

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

Ira S. Nathenson*

Abstract

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 source of procedures, the relevant actors, and the functions of enforcement (the descriptive framework), the Article suggests principles of transparency, participation, 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.

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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.¹ 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?”² The second is 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.”³

¹ As said in another context by Vikram David Amar, “As a teacher and scholar in both constitutional law and civil procedure, I love when the two intersect.” Vikram David Amar, *Adventures In Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 933 (2004).

² E-mail from John T. Cross to Ira S. Nathenson (June 1, 2009, 10:57 AM EST) (on file with author). Professor Cross also teaches and writes about Civil Procedure and Intellectual Property. See, e.g., JOHN T. CROSS ET AL., CIVIL PROCEDURE: CASES, PROBLEMS AND EXERCISES (2d ed. 2008); John T. Cross, *The Lingering Legacy of Trade-Mark Cases*, 2008 MICH. ST. L. REV. 367.

³ *Regulatory Reform Act: Hearing on H.R. 2327 before the H. App. Comm., Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell); see also Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 534 n.103 (2006) (quoting Dingell); Jean R. Sternlight, *Dispute Resolution and the Quest For Justice*, 19 NO. 1 EXPERIENCE 14, 15 (2009) (same). Sir Henry Maine similarly declared, 100 years earlier, “that substantive law has at first the look of being gradually secreted in the interstices of

In the context of copyright and the internet, these comments resonate deeply. Just as a right without a remedy is empty,⁴ Professor Cross' comment recognizes that a right without enforcement procedures can have little value.⁵ Representative Dingell's comment adds a cautionary note: the normative value of 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 108,⁶ and the notice-and-takedown procedures in Section 512.⁷ Both concern extensive sets of procedures to be followed by private actors such as libraries, archives, and internet service providers regarding copying done by or through these entities.⁸ So long as the procedures are followed, 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

procedure." SIR HENRY S. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883).

⁴ 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 WILLIAM BLACKSTONE, 3 COMMENTARIES *109); 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.").

⁵ 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.").

⁶ See James G. Neal, *A Lay Perspective on the Copyright Wars: A Report from the Trenches of the Section 108 Study Group*, 32 COLUM. J.L. & ARTS 193, 200 (2009) (the history of Section 108 shows "a remarkable history of side agreements, legal challenges, guidelines and best practices, extended industry investigations and grand compromises").

⁷ See Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 749-50 (1998) (describing "two months of laborious and at times acrimonious face-to-face" negotiations between service and content providers); see generally Ira S. Nathenson, *Looking for Fair Use in the DMCA's Safety Dance*, 3 AKRON INTELL. PROP. J. 121, 131-34 (2009) (discussing statute's drafting).

⁸ 17 U.S.C. § 108 (2005) (providing sets of conditions where copying or distributing works by libraries and archives will not constitute infringement); *id.* § 512 (providing safe harbors where service providers are not monetarily liable for copyright infringement).

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.”⁹ Lorelei Ritchie notes that even courts “have tended to overlook . . . synergies” between IP and civil procedure, resulting in “missed opportunities” and “judicial mistakes.”¹⁰ Edward Lee notes that IP scholars tend to ignore “informal practices” that serve as gap-fillers in copyright.¹¹

These admonitions are well-taken.¹² 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”).¹³ 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.¹⁴ 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

⁹ Rochelle Cooper Dreyfuss, *An Alert to the Intellectual Property Bar: The Hague Judgments Convention*, 2001 U. ILL. L. REV. 421, 455.

¹⁰ Lorelei Ritchie, *Reconciling Contract Doctrine with Intellectual Property Law: An Interdisciplinary Solution*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 105, 106 (2008).

¹¹ Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1468-69 (2008). 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 focuses 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”).

