 per work.67 Nonetheless, one should be thankful that Congress has not thought (yet) to do away with the registration requirement entirely and make statutory damages available in all cases. One should not cavalierly assume that such an action is beyond Congress. Statutory damages for cybersquatting may go as high as $100,000 per domain name, even if the plaintiff’s trademark is not federally registered.68

Copyright lawyers know the importance of timely registration. Even if no suit is ever filed, timely registration makes enhanced remedies possible in a hypothetical lawsuit, which permits lawyers to assert those remedies as a scare tactic in privately sent cease-and-desist letters.69 The in terrorem effect should not be underestimated: imagine that you are a single parent or a college student on a low or limited income who has downloaded some songs off of the internet. Later, you are sued by a record company for willful

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64 In contrast, for federal patents and trademarks, useful public records are available from the website of the United States Patent and Trademark Office.

65 “The remedies for infringement presently available at common law should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.” H.R. REP. NO. 94-1476, at 158 (1976) (emphasis added).


67 Normal statutory damages are between $750 and $30,000 per work. 17 U.S.C.A. § 504(c)(1). In cases of innocent infringement, the court has discretion to remit statutory damages to $200 per work. Id. § 504(c)(2). In certain other cases, the court can entirely remit statutory damages if, for example, the infringer was a library and had subjectively and objectively reasonable grounds for concluding the use was fair. Id. However, where the infringement is willful, statutory damages may be boosted up to $150,000 per work. Id.

68 See 15 U.S.C.A. § 1117(d) (statutory damages of up to $100,000); see also id. § 1125(d); cf. 17 U.S.C.A. § 512(f) (user who obtains DMCA put-back of materials based on counternotification containing knowing material misrepresentation is liable for attorneys’ fees and damages without regard to registration).

69 See Gibson, supra note 20, at 901 (noting power of cease-and-desist letters even when infringement claim is weak).
copyright infringement. If you are not scared, you should be. Many file sharers have settled for thousands of dollars in lieu of risking a court judgment for hundreds of thousands or possibly millions of dollars.\textsuperscript{70}

Some of those resisting the recording industry’s enforcement may pay heavily. Jammie Thomas-Rasset decided to go to trial and was found liable for $222,000 in statutory damages for 24 songs, or $9,250 per song.\textsuperscript{71} After the judge ordered a new trial based on erroneous jury instructions, a new jury found her liable for even more, $1.92 million in statutory damages, i.e., $80,000 per song.\textsuperscript{72} More recently, Joel Tenenbaum was found liable by a jury for $675,000 for downloading 30 songs, or $22,500 a song.\textsuperscript{73} In both cases, the courts later remitted damages to treble the $750 statutory minimum, or $2,250 per song, an amount both judges still deemed “harsh.”\textsuperscript{74} In the Thomas-Rasset case, the plaintiffs rejected the remittitur and obtained a $1.5 million award in a third jury trial; in the Tenenbaum case, an appeal is pending.\textsuperscript{75}

Ironically, much of the commentary regarding the Tenenbaum case was not about the merits of the matter, but about the strategy of defense counsel to proceed to trial rather than accepting a settlement.\textsuperscript{76} Yet without

\textsuperscript{70} In 2009, Wired.com reported that the Recording Industry Association of America (RIAA) had “issued about 30,000 lawsuits” during its file-sharing litigation campaign, with most settling out of court “for a few thousand dollars.” David Kravets, RIAA Sacks Up to $150,000 a Song in File Sharing Trial, Post to Threat Level: Privacy, Crime and Security Online, WIRED.COM [July 30, 2009, 6:42 PM], http://www.wired.com/threatlevel/2009/07/riaa-jugular/. According to another source, the RIAA was settling file-sharing matters at the rate of $750 per file. See Student Legal Services, Music Downloading—In the Year 2010, INDIANA UNIVERSITY, https://www.indiana.edu/~sls/files/MusicDownloading.pdf [last visited Dec. 28, 2010].

\textsuperscript{71} Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1049 (D. Minn. 2010).

\textsuperscript{72} Id. at 1049–50.


\textsuperscript{75} Tenenbaum faced potential damages of $4.5 million plus attorneys’ fees. As noted by Howard Knopf
the predicate registrations, the verdicts against Thomas-Rasset and Tenenbaum are arguably worth less than $21–$54.\textsuperscript{77} In the Thomas-Rasset case, the second jury award outweighed the costs of buying the songs online by a ratio of 80,000 to one. It is very difficult to imagine how such a result is rational, let alone constitutional.\textsuperscript{78}

These amounts are chilling, and they provide copyright owners with powerful terror tactics. If you receive a letter threatening “up to” $150,000 in damages plus attorneys’ fees for your fan site, how willing are you to gamble your house and bank account on something as amorphous as fair use? Few people are. If procedure seeks good results, then these results are deeply unsatisfying. The procedure of registration, permitting assertions of statutory damages in either private enforcement or at trial, has put the music industry in the repeated position of suing individuals who do not download for profit.\textsuperscript{79} This “public-relations disaster for the industry . . . targeted, among others, several single mothers, a dead person and a 13-year-old girl.”\textsuperscript{80} Further, the lawsuits did not appear to stem the amount of file sharing, making the strategy ineffective.\textsuperscript{81} Only recently has the music

\textsuperscript{77} In the \textit{Capitol Records} case, the court concluded that the cost of the relevant CDs was about $54. \textit{Capitol Records Inc. v. Thomas}, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008). The court did recognize, however, that “illegal downloading has caused serious, widespread harm to the recording industry,” justifying statutory damages “many multiples higher than the simple cost” of buying a CD or a download. \textit{Capitol Records}, 680 F. Supp. 2d at 1054. Similarly, the \textit{Tenenbaum} court concluded that record companies receive approximately 70 cents for every 99 cent song sold on the iTunes Store. \textit{Sony BMG}, 721 F. Supp. 2d at 112. For the 24 songs at issue, the lost profits would be approximately $21. \textit{Id.} The \textit{Tenenbaum} court further concluded that although the record companies claimed to “have lost billions of dollars in revenue due to file-sharing, the jury was not permitted to punish Tenenbaum for harm caused by other infringers.” \textit{Id.} at 111–12.

\textsuperscript{78} As put by the judge in the case against Thomas-Rasset, “The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court.” \textit{Capitol Records}, 579 F. Supp. 2d at 1227. Pamela Samuelson and Tara Wheatland argue that grossly excessive statutory damages violate due process, and propose principles for reform within the existing statutory damages framework. Pamela Samuelson & Tara Wheatland, \textit{Statutory Damages in Copyright Law: A Remedy in Need of Reform}, 51 WM. & MARY L. REV. 439, 500–09 (2009); see also Stephanie Berg, \textit{Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age}, 56 J. COPYRIGHT SOC’Y U.S.A. 265, 307–08 (2009) (noting concerns over excessive damages).

\textsuperscript{79} \textit{Capitol Records}, 579 F. Supp. 2d at 1227 (stating that “it would be a farce to say that a single mother’s acts of using Kazaa are the equivalent . . . to the acts of global financial firms illegally infringing on copyrights in order to profit”).


\textsuperscript{81} “Critics say the legal offensive ultimately did little to stem the tide of illegally downloaded music.” \textit{Id.}
industry seen the flaws in its enforcement approach, shifting its focus from lawsuits to that of seeking cooperation from service providers.\(^\text{82}\)

In sum, statutory damages serve as a substantive impetus to overreaching copyright enforcement procedures, thus enabling overreach and feedback. Ironically, statutory damages do not necessarily help copyright owners. They were like heroin to the music industry, a “quick fix” that did the music industry a huge amount of harm. While the music industry was busy suing its own customers, new companies and business models emerged to take advantage of the music industry’s diverted attention.\(^\text{83}\) Apple became the leading innovator in music players with the iPod and in legal channels of distribution with the iTunes store. In contrast, Sony—previously a leader in music technology with the Walkman—has seen its influence and brand panache wane accordingly.\(^\text{84}\)

**B. Indirect Enforcement**

Considering the quantity of online infringement, writing all infringers directly is not feasible. They might be anonymous or refuse to comply. To provide an indirect enforcement procedure with lower transaction costs and a higher success rate, Congress passed the notice and takedown provisions of the Digital Millennium Copyright Act (DMCA), which permits copyright owners to write ISPs and to demand takedown of alleged infringement hosted by the ISPs on behalf of their subscribers.\(^\text{85}\) There is no doubt that many feel that Congress, in writing the DMCA in 1998, gave copyright holders free license to—in Representative Dingell’s terms—“screw” fair

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\(^{82}\) Id. (“Depending on the agreement, the ISP will either forward the note to customers, or alert customers that they appear to be uploading music illegally, and ask them to stop. If the customers continue the file-sharing, they will get one or two more emails, perhaps accompanied by slower service from the provider. Finally, the ISP may cut off their access altogether.”) The industry group reserved the right to sue heavy file sharers or those ignoring repeated warnings. Id. However, the industry did not abandon pending suits, such as those against Thomas-Rasset or Tenenbaum.