¹³ In October 2007, a number of leaders in the copyright and UGC industries such as Disney and MySpace announced “Principles for User Generated Content Services” (“UGC Principles”). See Principles for User Generated Content Services, <http://www.ugcprinciples.com/> (last visited May 22, 2010); see also Note, *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 HARV. L. REV. 1387 (2008) [hereinafter, *Harvard UGC Principles*].

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 COLUM. J.L. & ARTS 497 (2008) (discussing user-generated fair use principles).

letter. 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.¹⁵ Such demands permit overextensions of substantive copyright law because users may be terrorized into submission without consideration of fair or other non-infringing use.

The second category includes *indirect enforcement* procedures. 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.¹⁶ Few of these takedowns are ever challenged by lawsuit or by a counter-notification demanding put-back of the removed materials.¹⁷

The third category includes *automated enforcement* procedures that 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.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.

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, the Article proposes descriptive and

¹⁵ See 17 U.S.C. § 412 (2008) (registration prerequisite to award of statutory damages and attorney's fees); *id.* § 504(c)(2) (2004) (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).

¹⁶ See Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited May 31, 2010). As of Oct. 19, 2010, the database contained approximately 7000 notices of various types; *see also infra* Part II.B (discussing indirect enforcement procedures).

¹⁷ See Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 679 (2006) (few users send counter-notifications).

¹⁸ See Fred von Lohmann, *YouTube's January Fair Use Massacre*, ELECTRONIC FRONTIER FOUNDATION DEEPLINKS BLOG, Feb. 3, 2009, <http://www EFF.ORG/deeplinks/2009/01/youtubes-january-fair-use-massacre>.

normative frameworks aimed towards creating better procedures. Thus, the use of “civil” in the 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 I 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 sources, actors, and functions of those procedures. Part II 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 III considers the values attendant to procedural justice in copyright enforcement, and sets forth a normative framework that looks to principles of transparency, participation, 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.

I. 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 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

¹⁹ Cf. 28 U.S.C. § 2072(b) (1990) (invalidating a Federal Rule of Civil Procedure if it “abridge[s], enlarge[s], or modif[ies] any substantive right”).

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, 1085 (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, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 394-400 (2009) (discussing feedback loops in the context of the UGC Principles and content-identification technology). Edward Lee notes an analogous concept that he calls “warming,” where “users are emboldened to use copyrighted works without authorization based on the development of what appears to be an increasingly accepted informal practice.” Lee, *supra* note 11, at 1463-64.

²¹ The UGC Principles are “guidelines negotiated among various industry stakeholders

accurate application of copyright law: it also subverts important values attendant to procedural justice. This Part first discusses the interplay of substance and procedure that 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

that take[] existing formal copyright law as its starting point and background assumption, [and] illustrate that self-governance and traditional regulation can complement one another.” *Harvard UGC Principles*, *supra* note 13, at 1387.

²² See *Feist Publ’n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359-60 (1991) (rejecting copyright protection based solely on creator’s “sweat of the brow”).

²³ See *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (upholding copyright extensions).

²⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (“Pretty Woman” parody could be fair use).

²⁵ Transcript of Oral Argument at 15-16, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010) (No. 08-103), 2009 WL 3197880. During the argument, Justice Ginsburg, a former civil procedure professor, noted that the relevant document was Form 19. *Id.* at 16; see FED. R. CIV. P. APPX., Form 19, Complaint for Copyright Infringement and Unfair Competition; see also 28 U.S.C. § 2072(a) (granting Supreme Court power to prescribe rules of practice and procedure).

²⁶ Transcript of Oral Argument at 16, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103).

²⁷ The Court held that it was not. *Reed Elsevier*, 130 S. Ct. at 1241.

²⁸ *Erie 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”).

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 substance 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. First, 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 what I call the “*substance-procedure-substance*” *feedback loop*: bad procedures subvert the 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

²⁹ Litigation conduct occurs not just in the courtroom, but also in “clerks’ offices, conference rooms where depositions are taken, 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.

³² Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) (emphasis added).

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) (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”).