\(^{84}\) Cyrus Farivar, Sony CEO Says Company Woulda, Coulda, Shoulda Beaten Apple, post to MacUser, MACWORLD.COM [May 13, 2009, 11:28 AM], http://www.macworld.com/article/140561/2009/05/sony_says_woulda_couida_shaoulda_beaten_apple.html (stating that Sony “is looking a little old and busted these days,” and is “playing second fiddle to Apple”).

\(^{85}\) Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.); Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512). In a sense, the procedure is direct because it also concerns the copyright liability of ISPs; however, the real goal of takedowns is indirect enforcement against users, obtained by buying ISP cooperation through the carrot of safe harbor.
users. One of the people who felt the wrath of DMCA takedowns was a legislator who voted in favor of the DMCA, Senator John McCain, who complained during the 2008 presidential campaign that campaign videos were unfairly removed from YouTube.

Two additional examples are instructive. In one, popular website BoingBoing was the subject of a takedown for reproducing a Ralph Lauren magazine ad that pictured an impossibly thin and obviously Photoshopped model. Mocking the ad, the site stated, “Dude, her head’s bigger than her pelvis.” Ralph Lauren’s lawyers sent a DMCA notice to BoingBoing’s Canadian ISP, providing BoingBoing blogger and free-speech advocate Cory Doctorow with a soapbox from which to comment on the absurdity of the takedown. In another, a record company sent a takedown to YouTube demanding removal of a video of a little boy dancing happily, just because a short, low-quality snippet of Prince’s song *Let’s Get Crazy* was playing in the background. In both instances, it is highly arguable, if not likely, that the materials posted were fairly used. Needless to say, it is

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86 See supra note 3 and accompanying text.
90 See id.; see also CORY DOCTOROW, CONTENT: SELECTED ESSAYS ON TECHNOLOGY, CREATIVITY, COPYRIGHT, AND THE FUTURE OF THE FUTURE 56 (2009) (“DMCA takedown notices have fast become the favorite weapon in the cowardly bully’s arsenal.”).
91 See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008); see also Nathenson, supra note 7, at 142–43 (discussing Lenz).
92 For instance, Lenz took only a portion of the song, and it was of extremely low fidelity. She was not seeking or making money from the video, and the title of the video, “Let’s Go Crazy #1,” suggests some transformative purpose, i.e., that her little boy was dancing “crazy” to a song titled *Let’s Go Crazy*. Additionally, it would be absurd to suggest that people would rather watch and listen to Lenz’s video than to buy the album. Equally so, BoingBoing’s posting of the Ralph Lauren ad serves the purposes of criticizing Ralph Lauren, generally for using models that promote unrealistic images of female beauty, and specifically for manipulating the image of a wafer-thin model to the point where her dimensions were biologically impossible. It is hard to imagine how BoingBoing could realistically make these criticisms without posting the picture. Although BoingBoing is a commercial website, it is not making money directly from the picture; instead, the purpose of posting the picture was to mock it. The posting is filled with comments from users denouncing the ad and how western women “get pressured by unnatural ideals [that] no one can live up to.” arikol, Comment #4 to *Ralph Lauren Opens New Outlet Store in the Uncanny Valley*, BOINGBOING (Sept. 29, 2009 23:14 EST), http://www.boingboing.net/2009/09/29/ralph-lauren-opens-n.html. Ralph Lauren later admitted “the poor imaging and retouching that resulted in a very distorted image of a woman’s body.” Star Justice, *Blog and Ralph Lauren Fight over Thin Model Ad*, EXTRA (Oct. 8, 2009), http://extratv.warnerbros.com/2009/10/blog_and_ralph_lauren_fight_over_skinny_model_ad.php.
troubling that the DMCA is too often used to censor criticism and other fair uses.93

The statute at issue is Section 512 of the Copyright Act, which contains a number of “safe harbors” for ISPs that immunize them from monetary copyright infringement liability.94 There are a number of safe harbors, but the one I will discuss is Section 512(c), which provides safe harbor to ISPs that host infringing content on behalf of a subscriber.95 Examples of relevant content would include user-submitted YouTube videos, Flickr photographs, blogs hosted on an ISP, and other online-hosted content. So long as the ISP, upon receiving a proper takedown notice, quickly removes the alleged infringement, the safe harbor makes it immune from monetary liability for copyright infringement.96 If the ISP’s subscriber believes that the materials were removed by mistake or misidentification, then the subscriber can send a counternotification to the ISP demanding put-back.97 After replacing the materials, the ISP still retains its safe harbor.98

As discussed in greater depth elsewhere, I am generally respectful of the results of Congress’s now more than ten-year old experiment in creating an extra-litigation process for resolution of copyright disputes over hosted content.99 Nonetheless, the statute and resulting practices have a number of deep flaws. As others have suggested, there is serious merit to amending the statute.100 I agree that revisions would be helpful, but believe such amendments unlikely. In recent years, Congress has passed several new laws expanding or clarifying the scope of intellectual property,101 but it has

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95 Id. § 512(c)(1)(C).
96 Id.
97 Id. § 512(g)(3).
98 Id. § 512(g)(4).
99 See Nathenson, supra note 7, at 135–36 (noting that Section 512 has helped to foster fair use and remix); see also David Kravets, 10 Years Later, Misunderstood DMCA is the Law That Saved the Web, Post to Threat Level: Privacy, Crime and Security Online, WIRED.COM (Oct. 27, 2008, 3:01 PM), http://www.wired.com/threatlevel/2008/10/ten-years-later/.
100 See, e.g., Malla Pollack, Rebalancing Section 512 To Protect Fair Uses From Herds Of Mice—“Trampling Elephants, or a Little Due Process Is Not Such a Dangerous Thing, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 547, 574–76 (2006); see also Urban & Quilter, supra note 17, at 688–92.
yet to act on important user-focused problems of orphan works and digital preservation. User-oriented amendments to Section 512 are unlikely, and one should instead consider ways of better interpreting the statute.

1. Incentives for Overreaching Takedowns

Section 512 typifies the dangers of the substance-procedure-substance feedback loop. Like a carefully orchestrated dance, Section 512 provides ISPs with safe harbor so long as every party plays its part. A copyright owner must send the ISP a takedown notice stating, *inter alia*, the works being infringed, the location of the infringing content, and that the sender has a good-faith belief that use is “not authorized by the copyright owner, its agent, or the law.” So long as the ISP “expeditiously” removes the materials, it is free from monetary remedies for infringement.

In terms of the descriptive framework, the source of the procedure is the DMCA. The actors are the copyright owner, the ISP, and, to a more limited extent, the user, who need not be contacted beforehand, although she has the right to later seek put-back. The primary function is to obtain quick removal of alleged infringement. But compared to litigation, the relative efficiency and low cost of this enforcement procedure invites abuses. The Chilling Effects Clearinghouse database is filled with countless takedown notices, almost a third of which are legally questionable. The obvious reason for such problems is that Section 512, by creating a simple extra-litigation procedure for quick removal, has incentivized sloppy and aggressive enforcement methods. Online materials, including fair or other noninfringing uses, are being removed regularly. In a court of law, such relief would be denied, but with takedowns, removal is quick and simple.

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103 Nathenson, supra note 7, at 126–28.

104 Elsewhere I call this a “safety dance.” Id. at 123.


106 Id. § 512(c)(1)(C).

107 Urban and Quilter conclude that over 30% of notices in Chilling Effects’s database raised serious questions regarding fair use, non-copyrightable matter, thin copyright, or other copyright defenses. Urban & Quilter, supra note 17, at 666–67.

108 I don’t mean to suggest that frivolous takedowns represent a majority, or even a substantial minority of takedowns. It is highly likely that most takedowns are well-founded under copyright law and represent obvious infringement without any defenses. That does not, however, excuse frivolous takedowns that ignore fair use.
There can be little doubt that at its core, Section 512 is procedural. Sending a takedown notice is analogous to filing a complaint with a court along with a motion for a temporary restraining order (TRO). The statute provides the elements of a proper takedown,\(^\text{109}\) and relief is granted quickly, with notice provided afterwards to the user.\(^\text{110}\) Considering that the process is akin to a de facto ex parte seizure, it is vital that the statute and its procedures be read to limit the chances of fair uses being removed.\(^\text{111}\) Even worse, the decision-maker is not a judge, but an ISP that possesses strong incentives to blindly and immediately comply with a takedown, meritorious or not.\(^\text{112}\)

As such, Section 512 is a paradigmatic representative of the substance-procedure-substance feedback loop. Concerned with massive online violations of de jure substantive copyright law, Congress crafted the takedown procedure to lower transaction costs, permitting assertions of de facto substantive rights far beyond those permitted under copyright law—in other words, removals of speech that could not be obtained in court. It is ironic indeed that a procedural statute that was intended to deal with the problems of copyright underenforcement has created problems with overenforcement. It is therefore important that the statute be either amended (as suggested by some) or interpreted in a way that avoids the negative consequences.

Important guidance is provided by the district court’s decision in *Lenz v. Universal Music Corp.*,\(^\text{113}\) a case filed by a YouTube user whose video was taken down, allegedly improperly, at the behest of Universal Music.\(^\text{114}\) In that case, the court examined the structure of Section 512 and other parts of the Copyright Act and concluded that a copyright owner must consider fair use before sending a takedown.\(^\text{115}\) Noting that the takedown must include a statement of a good-faith belief that use is “not authorized by . . . the law,” the Court reasoned that “fair use is a lawful use of a copyright.”\(^\text{116}\) Moreover, the fair use statute expressly notes that “the fair use of a


\(^{111}\) See Nathenson, supra note 7, at 143–46.

\(^{112}\) See id. at 145.

\(^{113}\) *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

\(^{114}\) Id. at 1153.

\(^{115}\) Id. at 1154–56.

\(^{116}\) Id. at 1154 (emphasis added); Nathenson, supra note 7, at 142–43 (discussing *Lenz*).
copyrighted work . . . is not an infringement of copyright.”117 In other words, a copyright owner must consider fair use as part of its “initial review” before sending a takedown.118

I continue to agree with the analysis in Lenz. For one thing, it makes sense as a matter of the plain text of the Copyright Act. The heart of the Copyright Act is Section 106, which lists the six main exclusive rights, such as reproduction, adaptation, etc.119 The very first words of Section 106 are “Subject to sections 107 through 122,” expressly indicating that the rights are subject to limitations such as fair use.120 Some legislative history supports this position.121 Judge Birch has also suggested that fair use is an affirmative right of the public.122 Nevertheless, other portions of legislative history,123 and decisions by the Supreme Court, treat fair use as a defense.124

Regardless, even if a defendant in court has the burden of proving fair use,125 the procedural posture of takedowns is materially different. Thus,

118 Id. at 1155.
120 Id.
121 H.R. REP. NO. 94-1476, at 61 [1976] ("[E]verything in section 106 is made ‘subject to sections 107 through 118,’ and must be read in conjunction with those provisions.").
122 See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (Birch, J.) ("I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright."); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch, J.) ("Although the traditional approach is to view ‘fair use’ as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. . . . [But] the burden of proving fair use is always on the putative infringer.").
123 See H.R. REP. NO. 94-1476, at 65 [1976] (stating that fair use “has been raised as a defense in innumerable copyright actions over the years”); see also H.R. REP. NO. 102-836, at 3 [1992] (post-1976 legislative history stating that “Fair use is an affirmative defense”).
124 In Harper & Row, Publishers, Inc. v. Nation Enterprises, the Supreme Court stated that the drafters of 1976 Act “structured the provision as an affirmative defense requiring a case-by-case analysis.” 471 U.S. 539, 561 (1985); see also Quality King Distrib., Inc. v. L’Anza Research Intern., Inc., 523 U.S. 135, 150 (1998) (fair use is defense); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("[F]air use is an affirmative defense."); Stewart v. Abend, 495 U.S. 207, 214 (1990) (defense). Yet almost in the same breath, the Harper & Row Court stated that prior to the 1976 Act, fair use was considered an implied consent rather than a defense. 471 U.S. at 550–51 ("Perhaps because the fair use doctrine was predicated on the author’s implied consent to ‘reasonable and customary’ use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author’s as yet unpublished works.") (emphasis added). Considering that the 1976 adoption of Section 107 “reflect[ed] the intent of Congress to codify the common-law doctrine,” id. at 549, it is hard to reconcile these statements. If fair use was not traditionally viewed as a defense, and Congress intended to adopt the common-law view, then how did the creation of Section 107 magically transform fair use into an affirmative defense?
125 Bateman, 79 F.3d at 1542 n.22 (“[I]t is clear that the burden of proving fair use is always on the putative infringer.”).
although some have argued that the burden should generally fall on rights-holders,126 my argument is narrower: In the ex parte context of takedowns under Section 512, the copyright owner must consider fair use before sending a takedown.127 To hold otherwise would permit copyright owners to blind themselves to fair-use issues, in the hopes that fair users will back down. I think of this as the Lenz “stop-and-think” rule, requiring copyright owners to consider colorable cases of fair use before sending takedowns.

2. Disincentives for Meritorious Put-Backs

If a takedown notice is like a motion for a TRO, then Section 512’s equivalent to an opposition would be a user’s counternotification. Under Section 512(g), a user has the right to demand put-back by sending a counternotification to the ISP.128 However, just as some defendants may choose to default by not answering,129 it appears that few people send counternotifications.130 One reason could be that most subjects of takedowns are true infringement, and counternotification would be frivolous.131

But there is little doubt that many fair users choose not to seek put-back. This is partially due to people’s fear of fighting big companies and scary lawyers, but it is also because Section 512 contains significant disincentives to seeking put-back. First, users must identify themselves, provide contact information, and consent to personal jurisdiction.132 Second, they must make the assertion of incorrect removal under penalty of perjury.133 Third, and most frustratingly, the basis for put-back is somewhat ambiguous: “a

127 Nathenson, supra note 7, at 143–46.
129 Fed. R. Civ. P. 55(a) (entry of default); id. 55(b) (default judgment).
130 Urban & Quilter, supra note 17, at 679.
131 Compare Fed. R. Civ. P. 11(c) (sanctions in civil actions), with 17 U.S.C.A. § 512(f) (damages for knowing material misrepresentations in takedown or put-back).
133 Id. § 512(g)(3)(C). In contrast, the takedown’s assertion under penalty of perjury is limited to the milder factual statement that the person sending the letter is acting with authority of the copyright owner. Id. § 512(c)(3)(A)(vi).
good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.\(^{134}\)

Under normal conditions, I am not particularly disturbed by requiring users to sacrifice anonymity and consent to service of process if they choose to send a counternotification. After all, a user who seeks put-back is invoking a private procedure and asserting that removal was due to some error (such as the wrong page being taken down) or, as I argue below, that the material was not infringing. By invoking this procedure, the user should be willing to “put their money where their mouth is” should a suit ensue.\(^{135}\) Of deeper concern is the proper interpretation of “mistake.” It is abundantly clear that the primary drafters of the put-back provision intended counternotifications to be based on fair use.\(^{136}\) Senator John Ashcroft, a driving force behind put-backs, stated:

> If material is wrongly taken down from an Internet user’s home page because the original notice mistakenly did not take into account that the Internet user was only making a fair use of the copyrighted work, my amendment ensures that the end-user will be given notice of the action taken, and gives them a right to initiate a process that allows them to put their material back online, without the need to hire a lawyer and go to court.\(^{137}\)

Despite Ashcroft’s confidence in the bases for put-back, the statutory language is unclear.\(^{138}\) From my own conversations about this topic, interpretations of the statute are conflicting: some assert that fair use is an obvious basis for put-back, while others opine that it is not.\(^{139}\) I respectfully

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134 Id. § 512(g)(3)(C).

135 This bears an important qualification. One can imagine a whistleblower or online critic whose online accusations are removed by baseless takedown notifications. Under such circumstances, the only way for the whistleblower or critic to get the materials replaced would be by sacrificing anonymity and placing herself in the line of fire. Assuming that the takedown is baseless and that its only purpose is to silence or “out” the critic, there is a clear hole in the statute regarding the propriety of requiring a whistleblower to sacrifice his or her anonymity where the copyright claim is baseless.

136 See Nathenson, supra note 7, at 133–34.


138 By comparison, the Supreme Court has recently clarified the nature of “mistake” in relation-back under Fed. R. Civ. P. 15(c)(1)(C), stating “[t]hat a plaintiff knows of a party’s existence does not preclude her from making a mistake with respect to that party’s identity.” Krupski v. Costa Crociere S. p. A., 130 S. Ct. 2485, 2494 (2010).

139 Authorities have addressed the issue in passing and reached inconsistent views. Compare, e.g., JAY DRATLER, JR., CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM § 6.03 n.312 (2009) (fair use not included), with Matt Williams, The Truth and the “Truthiness” About Knowing Material Misrepresentations, 9 N.C. J.L. & TECH. 1, 2–3 n.7 (2007) (courts likely to permit fair use for put-back). See Robert Kasunic, Preserving the Traditional Contours of Copyright, 30 COLUM. J.L. & ARTS 397, 415–16 & n.59 (2007) (issue unclear); Nathenson,
submit that neither interpretation is obvious. As analyzed in greater depth elsewhere, I conclude that the statute must be read consistent with Ashcroft’s statement. Although “mistake” is arguably ambiguous—referring to either a mistake of fact, a mistake of law, or both—the statutory structure includes both mistakes of fact and of law for the following reasons. Counternotifications must be based on “mistake or misidentification of the material to be removed or disabled.” The most obvious place for a mistake or misidentification to take place is in the takedown. The takedown, in turn, must assert that the use is unauthorized by the law. Since a fair use is one authorized by law, a takedown that erroneously asserts infringement is a mistake of law for purposes of Section 512(g), thus supporting counternotice.