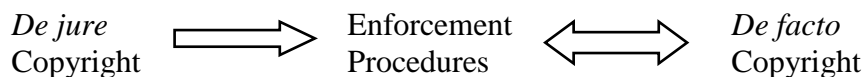
³⁴ Main, *supra* note 32, at 803.

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”).

³⁶ “[A]s time passes and legal advice translates the substance-affecting procedural

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

Thus, procedure ought to embrace values beyond the accurate

decision rules for those whose conduct is at issue, rules of procedure may become de facto rules of conduct.” Solum, *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 884; Sawyer, *supra* note 20, at 395-96; cf. Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (questioning role of custom in IP law).

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. 693, 724 (1974); see also Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 62 (2008) (quoting Ely).

⁴⁰ *Sims v. Great American Life Insurance Co.*, 469 F.3d 870, 882 (10th Cir. 2006) (quoting Michael Lewis Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 504 (1989)); see also Redish & Murashko, *supra* note 39, at 27-28 n.12 (quoting *Sims*, 469 F.3d at 882); cf. FED. R. CIV. P. 1.

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, those values are often elevated above all others, leading to abandonment of other procedural values. *Transparency* is another such value. Bad 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 hurt. 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 my main focus 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 instead choosing to tolerate the user conduct.⁴⁶ Second, I do not suggest that *de facto* accuracy is an achievable goal. Doctrines such as

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 (emphasis in original).

⁴³ William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964 (1989) (reviewing ROBERT M. COVER ET AL., *PROCEDURE* (1988)) (emphasis in original).

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 (emphasis in original).

⁴⁶ Lee, *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, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008) (discussing “tolerated use”).

idea/expression, substantial similarity, and fair use make copyright highly indeterminate.⁴⁷ However, some cases will involve clear non-infringement. 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 them 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 be used to foster inaccurate claims, and should permit users breathing room in the gray cases. Further, enforcement procedures ought to better accommodate principles of transparency and participation, so as to better balance owner and user rights.

C. A 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 internet service providers demanding identification of users engaging in certain types of infringement, without ever having to file a lawsuit.⁴⁸ Yet copyright procedures exist in other forms as well, such as the robots exclusion standard, an internet standard by which website owners can constrain search engine indexing by inserting a short file onto their servers.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:

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

⁴⁷ Gibson, *supra* note 20, at 889-91; Lee, *supra* note 11, at 1480.

⁴⁸ 17 U.S.C. § 512(h) (1999). In the civil context, a copyright owner would otherwise generally have to file a lawsuit and then issue a subpoena pursuant to Rule 45. *See* FED. R. CIV. P. 45.

⁴⁹ *See* The Web Robots Pages, <http://www.robotstxt.org/> (last visited June 1, 2010) (explaining how robots exclusion files work); *see also* Field v. Google Inc., 412 F. Supp. 2d 1106, 1122-23 (D. Nev. 2006) (discussing fair use arising in part from Google’s adherence to technological procedures that permit copyright owners to opt-out of caching).

By this framework, the *source* of a copyright procedure consists of where the procedure originates. It can be created through public statutes, procedural rules, case law, or in the case of private enforcement, by private practices. Even though private procedures are usually created and executed without direct governmental involvement, they are *always* formed 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.

The *actors* are those who participate in the formation, execution, and resolution of enforcement procedures. They include copyright owners, those posting UGC, and intermediaries such as YouTube. The actors can even be 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.⁵⁰ Here, code is an actor.

Finally, the *functions* of copyright procedures can vary.⁵¹ 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. Copyright controls include processes used to *enforce* copyrights. The next Part discusses three examples of private copyright enforcement and explores how they cause feedback problems.

II. 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 bad substantive results, such as bullying users with ruinous statutory damages; censoring criticism, commentary, and transformative works; and automatically blocking fair or non-infringing uses without a human decision-maker. But the "law cannot pretend to be neutral by providing homogenized procedures that have a malignant social impact."⁵²

⁵⁰ See YouTube, *YouTube Copyright Policy: Video Identification Tool*, <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.

⁵² Eskridge, *supra* note 43, at 966.

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-unosophisticated 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.⁵³ 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.⁵⁴ Write it down, save a file, take a photo, it’s copyrighted.

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,⁵⁶ as well as the possibility of attorney’s fees.⁵⁷ In contrast, for owners who fail to 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.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-

⁵³ 17 U.S.C. § 408(a) (2005) (registration permissive).

⁵⁴ *See id.* § 102(a) (1990).

⁵⁵ *Id.* § 411(a) (2008). 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. § 412 (2008) (timely registration required for statutory damages); *id.* § 504(c)(2) (statutory damages of up to \$150,000).

⁵⁷ *Id.* § 505 (costs and attorney’s fees).

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).

substance feedback loop.

For copyright owners, registration is a generally inexpensive process.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.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.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.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.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 subsisting or expired copyrights.⁶⁴ That means that copyright owners get a tremendous benefit, enhanced damages, in exchange for public records of

⁵⁹ The cost of registration is not high: currently, \$35 for a single work registered online or \$50 or more using a form. See U.S. Copyright Office, *Fees*, <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. *Id.*

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. See 17 U.S.C. § 101 (2008) (definition); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-52 (1989) (using common-law agency principles as part of definition).

⁶¹ In *Raquel v. Education Management Corp.*, the Third Circuit dismissed a copyright lawsuit because of a misstatement in the copyright registration. *Raquel v. Educ. Mgmt. Corp.*, 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. 531 U.S. 952 (2000); see also *Registration of Claims to Copyright*, Statement of Policy, 65 Fed. Reg. 41,508 (July 5, 2000).

⁶² See U.S. Copyright Office, *Forms*, <http://www.copyright.gov/forms/> (last visited June 8, 2010).

⁶³ See *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, Pub. L. No. 110-403, Title I, § 101(a), 122 Stat. 4257-58 (amending 17 U.S.C. § 411 (2008)).

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

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 attorney’s 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 copyright infringement. If you aren’t scared, you should be. Many

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).

⁶⁶ See Marybeth Peters, Register of Copyrights, *The Importance of Orphan Works Legislation*, Sept. 25, 2008, <http://www.copyright.gov/orphan/> (last visited June 11, 2010).

⁶⁷ Normal statutory damages are between \$750 and \$30,000 per work. 17 U.S.C. § 504(c)(1) (2004). 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. § 1117(d) (2008) (statutory damages of up to \$100,000); see also *id.* § 1125(d); cf. 17 U.S.C. § 512(f) (1999) (user who obtains DMCA put-back of materials based on counter-notification containing knowing material misrepresentation liable for attorney’s 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).

file sharers have settled for thousands of dollars in lieu of risking a court judgment for hundreds of thousands or possibly millions of dollars.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.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.⁷² More recently, Joel Tenenbaum was found liable by a jury for \$675,000 for downloading 30 songs, or \$22,500 a song.⁷³ In both cases, the courts later reduced damages to treble the \$750 statutory minimum, or \$2,250 per song, an amount both judges deemed still "harsh."⁷⁴ Appeals are pending in both cases.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.⁷⁶ Yet without the

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 Seeks Up to \$150,000 a Song in File Sharing Trial*, July 30, 2009, WIRED BLOG NETWORK: THREAT LEVEL, <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, *Internet File Sharing*, http://www.indiana.edu/~sls/internet_file_sharing.html (last visited June 11, 2010).

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

⁷² *Id.* at 1049-50.

⁷³ David Kravets, *Jury Dings File Sharer \$675,000, RIAA Prevails—Update*, July 31, 2009, WIRED BLOG NETWORK: THREAT LEVEL, <http://www.wired.com/threatlevel/2009/07/jury-dings-file-sharer-675000>.