Although the statutory analysis is not immediately obvious, I believe it is correct. If one concludes to the contrary, then a fair user would have no remedy but to go to court. Not only would that run counter to Ashcroft’s statement, but it would be a procedurally appalling result. Because most creators of UGC create content for cultural engagement rather than profit, most users would lack the financial resources or stomach for litigation. In short, to read the counternotification provision to prohibit put-backs based on fair use would permit the extra-litigation procedure under Section 512 to effect de facto expansions of substantive copyright rights that would read fair use entirely out of the Copyright Act. Accordingly, to avoid bad results from the substance-procedure-substance feedback loop, it is necessary to read Section 512 to both: (1) require owners to consider colorable issues of fair use; and (2) permit users to use colorable claims of fair use for put-back.

C. Automated Enforcement

As Lawrence Lessig notes, “code,” or the “instructions embedded in the software or hardware that makes cyberspace what it is,” can threaten liberty just as much as state power and markets did in earlier times. This is because “the most effective way to regulate behavior in cyberspace will be through the regulation of code,” either through the code itself or through controlling the code writers. Thus, argues Lessig, although law can

\[\text{supra note 7, at 158 n.181 (collecting sources).}\]

\[\text{140 Nathenson, supra note 7, at 158–62.}\]


\[\text{142 Id. § 512(c)(3)(A)(v).}\]

\[\text{143 LAWRENCE LESSIG, CODE: VERSION 2.0 121 (2006).}\]

sometimes regulate code, oftentimes code itself will override and supplant law, rendering ineffective the values underlying law.\footnote{Id. at 514–15, 522–23.}

Accordingly, a third example of a flawed extra-litigation procedure was not created by Congress, but by private parties: automated filters. Such measures are discussed in the Principles for User Generated Content Services (UGC Principles), a set of nonbinding principles agreed to by a number of leading copyright owners and service providers, such as Viacom, Sony, Microsoft, Disney, and Veoh.\footnote{See UGC Principles, supra note 13.} However, two of the biggest providers of UGC—Google and Facebook—are not signatories.\footnote{See id. (showing listing of supporters).} Nevertheless, YouTube uses automated filters similar to those discussed in the UGC Principles.\footnote{The UGC Principles call for content identification technology that permits copyright owners to upload reference data and to provide usage instructions, such as blockage of matching content. \textit{Id.} ¶ 3. The UGC Principles declare that such technology should accommodate fair use, but are silent on just how such accommodation should take place. \textit{Id.} ¶ 3(d). This silence is intentional, considering that the owners and providers subscribing to the UGC Principles may disagree on the scope of fair use. \textit{See id. pmbl.} (signatories \textit{“differ in our interpretation of relevant laws”} and UGC Principles do not create \textit{“any legally binding rights or obligations”}).} The stated objectives of the UGC Principles are:

\begin{enumerate}
  \item the elimination of infringing content on UGC Services,
  \item the encouragement of uploads of wholly original and authorized user-generated audio and video content,
  \item the accommodation of fair use of copyrighted content on UGC Services, and
  \item the protection of legitimate interests of user privacy.\footnote{\textit{Id.} pmbl.}
\end{enumerate}

Wrongly implemented, automated control may be the most dangerous procedure of all because it permits the automated censoring of lawful content without any prior consideration of fair or noninfringing use.\footnote{Some suggest that filtering technologies may lead to narrowing of de jure fair-use law: \textit{“Once most sites develop and implement such code, filtering will become the norm and courts may disfavor sites that do not follow industry practice in filtering.”} \textit{Harvard UGC Principles, supra note 13, at 1404.}} The particular control mechanism to be discussed is YouTube’s Content Identification (Content ID) program.\footnote{See Nathenson, supra note 7, at 169–70 n.223 (noting issue but reserving discussion as beyond scope of article).} This technology can be used to easily censor fair and noninfringing uses, preventing them from ever...
appearing online. But fairly tuned, filtering and usage rules may reasonably address legitimate concerns of both copyright owners and users.

1. Risk of Wholesale Censorship

YouTube’s Content ID program operates as a filter that sits between YouTube submissions and YouTube viewers. Content ID uses “fingerprint” files that YouTube creates by running owner-submitted media through an algorithm. The owner-submitted media can be audio, video, or both, and are submitted by copyright owners who voluntarily participate in the Content ID program. Owners also choose usage rules to be applied when a user submission matches a fingerprint file. Thus, if submitted audio or video matches a fingerprint, Content ID can automatically block, track, or monetize the user submission. Human screening for fair use is not made before usage rules are applied. Thus, a matching video can be automatically blocked from appearing on YouTube even if it might constitute fair use of the copyrighted materials.

In terms of the descriptive framework, the source of Content ID is privately crafted code written against the backdrop of substantive copyright law. The main actors are the copyright owner (who uploads files and chooses usage rules), the intermediary (YouTube), and the automated filtering code (Content ID). As noted below, the user can play a secondary but important role by disputing the blocking. In terms of function, Content ID is very interesting because it serves as a combined vesting and enforcement mechanism. Just as registration helps to further vest copyright rights, fingerprint files and usage rules set the metes & bounds of a copyright owner’s rights under Content ID. And just as Section 512 serves as a statutory enforcement mechanism, Content ID serves as a private mechanism, permitting blockage of content that matches a fingerprint file.

It is understandable why YouTube implemented the technology. YouTube is a haven of massive and willful copyright infringement posted by users. It is impractical for copyright owners to find all infringements via human review. But despite the system’s understandable goals, Content

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152 YouTube, Copyright Policy, supra note 50. Sometimes the program was previously referred to as “Video Identification” or “Video ID.”
153 “If a rights owner specifies a Block policy, the video will not be viewable on YouTube.” Id.
154 See Sawyer, supra note 20, at 388–90 (discussing automatic filtering and fair use).
155 Viacom and others sued YouTube for copyright infringement. See Viacom Int’l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010). As of this writing, the District Court has granted summary judgment to YouTube on the basis of the Section 512(c) safe harbor, dismissing all claims for direct and secondary copyright
ID is a serious threat to fair use.\textsuperscript{156} It can easily be used to remove far more speech than is removed by Section 512 takedowns, and far more quickly.\textsuperscript{157} As Lilli Levi notes, “[m]ore copyright owner activity should be expected if the costs of policing diminish.”\textsuperscript{158} With Section 512, speech is not removed until after it appears and is later taken down. But with Content ID, the speech can be removed before anyone ever sees it online. Thus, what Tim Wu calls “tolerated use” (i.e., “technically infringing, but nonetheless tolerated” uses) would increasingly be removed because of the ease of enforcement.\textsuperscript{159} Further, software filters suffer from dual dangers: overinclusiveness, by blocking fairly used content, and underinclusiveness, by missing infringement that is sufficiently changed so that it does not trigger a fingerprint.\textsuperscript{160} Thus, not only may software filters be ineffective, they may overextend de facto copyright rights, providing another example of the substance-procedure-substance feedback loop.

Under current Content ID rules, any audio or video matching a fingerprint file will trigger application of the chosen usage rules. For example, suppose a copyright owner uploads an audio file of a song. Further suppose that a creator of UGC mashes up the song with images that wryly comment on both the images and the song. If so, the resulting video very well could be a fair use. However, because the audio would match the Content ID fingerprint, the audio could be blocked.\textsuperscript{161} This may have happened with a wonderful parody video entitled William Shatner in Lucy in the Sky with Diamonds.\textsuperscript{162} The soundtrack for the video is William

\textsuperscript{156} See Brette G. Meyers, Note, Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations for User-Generated Content, 26 CARDOZO ARTS & ENT. L.J. 935, 950–51 (2009); see also Sawyer, supra note 20, at 389–90.

\textsuperscript{157} See von Lohmann, supra note 18.


\textsuperscript{159} Wu, supra note 46, at 617.

\textsuperscript{160} See United States v. Am. Library Ass’n, 539 U.S. 194, 219 (2003) (Breyer, J., concurring) (“software filters both ‘overblock,’ screening out some perfectly legitimate material, and ‘underblock,’ allowing some obscene material to escape detection by the filter”); cf. Ira S. Nathenson, Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags, 12 HARV. J.L. & TECH. 43, 73 (1998) (“[Web] should not suffer undue interference from trademark owners, whose rights can make searches underinclusive, or from webmasters, whose spamdexing makes searches overinclusive.”).

\textsuperscript{161} See von Lohmann, supra note 18.

Shatner’s 1968 spoken-voice version of The Beatles’ *Lucy in the Sky with Diamonds*. The video is a magnificent pastiche of pop culture references, beautifully parodying the song as well as The Beatles, Shatner, *Star Trek*, Lucy Ricardo from the *I Love Lucy* show, Lucy Van Pelt of *Peanuts* fame, the movie *Taxi Driver*, and more. Although fair use is a notoriously difficult area of the law, I have little doubt that the video is a fair use of the materials noted. Not only is the video noncommercial, but it is also a hugely transformative parody. Fittingly, the main target, Shatner’s song, is itself from an album entitled *The Transformed Man*.