⁷⁴ *Capitol Records*, 680 F. Supp. 2d at 1048-49; *Sony BMG Music Entm't v. Tenenbaum*, -- F. Supp. 2d --, 2010 WL 2705499, at *3-*4 (D. Mass. July 9, 2010). The *Sony BMG* court concluded that the jury's award against Tenenbaum was constitutionally excessive; in contrast, the *Capitol Records* court found no need to reach the constitutional issue. Compare *Sony BMG*, 2010 WL 2705499, at *3, with *Capitol Records*, 680 F. Supp. 2d at 1057. In another case, the Fifth Circuit held that a file sharer did not qualify for a reduction to the minimum \$200 statutory damages because proper copyright notice had been placed on the works, precluding an innocent infringer defense. See *Maverick Recording Co. v. Harper*, 598 F.3d 193, 198-99 (5th Cir. 2010), *pet. for cert. filed*, 79 U.S.L.W. 3062 (May 26, 2010) (No. 10-94). The court held that plaintiffs would instead be awarded \$750 for each of 37 songs. *Id.* at 199.

⁷⁵ See Elias J. Groll, *Tenenbaum To Appeal Again*, THE HARVARD CRIMSON, Sep. 3, 2010, <http://www.thecrimson.com/article/2010/9/3/tenenbaum-legal-riaa-fine/>; David Kravets, *Lawyers Challenge Lowered Amount of 'Shocking' File Sharing Award*, Jan. 25, 2010, WIRED BLOG NETWORK: THREAT LEVEL, <http://www.wired.com/threatlevel/2010/01/lawyers-challenge-files-sharing-verdict>.

⁷⁶ Tenenbaum faced potential damages of \$4.5 million plus attorney's fees. As noted by Howard Knopf after the initial jury award of \$675,000, "[t]here are going to be a lot of

predicate registrations, the verdicts against Thomas-Rasset and Tenenbaum are arguably worth less than \$21-\$54.⁷⁷ 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.⁷⁸

Even when damages are “only” 2000 times the cost of a song, these amounts are chilling, and provide extremely forceful terror tactics to copyright owners. If you receive a letter threatening “up to” \$150,000 damages plus attorney’s 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.⁷⁹ This “public-relations disaster for the industry . . . targeted, among others, several single mothers, a dead person and a 13-year-old girl.”⁸⁰ Further, the lawsuits did not appear to stem the amount of file

questions as to why Joel didn’t settle at the outset for a few thousand dollars, and whether he was later well served by the controversial strategy and behaviour” of defense counsel. Excess Copyright, <http://excesscopyright.blogspot.com> (Aug. 3, 2009, 21:28 EST).

⁷⁷ In the *Capitol Records* case, the court concluded that the cost of the relevant CDs was about \$54. *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. *Capitol Records*, 680 F. Supp. 2d at 1054. Similarly, the *Tenenbaum* court concluded that record companies receive approximately 70 cents for every 99 cent song sold on the iTunes Store. *Sony BMG*, 2010 WL 2705499, at *21. For the 24 songs at issue, the lost profits would be approximately \$21. *Id.* at *22. The *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.” *Id.* at *21.

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.” *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, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 500-09 (2009); see also Stephanie Berg, *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).

⁷⁹ *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”).

⁸⁰ Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J.,

sharing, making the strategy ineffective.⁸¹ Only recently has the music industry seen the flaws in its enforcement approach, shifting its focus from lawsuits to that of seeking cooperation from service providers.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 diversion.⁸³ Apple became the leading innovator in music players with the iPod, and 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.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 internet service providers (“ISPs”) and to demand takedown of alleged infringement hosted by the ISPs on behalf of their

B1, Dec. 19, 2008, available at <http://online.wsj.com/article/SB122966038836021137.html>.

⁸¹ “Critics say the legal offensive ultimately did little to stem the tide of illegally downloaded music.” *Id.*

⁸²

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.

Id. 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.