Equally fascinating is the long, strange trip the video has taken online. I have previously commented on this video in the context of Section 512. However, research for this Article shows that the video has also apparently been a victim of YouTube’s Content ID program. In August 2009, a search of YouTube showed that for at least one upload of the video, the audio track had been disabled. As the page stated: “This video contains an audio track that has not been authorized by all copyright holders. The audio has been disabled.” This is an example of the kind of content that should not be blocked, in whole or in part. Interestingly, the audio was later restored and, of this writing, is still online. It is unknown whose claim, if any, led to the temporary silencing of the audio.

2. Potential for “Fairer” Use

What is unfortunate about Content ID is that, properly tuned, it has the potential of providing a nuanced balance between the interests of copyright owners and creators of UGC. Filtering technology is not utterly incompatible with fair use and technological innovation. Peter Menell

became an internet hit. Who would of [sic] thought!”).

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163 *See* THE BEATLES, *Lucy in the Sky with Diamonds*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (EMI Records Ltd. 1967).

164 For instance, when the video gets to the lyric “Newspaper taxis appear on the shore, waiting to take you away,” the video shows an image of Shatner sitting in a taxi covered with newspapers, with Robert De Niro (the star of *Taxi Driver*) sitting in the passenger seat. *See* Shatner video, supra note 162.


167 Nathenson, supra note 7, at 141–42 (discussing Shatner video and removal in context of Section 512).

168 A screen capture reflecting the disabling may be found at http://nathenson.org/mine/Shat_YT.jpg (last visited Oct. 22, 2010). As of this writing, the audio remains restored. *See* Fuzzpockets, Lucy in the Sky, YOUTUBE [Jan. 13, 2009], http://www.youtube.com/watch?v=EyfTNdlKR7A. The comments attached to the now-restored video attest to the prior disabling of the audio. *See* id.

169 But neither are they a perfect match. As noted by Dan Burk and Julie Cohen, “an algorithm-based approach to fair use is unlikely to accommodate even the shadow of fair use as formulated in current copyright
points to YouTube’s Content ID program as an innovation that seeks to balance “the need for technological innovation with the socially beneficial goal of a well-functioning marketplace for copyrighted works.”

Fred von Lohmann, formerly of the Electronic Frontier Foundation (EFF), argued that YouTube’s filters “should not remove videos unless there is a match between the video and audio tracks of a submitted fingerprint.”

Along those lines, the EFF and others endorsed a set of “Fair Use Principles” for UGC, which include suggested guidelines for automated filtering. Videos should not be blocked unless there is a near-total (90% or more) match between both the video and audio of the same copyrighted work.

Users should be able to dispute filters, regardless of whether the filter has blocked or monetized the content.

YouTube has implemented some measures aimed at accommodating user rights, but more needs to be done. Importantly, YouTube has a dispute procedure:

If you feel your video has been misidentified by the Content Identification system, you can dispute the identification. This involves filling out a short form listing the reason for your dispute. We then notify the content owner.
whose reference material was matched. The content owner will then review the match. If the content owner disagrees with your dispute for any reason, they will have the option to submit a copyright takedown notice . . . . 176

What YouTube has done with its dispute procedure is two-fold. First, it has crafted specific extra-litigation procedures to handle disputes over Content ID. Second, it has grafted those procedures onto the existing statutory takedown regime under Section 512 of the Copyright Act. This is a fairly workable dispute-resolution mechanism. Users whose videos are blocked, in part or in whole, may dispute the blockage. 177 YouTube then notifies the copyright owner, who then has the duty to actually review the site and determine whether a takedown is warranted. 178 If so, then the normal takedown and put-back procedures can proceed. So long as the copyright owner considers fair-use issues, and so long as the user can seek put-back based on colorable claims of fair use, the system could work. In fact, this might be what happened with the Shatner video. As noted, the once-blocked audio was later restored. Thus, the person posting the video might have disputed the audio blockage, and absent a formal takedown by the copyright owner in response, the audio was restored.

YouTube has engaged in fine-tuning to Content ID that also may have helped to restore the audio in the Shatner video. YouTube now permits owners to vary the type of treatment (blockage, tracking, monetization) based on factors such as the length of the matching material or proportion of matching material to the video as a whole. 179 This permits owners more ways of flexibly accommodating fair uses, “letting them create different policies depending on the proportion of a claimed video that contains their work, or the absolute length of the clip used.” 180 Such modifications are a

177 See id. (“There are different options for video-only matches versus video matches.”).
178 Id.
179 See Kyle Harrison, Over 1,000 Content Owners Now Using Content ID, YOUTUBE BIZ BLOG (Sept. 16, 2009 10:36 AM), http://ytbizblog.blogspot.com/2009/09/over-1000-content-owners-now-using.html (“Sometimes rightsholders encourage fans to upload clips of their content, so we allow them to set different policies depending on the length of the match. For example, a rightsholder might allow and monetize a video that uses less than 3 minutes of its content, while blocking any video that contains more.”).
180 Id. Interestingly, some copyright owners appear to be reaching similar conclusions. Viacom, which sued YouTube, now states that it has “not generally challenged users . . . where the use or copy is occasional and is a creative, newsworthy or transformative use of a limited excerpt for non [sic] commercial purposes.” Fair Use and Availability of Viacom Content on Authorized Websites, VIACOM, http://www.viacom.com/news/pages/abouthowuse.aspx (last visited Dec. 20, 2010).
significant and welcome step. A copyright owner who wishes to permit certain types of uses can indicate, for instance, not to block a clip of thirty seconds or less, or not to block a video where the percentage of copyrighted material is a de minimus part of the video.

But such changes are still not sufficient because they leave too much discretion to the copyright owner, who can opt out of fair use via code, without ever having to send a takedown notice. Suppose a copyright owner (for example, a bank, oil company, or tobacco company) wants all unauthorized uses of its television commercials blocked, regardless of percentage used. Further suppose a five-minute YouTube submission includes the entirety of the owner’s thirty-second commercial for purposes of criticism. Such use would constitute 100% usage of the copyrighted work, but only 10% of the submission, and may well be a transformative fair use. Under such circumstances, YouTube should give breathing room for fair use and ignore the usage rule seeking blockage. Instead, as the Fair Use Principles note, the proper route would be for YouTube to notify the copyright owner, who could then make individual review and determine if a takedown is appropriate. In other words, regardless of a copyright owner’s choice, YouTube should institute an additional usage rule of “notification-without-blockage”—i.e., copyright-owner notification in cases where fair use is likely to exist. In contexts where fair use is highly likely, such as partial or de minimus matches, notice without blockage is the procedural route most likely to lead to good outcomes because the copyright

181 In contrast, a frivolous takedown notice can subject the sender to liability for knowing material misrepresentations of infringement. See 17 U.S.C.A. § 512(f) (West, Westlaw through P.L. 111-264 (excluding P.L. 111-259) approved Oct. 10, 2010); Nathenson, supra note 7, at 142–43, 147–50 (discussing § 512(f)).

182 See EFF, Fair Use Principles, supra note 173, ¶ 2(a); see also von Lohmann, supra note 18. Concerns remain. In most cases where high percentages of user video and audio match the copyright owner’s “fingerprint,” the use is likely infringing. But it remains possible that literal copying might be fair use. In such cases, the proper route should not be a prohibition on filtering. After all, if filtering cannot be used for wholesale literal copying, then it is hard to imagine any case where it could be used properly. Instead, the solution is for the user to file a dispute, the owner to review for fair use and, if appropriate, submit a formal takedown. Hopefully, a true fair user will then seek put-back.

183 See EFF, Fair Use Principles, supra note 173, ¶ 2(a) (“Further human review by the content owner should be required before content is taken down or blocked.”). A notification procedure would be practicable for both the copyright owner and YouTube. Because the relevant copyright owners are all participants in the Content ID program, YouTube will possess contact information for the copyright owner. Thus, where a video only makes de minimus use, YouTube could automatically send a notification to the copyright owner, who could then make an individualized review and submit a takedown. Considering that the purpose of filtering is to shift some of the enforcement burdens to the online service, it remains incumbent that these burdens still be shared with the copyright owner who seeks blockage of materials.
owner remains free to send a takedown after reviewing the video. This usage rule should trump any copyright owner’s preference.184

This kind of fine-tuning is extremely important, and may provide copyright owners an option of a middle ground between total censorship and total acquiescence. Many lawyers urge prompt action after learning of potential infringement because time-bars may start ticking. In the civil context, even a few months’ delay can make it much harder to obtain preliminary injunctive relief.185 But with the middle ground of balanced usage rules combined with fair implementation of Section 512’s takedown and put-back regime, owners may be more tempted to take the position that choosing to track or monetize use constitutes a revocable nonexclusive license. It might be argued that such a solution is unsatisfying because it treats many fair uses as if they were merely tolerated, but now licensed, uses.186 Nevertheless, many businesses take licenses even when the uses are arguably fair because the certainty of a license reduces transaction costs for all and increases certainty. Equally so, providing flexibility through usage rules further promotes certainty for copyright owners and users.187

184 There is a risk that ISPs using automated filtering could lose their safe harbor due to constructive knowledge or an increased right and ability to control possible infringement. See Sawyer, supra note 20, at 402. Anticipating this issue, the UGC Principles—which call for automated filters—state that copyright owners “should not assert” that online services lose their safe harbor by utilizing the very filters demanded by those principles. UGC Principles, supra note 13, ¶ 13. In the same breath, the signatories to the UGC Principles indicate that they are not legally bound by the principles they signed. Id. pmbl.

185 See, e.g., Gidatex, S.r.L. v. Campaniello Imps., Ltd., 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998) (stating that “courts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months”).

186 Although this Article focuses on de facto rather than de jure rights, see supra notes 36–38 and accompanying text, it would be troubling for courts to treat licenses arising from Content ID as evidence that the licensed uses are not fair. But cf. Princeton Univ. Press v. Mich. Document Serv., Inc., 99 F.3d 1381, 1387 (6th Cir. 1996) (treating licensing market as factor cutting against fair use). Unlike typical licensing markets, any licenses created through Content ID lack express agreements with, or direct fees from, the licensees (the users) and ought to be treated as tacit admissions by copyright owners that the “licensed” uses tend to be fair. Cf. Gibson, supra note 20, at 948 (arguing that fair use ought to look at “why” licensing markets exist rather than “whether” they exist).

187 Although privacy issues are beyond the scope of this Article, Content ID also gives rise to such concerns. YouTube should not provide a copyright owner with personally identifying information regarding any person posting or viewing a video without a proper subpoena or court order. Of course, if the formal takedown process occurs under Section 512 and the user sends a put-back, then the user chooses to part with personally identifying information. See 17 U.S.C.A. § 512(g)(3)(D) (West, Westlaw through P.L. 111-264 (excluding P.L. 111-259) approved Oct. 10, 2010).
IV. PATHS TO BETTER COPYRIGHT ENFORCEMENT PROCEDURES

The previous Part showed how flawed enforcement procedures can cause bad results by expanding copyright far beyond what is embedded in the substantive legal norms of copyright law. This Part considers the values attendant to procedural justice in copyright and then, building upon the descriptive framework discussed in Part II.C, formulates a normative framework that might help to craft better enforcement procedures, allowing owners to effectively enforce copyrights, while reserving a rich arena for UGC.

A. Procedural Values

Others have addressed the values that ought to underlie a theory of procedural justice. One approach is to focus on the merits of process-as-process. For example, writers in the legal-process school focused on process itself. Expanding upon earlier observations from legal realism, they suggested that good process was the best guarantor of good results. But such a focus risks ignoring the interplay of substance and procedure, and the fact that seemingly fair procedures can lead to substantively bad results. In contrast, William Eskridge describes an approach of “normativism” taken by Robert Cover, Owen Fiss, and Judith Resnik, in a groundbreaking procedure casebook: their approach is “not proceduralism, the notion that good procedures are presumptive evidence of good results, but is instead normativism, the notion that good results (substantive justice) are presumptive evidence of good procedures.” As Eskridge notes, however, this approach begs the question of defining the criteria upon which normativism is based: “one scholar’s public value is another scholar’s rent.”

Thus, the value of a procedure should not be defined solely in substantive terms. And in light of the feedback between procedure and

188 Eskridge, supra note 43, at 962–64; Martinez, supra note 35, at 1025.
189 Eskridge, supra note 43, at 973.
190 Id. at 964 (reviewing ROBERT M. COVER ET AL., PROCEDURE (1988)).
191 Id. at 967–68. Eskridge notes that the term “normativism” was not used in the casebook, but was instead suggested to him by Alex Aleinikoff. Id. at 964 n.105.
192 Linda S. Mullenix argues that normativism “reduces substantive justice to the personal perspective of the metaproceduralist, and in the judicial arena, to judicial tyranny.” Linda S. Mullenix, The Influence of History on Procedure: Volumes of Logic, Scant Pages of History, 50 OHIO ST. L.J. 803, 823 (1989). These are important objections. Defining good procedures solely in terms of good results gives little insight into how to craft good procedures, instead substituting ends-means justifications rooted in relativism. Moreover, it does not help to explain why
people ought to comply with substantively erroneous decisions. See Solum, supra note 29, at 190. However, in the context of copyright procedure, it becomes much easier to find substantive roots, namely, the legal norms contained in copyright and related principles such as free speech. Nonetheless, because much of copyright law—particularly fair use—is indeterminate, a theory of procedural justice for enforcement should not be rooted solely in substantive accuracy.


194 Solum, supra note 29, at 303–06.

195 Id.

196 Id.; see also id. at 250 (noting that “the goals of case accuracy and systemic accuracy may conflict”).

197 Martinez, supra note 35, at 1031–32, 1091–92.

198 Id. at 1091.

199 Id.

200 Id.

201 Martinez on occasion speaks in terms of transparency as well. See, e.g., id. at 1059.

202 See Solum, supra note 29, at 201 (noting that “substance-affecting rules of procedure are less transparent
The observations of Eskridge, Solum, and Martinez are extremely useful in identifying relevant values for copyright enforcement. Without meaningful participation by parties and relevant nonparty stakeholders, copyright-enforcement procedures may lack legitimacy in the eyes of the public, reducing the aggregate value of copyright enforcement, and increasing public contempt for copyright law. Without appropriate levels of transparency, copyright owners will operate mostly in the dark, permitting overreach to occur without accountability. Without sufficient accuracy, enforcement procedures permit gross substantive overreach, benefiting individual copyright owners to the detriment of users, and again increasing public contempt for copyright law.

Yet one cannot expect full participation, transparency, and accuracy. Copyright enforcement is an essentially private endeavor. Further, countervailing principles of efficiency and cost dictate that copyright enforcement cannot always lead to substantively accurate outcomes. The task addressed below, then, is to formulate a normative framework that helps to find a balance between the interests of owners, users, and the public at large, both at the level of particular disputes, as well as at the systemic level.203

B. Normative Framework

Part II.C put forth a descriptive framework for copyright procedure that looked to the actors involved (human and/or computerized parties, decision-makers, and bystanders), the source of procedure (public laws or private processes), and the function of the procedure (such as vesting, controlling, or otherwise enforcing rights). Part III focused on an important subset of procedures, namely, private enforcement, and addressed the problems of direct, indirect, and automated enforcement. The subsection above, Part IV.A, considered procedural values relevant to copyright enforcement.

Below is a normative framework that builds upon the descriptive framework by showing how problems with actor, source, and function may be rooted in a deficiency of participation, transparency, and balanced accuracy. First, when enforcement is done quietly between actors of unmatched power and knowledge, users might submit to threats and other stakeholders might not

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203 I am trying to avoid the use of words such as “fairness” and “justice” because those terms beg the question at hand, which is to try to find a way of defining “procedural justice” in the context of copyright enforcement.
object, defeating the benefits of participation. Second, when the sources of enforcement procedures are primarily private, they can defeat the benefits of transparency. Finally, enforcement functions that elevate efficiency and low cost over substantively justified results can undermine a balanced accuracy.

Figure 2 – Normative framework for copyright procedures

As one would expect, the three principles are connected in a fashion that evokes the feedback loops discussed throughout this Article. They are akin to the vertices of an isosceles triangle, each feeding back on the others through the legs of the triangle. 204 Although no principle is primary, participation and transparency are the keys to balanced accuracy. Participation and transparency are not polar opposites, but instead correlatives, intertwined principles that can easily reinforce or undermine one another. Without them, balanced accuracy is unlikely to exist at either the dispute level or the systemic level. Below, I address the principles in turn, illustrating how direct, indirect, and automated enforcement can undermine them. I also suggest how paying greater attention to these principles can foster procedural reform.

1. Participation

Although it would seem that private enforcement by definition precludes broad participation, such an assertion would be inaccurate and objectionable. Instead, participation is the glue that holds together the tenuous framework of procedural justice in copyright. At a minimum, it means that interested parties receive meaningful notice of matters of import,

204 See Solum, supra note 29, at 285–86 (discussing potentially dependent relationship between participation and accuracy).
as well as an opportunity to be heard.\footnote{Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).} A lack of meaningful participation, such as UGC users with limited knowledge and resources, makes overreaching copyright demands easy. It makes frivolous takedowns easier to send. It can tempt the creation of automated filtering systems with secret usage rules that vary by copyright owner, with little regard for fair use.

I do not suggest that every interested stakeholder ought to micro-participate in every enforcement action; instead, I suggest that procedural justice increases with the extent that such participation occurs, especially at the systemic level.\footnote{Gibson, supra note 20, at 903 (arguing that user “resistance” to copyright feedbacks “only helps if a critical mass of users resists”); Lee, supra note 11, at 1491 (suggesting that “the development of informal copyright practices should be open to all”).} Potentially relevant participants can be identified by reexamining the descriptive framework proposed in Part II. In terms of that framework, problems involving the actors in the enforcement function may indicate a lack of meaningful participation. Actors may include the opposing parties (the copyright holder, the challenged user, and less often, the intermediary), the decision-makers (intermediaries removing content and computers), and interested bystanders (consumers of UGC and groups representing both public interests and the copyright industry).