⁸³ See Henry H. Perritt, Jr., *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTEL. PROP. L. 831, 834 (2010) (“The threat [record labels] face is not one of attack on their property, but irrelevance.”).

⁸⁴ Cyrus Farivar, *Sony CEO Says Company Woulda, Coulda, Shoulda Beaten Apple*, MACWORLD.COM, May 13, 2009, http://www.macworld.com/article/140561/2009/05/sony_says_woulda_coulda_shoulda_beaten_apple.html (stating that Sony “is looking a little old and busted these days,” and is “playing second fiddle to Apple”).

subscribers.⁸⁵ There's no doubt that many feel that in writing the DMCA in 1998, Congress gave copyright holders free license to – in Rep. Dingell's terms – “screw” fair users.⁸⁶ One of the people who felt the wrath of DMCA takedowns was a legislator who voted in favor of the DMCA, Sen. John McCain, who complained during the 2008 presidential campaign that campaign videos were unfairly removed from YouTube.⁸⁷

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.”⁸⁸ Ralph Lauren's lawyers sent a DMCA notice to BoingBoing's Canadian ISP,⁸⁹ providing BoingBoing blogger and free-speech advocate Cory Doctorow with a soapbox from which to comment on the absurdity of the takedown.⁹⁰ 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.⁹¹ In both instances, it is highly arguable that the materials posted were fairly used.⁹² Needless to say, it is troubling that the DMCA is

⁸⁵ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512 (1999)). 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.

⁸⁶ See *supra* note 3 and accompanying text.

⁸⁷ See Sarah Lai Stirland, *Stifled by Copyright, McCain Asks YouTube to Consider Fair Use*, WIRED BLOG NETWORK: THREAT LEVEL, Oct. 14, 2008, <http://blog.wired.com/27bstroke6/2008/10/stifled-by-copy.html>; see also Nathenson, *supra* note 7, at 124.

⁸⁸ Xenii Jardin, *Ralph Lauren Opens New Outlet Store in the Uncanny Valley*, BOINGBOING, Sept. 29, 2009, <http://www.boingboing.net/2009/09/29/ralph-lauren-opens-n.html>.

⁸⁹ Cory Doctorow, *The Criticism that Ralph Lauren Doesn't Want You to See!*, BOINGBOING, Oct. 6, 2009, <http://www.boingboing.net/2009/10/06/the-criticism-that-r.html>.

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*' video than to buy the album. Equally so, BoingBoing's posting of the Ralph Lauren ad serves the purposes of criticizing

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’ll 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 counter-notification 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’ 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

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 deriding the ad and how western women “get pressured by unnatural ideals [that] no one can live up to.” Comment of arikol to <http://www.boingboing.net/2009/09/29/ralph-lauren-opens-n.html> (Sep. 29, 2009 23:14 EST). 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.

⁹³ One blogger accuses Fox News of sending takedowns selectively against YouTube videos posted by liberal blogs. See Adrian Chen, *Fox News Declares Cyberwar on Liberal Blogosphere*, GAWKER, Nov. 12, 2009, <http://gawker.com/5403691/fox-news-declares-cyberwar-on-liberal-blogosphere>.

⁹⁴ See 17 U.S.C. § 512 (1999).

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*, WIRED BLOG NETWORK: THREAT LEVEL, Oct. 27, 2008, <http://www.wired.com/threatlevel/2008/10/ten-years-later/>.

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 has yet to act on important user-focused problems of orphan works and digital preservation.¹⁰² User-oriented amendments to Section 512 are unlikely, and one should instead consider ways of better interpreting the statute.¹⁰³

1. Incentives for overreaching takedowns

Section 512 typifies the dangers of the substance-procedure-substance feedback loop. Like a carefully orchestrated dance,¹⁰⁴ 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 infringed, the location of the infringing content, and a statement that the sender has a good faith belief that use is “not authorized by the copyright owner, its agent, or the law.”¹⁰⁵ So long as the ISP “expeditiously” removes the materials, it is free from monetary remedies for infringement.¹⁰⁶

In terms of the descriptive framework, the source of the procedure is the DMCA. The actors are the copyright owner and 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 the efficiency 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.¹⁰⁷ The obvious reason for such problems is that Section 512, by creating a simple extra-litigation procedure for quick

¹⁰⁰ See, e.g., Malla Pollack, *Rebalancing Section 512 To Protect Fair Users 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.