After recognizing that the stakeholders extend far beyond the nominally opposing parties, the nature of participation becomes clearer. Participation can take several forms. The first is dispute participation at the level of individual enforcement actions, which can involve direct cease-and-desist notices, indirect DMCA takedowns sent to intermediaries, and automated enforcement via computer filters.\footnote{Law is created “through an essentially cultural medium” of discussion, experience, sharing, and disputing among members of the community.” Eskridge, supra note 43, at 970 (quoting Robert M. Cover, The Supreme Court, 1982 Term, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 11 (1983)).} The second is systemic participation, which can include formulating, revising, or criticizing enforcement at the systemic level.\footnote{It can also involve litigation, the most public type of dispute participation.} As I suggest, procedural justice in copyright enforcement is enhanced by participation at both levels by interested stakeholders, above and beyond the mere parties.

In this sense, participation is a correlative to transparency because it fosters disclosure and accountability. Although it is theoretically possible to have transparency and accuracy without the participation of interested parties, it is not likely. The benefits of participation are not limited to maximizing accurate outcomes and transparency: participation also helps to foster stakeholder satisfaction at the outcome, and more importantly, helps
proceedings serve “as a legitimate source of authority.” As Solum notes, the “hard question” of procedural justice goes beyond ensuring accurate results: it is also about encouraging the public to comply with sometimes inaccurate results. Procedures viewed as legitimate may obtain the “voluntary cooperation” of citizens, whereas those viewed as illegitimate may require sanctions, leading to social problems. Unfortunately, copyright-enforcement procedures are often viewed with contempt. The key to legitimacy, Solum suggests, is participation of the parties or their representatives.

Thus, participation is a vital tool to developing good copyright procedures. Unfortunately, at the level of dispute participation, there are great abuses of the participation principle. Direct enforcement is typically done by cease-and-desist letters sent by sophisticated businesses and lawyers to individuals who are oftentimes cowed by the threat of statutory damages. As a result, it is easy to send overreaching demands that ignore fair use. Indirect and automated enforcements magnify these problems. Participation by the affected party is undermined by the fact that copyright owners and intermediaries have no obligation to notify a user before removing or blocking content. Further, in the case of DMCA takedowns, the decision-maker is an interested intermediary that automatically removes content to preserve its safe harbor. With automated filters like YouTube Content ID, intermediaries can automatically block videos at the behest of a copyright owner without any regard to whether the use is fair. The absence of a neutral decision-maker is striking.

In all three scenarios, review by a disinterested court is possible, but for most users, hardly feasible. The rare case is one like *Lenz*, where a user objected to what she viewed as an overreaching takedown. But importantly, the *Lenz* dispute provides a paradigmatic example of the importance of involving stakeholders beyond the opposing parties and a nominal decision-maker. In that case, Stephanie Lenz was represented by the Electronic Frontier Foundation (EFF), a public-interest group. Involvement of interested bystanders increases the quality of participation, with corresponding increases in transparency and accuracy.

209 Solum, supra note 29, at 321.
210 Id. at 190. Solum suggests that participation is the key to obtaining compliance to erroneous decisions. Id. at 320–21. Martinez argues similarly. See Martinez, supra note 35, at 1084, 1087 (noting that dignified participation can enhance legitimacy, but warning that such legitimacy may come at the cost of appropriate substantive outcomes).
211 Solum, supra note 29, at 278–79.
212 Id. at 279.
The benefits of bystander participation can be felt even more strongly at the level of systematic participation. As Lawrence Lessig notes, regulation of behavior is accomplished not just by law, but also by code, markets, and social norms.\textsuperscript{213} First, code can present a significant obstacle to systemic participation. With automated filters, content can be blocked automatically without regard to fair uses. Therefore, the public may not know what is blocked, frustrating bystander participation \textit{ab initio}.\textsuperscript{214} It is one thing for the public to object to what is available and removed after the fact; it is quite another when nobody knows that something was blocked. As Jennifer Rothman argues, we ought to be suspicious of customs that represent the interests of only one side.\textsuperscript{215} On the other hand, “when a custom develops with input and participation of both IP owners and users and large and small players in the IP industries, it is more meaningful.”\textsuperscript{216} Needless to say, for such participation to take place, it is necessary for stakeholders to know of the enforcement.

Second, regarding markets, Viacom—a company that has sued YouTube for copyright infringement—now uses personnel trained in fair-use issues to review alleged infringement before sending takedowns.\textsuperscript{217} Why? Although Viacom owns many films and TV shows, it is acutely aware that fans increasingly expect to participate with its works through fan sites, fan fiction, mash-ups, and video parodies. As such, participants in the market for information helped to fuel Viacom’s desire to engage rather than alienate fans, in turn spurring a more fair-use friendly approach.

Third, regarding social norms, public-interest groups and other advocates play a major role in criticizing overreaching copyright enforcement at the systemic level.\textsuperscript{218} There are shaming sites aimed at copyright owners, such as Chilling Effects Clearinghouse, which publicly posts demands and takedowns, thus acting to draw attention to content providers who overextend their copyrights.\textsuperscript{219} Similarly, speech and

\textsuperscript{213} See L\textsc{essig}, supra note 143, at 121–25.
\textsuperscript{214} See Sawyer, supra note 20, at 393 (noting that public may never learn about automatically blocked material).
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{218} See Sawyer, supra note 20, at 392 (noting the “wisdom of crowds” and value of “backlash”).
\textsuperscript{219} CHILLING EFFECTS CLEARINGHOUSE, http://www.chillingeffects.org/search.cgi [last visited July 6, 2010].
privacy-advocacy groups such as the EFF, the Berkman Center, the Center for Internet and Society, the Citizen Media Law Project, the Organization for Transformative Works, Public Knowledge, and the Electronic Privacy Information Center have all emerged as counterforces against overly aggressive copyright owners and other commercial constituencies. Older organizations, such as the ACLU, also remain important. Indeed, the Fair Use Principles put forth by the EFF are also endorsed by the Berkman Center, ACLU of Northern California, and others. This listing does not even begin to include the sites that have become increasingly active regarding free speech and fair-use issues, such as TechDirt, Wired, SlashDot, and BoingBoing, the latter of which rightfully opposed Ralph Lauren’s attempt to use a DMCA takedown to remove commentary regarding an advertisement that featured an impossibly thin model.

2. Transparency

Scholarship on procedure generally focuses on court procedures, which consist of rules and statutes that are promulgated pursuant to open processes. Because transsubstantive rules such as those in the Federal Rules of Civil Procedure are created and enforced publicly, transparency values are embedded in the system. Court decisions announcing rules of procedure are also public so that their holdings may be applied by others. Thus, for the most part, transparency is an implicit characteristic of modern procedure.222

Unfortunately, transparency is often lacking in copyright procedure, where procedures are crafted or implemented in private, sometimes with proprietary code.223 Since low costs and efficiency are valued by companies more than transparency or accuracy, there are incredible incentives to sacrifice fair results for quick ones.224 Enforcement, whether direct, indirect,
or automated, is often invisible to those other than the affected user. As Thomas Main notes, “subterfuge” via procedure “is dangerous because procedural reforms can have the effect of denying substantive rights without the transparency, safeguards and accountability that attend public and legislative decision-making.” But transparency fosters greater participation and, when combined with participation, is more likely to increase accuracy.

In some senses, copyright enforcement has some qualities of transparency. Copyright lawsuits are matters of public record. Private copyright enforcement is built upon the framework of preexisting copyright laws. These public laws include the registration scheme and the structure of DMCA takedowns. Therefore, private enforcement has a significant public component. However, most enforcement takes place privately, out of court. Even though the notice-and-takedown scheme stems from a statute, its implementation is nearly always private and often involves parties of vastly unequal resources and sophistication. Moreover, the relative secrecy of private enforcement makes it difficult to quantify the extent of copyright overreach. For example, one study suggests that approximately one-third of takedowns are without merit, but a lack of transparency makes a representative dataset effectively unobtainable.

It might be objected that private enforcement is a private matter, akin to disputes that lead to confidential settlements. By that argument, there is no need for greater transparency. But a descriptive state of secrecy does not equate to a conclusion that secrecy is optimal. As noted by Solum, the “substance-affecting rules of procedure are less transparent to the public than are rules of substantive law.” The problem with copyright enforcement procedures is that they fly under the radar, permitting de facto

Unaccountability: Trade Secrets in Our Public Infrastructure, 59 FL. L. REV. 135, 137 (2007). He argues “that public access to information should prevail over trade secrecy protection.” Id. Otherwise, “[t]he values of commerce will eliminate public values like transparency and accountability from our voting machines, Internet routers, and telecommunications systems.” Id. at 193.

Main, supra note 32, at 821.

Private enforcement practices can also be revealed in court proceedings. There, the invisibility of private enforcement is no thicker than the skin of an apple, waiting to be peeled to reveal a possibly rotting core. A better term might be “thinvisibility.”

Knowing the degree to which takedowns are frivolous is impossible to pinpoint because they are private. One study concluded that at least one-third of takedowns were legally questionable. See Urban & Quilter, supra note 17, at 666–67. However, that study is not necessarily representative of actual enforcement because it consisted primarily of takedowns sent to Google and other self-reported letters. Id. at 642. That is not to say that takedown abuse is not rampant, but rather to acknowledge the impracticability of reaching empirical conclusions that accurately reflect actual enforcement. This quagmire provides an additional reason for transparency in copyright enforcement.

Solum, supra note 29, at 201.
results at odds with copyright law and frustrating participation. Thus, a lack of transparency is at the root of significant enforcement overreach. Moreover, the effects can go far beyond the nominal direct parties to a dispute, affecting public users of UGC. It can also embolden copyright owners to use improper tactics against others.

Here, dispute transparency is often lacking in specific enforcement actions, inviting significant abuses. With direct enforcement, copyright owners feel free to provide the typical litany of threats of significant damages and attorneys’ fees, oftentimes ignoring potential fair-use arguments. With indirect enforcement, copyright owners have tremendous incentives to send DMCA takedowns, gambling that even in cases of fair use, the user will back down rather than submit a statutory put-back or wage a court challenge. This is the essence of what Martinez called “process by avoidance,” when “process is intentionally used to avoid difficult substantive questions.”229 The DMCA’s takedown procedure runs a high risk of encouraging process by avoidance, when copyright owners willfully ignore fair use when demanding removal. Most disturbingly, with automated enforcement, code is used to block content. Yet the public may not know the usage rules chosen by a copyright owner, or even that filtering is used at all. As noted by Lessig, code can threaten liberty just as much as state power and markets did in earlier times.230 Because code is “the most effective way to regulate behavior in cyberspace,”231 a lack of transparency makes code-as-regulator all the more dangerous.

The best methods of combating a lack of dispute transparency are also relevant to fostering systemic transparency. The first is through litigation, the route taken in the Lenz case. The plaintiff “outed” Universal’s questionable takedown policies, including a takedown policy rooted in allegedly deliberate ignorance of fair use.232 By making such practices a matter of public record, transparency values are enhanced. In addition, the “stop-and-think” rule of Lenz further encourages transparency by requiring copyright owners to consider fair use before sending a takedown.233 This may encourage copyright owners to consider fair use ex ante, in order to create an enforcement record that is supportable ex post. The positive spillover of enhanced transparency may be fewer questionable takedowns.

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229 Martinez, supra note 35, at 1031.
230 Lessig, supra note 143, at 121.
231 Lessig, supra note 144, at 514.
232 See Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008); see also supra notes 113–18 and accompanying text.
233 Lenz, 572 F. Supp. 2d at 1156.
A second method of fostering transparency is through the bystander stakeholders noted in regards to participation. Organizations that publicize, criticize, and shame bad practices play a vital role in enforcement reform. Takedown notices are regularly published on the Chilling Effects Clearinghouse database. In addition, the EFF represents Lenz in the ongoing litigation noted above. Such organizations, along with news organizations and noted bloggers, help bring to light the abuses in specific disputes, as well as systemically ongoing abuses. As such, they enhance transparency, the correlative of participation.

3. Balanced Accuracy

The final component of a theory of procedural justice for copyright enforcement is accuracy. However, pure accuracy is neither attainable nor desirable. As Lawrence Solum notes, procedures are crafted to deal with problems of “imperfect knowledge of law and fact,” “incomplete specification of legal norms,” and “partiality.” Few procedures lead to perfect knowledge, and the informal nature of copyright enforcement means that information known will sometimes be incomplete or inaccurate. Further, although one can talk at length about the merits of accuracy, much of copyright law is indeterminate, particularly the “most troublesome” doctrine of fair use. Finally, both copyright owners and creators of UGC may be prone to partiality, overestimating the strength of their positions.

Moreover, even if pure accuracy were possible, it would not be desirable. The cost of such theoretical accuracy would require every copyright dispute to be extensively litigated, driving the cost of enforcement far beyond the value of the copyrights. Instead, the goal ought to be a balanced accuracy that considers not only dispute accuracy, but also the balance of countervailing values prompted by Solum’s framework, such as free speech and privacy, fair distribution of risk, systemic accuracy, and reduction of enforcement costs. However, if procedures “thwart the
accurate application of substantive law without any corresponding benefit," then the balance is inappropriate.239

The normative framework, presented as an isosceles triangle, places balanced accuracy at the top. This is not intended to suggest that it is the most important principle, but rather that it rests heavily on a foundation of participation and transparency. Unfortunately, balanced accuracy is all too often sacrificed in copyright enforcement due to a lack of participation and transparency, as well as a lack of balance between accuracy and countervailing concerns such as cost and efficiency. Accordingly, dispute accuracy can be sacrificed for values more appealing to copyright owners, such as efficiency and low cost in enforcement. At the same time, other important substantive values, such as free speech, can be lost in the shuffle. Indeed, the motivations that tip the scales toward low cost and high efficiency are strong parts of the feedback loop, inflating de facto copyright enforcement far beyond the scope of de jure copyright law.

It is possible that at the systemic level, copyright enforcement is effective and generally comports with substantive copyright law. After all, this Article focuses primarily on UGC whereas significant percentages of copyright enforcement likely focus on much clearer cases of infringement. Unfortunately, limited transparency and participation make it terribly difficult to determine the extent to which copyright enforcement is overreaching.240 Regardless of whether clear infringement represents 50% or even 95% of enforcement targets, it is still speech, and care must be taken to ensure that copyright enforcement serves both substantive and procedural values.

I do not mean to suggest that there can be a formulaic recitation of how to properly balance accuracy against efficiency and cost. Instead, my prescription is far more modest. The most visible problem with private copyright enforcement is the mismatch between de jure and de facto copyright rights, i.e., the substance-procedure-substance feedback loop. However, it is not the only problem or even the primary cause of the problem. Instead, the best way to reach an optimal balance is to make private copyright enforcement as transparent and participatory as possible, both at the dispute level and systemic level. This will encourage a closer match between copyright enforcement and substantive law, and bring greater legitimacy to an otherwise obscure, scary, and overreaching process.

239 Martinez, supra note 35, at 1080-81.
240 See supra note 227 and accompanying text.
V. CONCLUSION

Although well beyond the scope of this Article, the normative framework discussed here underscores the problems with the drafting of the so-called Anti-Counterfeiting Trade Agreement (ACTA). The document was negotiated in secret and without the participation of the public. As noted in a letter signed by dozens of law professors and sent to President Obama in October 2010, it is of:

grave concern that [the Obama] Administration is negotiating a far-reaching international intellectual property agreement behind a shroud of secrecy, with little opportunity for public input, and with active participation by special interests who stand to gain from restrictive new international rules that may harm the public interest.

As stated in the letter, the U.S. claims “that ACTA’s provisions are merely procedural and only about enforcing existing rights.” Even if that were true, this Article has argued that procedures are a key element in copyright overreach. There is no such thing as “mere” procedure.

In sum, the copyright wars are not just over the scope of copyright, but also over the procedures used to enforce those rights. Flawed procedures can permit gross overextensions of those rights and subvert other important values. Those interested in copyrights should therefore pay very close attention to the substance-procedure-substance feedback loop. In resisting enforcement overreach, stakeholders—whether creators of UGC or public-interest groups—should consider the descriptive and normative frameworks outlined above. Regarding the descriptive framework, close attention should be paid to the actors involved, the sources of copyright enforcement, and the function of enforcement procedures. This Article focused on three major enforcement procedures, namely, direct cease-and-desist letters, indirect DMCA takedowns, and automated filtering. All three suffer from potential and actual copyright overreach, leading to de facto rights that can far exceed de jure copyright rights.

Regarding the normative framework, many of the dangers of private copyright enforcement arise from a lack of meaningful participation and

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242 Letter from over 70 law professors to President Barack Obama (Oct. 28, 2010), available at http://www.wcl.american.edu/pijip/download.cfm?downloadfile=83CE3453-EFC7-453B-0-CBA50D82A84568&typename=cmFile&fieldname=filename. The author is a signatory. Id.
243 Id.
transparency. This leads to reductions of accuracy in favor of owner-oriented values such as efficiency and low cost. Although these flaws arise naturally in private enforcement, they are not completely insurmountable. Accordingly, it is vital to call attention to flawed procedures, whether through publicity, shaming, or even litigation, regardless of whether those flaws arise in individual disputes or occur systemically. When participation and transparency are maximized, a better balance may be struck. Accuracy should not be sacrificed to the altar of easy takedowns. Owners ought to focus more heavily on creating transparent usage policies. Users ought to be able to share their creations with more confidence that they will be seen and tolerated, civilly, in our world of shared and user-generated content.