¹⁰¹ See Vessel Hull Design Protection Amendments of 2008, Pub. L. No. 110-434, 122 Stat. 4972 (clarifying vessel hull design protection); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (enhancing civil and criminal IP laws); Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (clarifying scope of trademark dilution liability).

¹⁰² See THE SECTION 108 STUDY GROUP REPORT, March 2008, available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>; see also *supra* note 66.

¹⁰³ Nathenson, *supra* note 7, at 126-28.

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

¹⁰⁵ 17 U.S.C. § 512(c)(3)(A) (1999).

¹⁰⁶ *Id.* § 512(c)(1)(C) (1999).

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

removal, has incentivized sloppy and aggressive enforcement methods. Online materials, including fair or other non-infringing uses, are being removed regularly.¹⁰⁸ In a court of law, such relief would be denied, but with takedowns, removal is quick and simple.

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,¹⁰⁹ and relief is granted quickly, with notice provided afterwards to the user.¹¹⁰ Considering that the process is akin to a *de facto ex parte seizure*, and that full injunctive relief is effectively granted immediately before the user has a chance to object, it is vital that the statute and its procedures be read to limit the chances of fair uses being removed.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.¹¹²

As such, Section 512 is a paradigmatic representative of the substance-procedure-substance feedback loop. Substantive copyright law (massive online infringement) prompted Congress to craft a procedure intended to lower transaction costs (takedowns), but in turn created *de facto* substantive rights beyond those permitted under copyright law (takedowns that would not be permitted by a 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.*,¹¹³ a case filed by a YouTube user whose video was taken down, allegedly improperly, at the behest of Universal Music.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

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.

¹⁰⁹ Compare 17 U.S.C. § 512(c)(3) (1999) (elements of takedown), with FED. R. CIV. P. 8(a) (elements of a complaint).

¹¹⁰ Compare 17 U.S.C. 512(c)(1)(C), (g)(2)(A) (1999) (expeditious removal, reasonably prompt notice to subscriber), with FED R. CIV. P. 65(b)(1) (permitting *ex parte* TRO without notice in limited circumstances).

¹¹¹ See Nathenson, *supra* note 7, at 143-46.

¹¹² See *id.* at 145.

¹¹³ 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

¹¹⁴ *Id.* at 1153.

use before sending a takedown.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.”¹¹⁶ Moreover, the fair use statute expressly notes that “the fair use of a 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

¹¹⁵ *Id.* at 1154-56.

¹¹⁶ *Id.* at 1154 (emphasis added); Nathenson, *supra* note 7, at 142-43 (discussing *Lenz*).

¹¹⁷ *Lenz*, 572 F. Supp. 2d at 1154 (quoting 17 U.S.C. § 107).

¹¹⁸ *Id.* at 1155.

¹¹⁹ 17 U.S.C. § 106 (2002).

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”) (emphasis in original); *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) (“fair 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

Regardless, even if a defendant in court has the burden of proving fair use,¹²⁵ the procedural posture of takedowns is materially different. Thus, 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 counter-notification. Under Section 512(g), a user has the right to send a counter-notification to the ISP demanding put-back.¹²⁸ However, just as some defendants may choose to default by not answering,¹²⁹ it appears that few people send counter-notifications.¹³⁰ One reason could be that most subjects of takedowns are true infringement, and counter-notification 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

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 (“clear that the burden of proving fair use is always on the putative infringer”).

¹²⁶ See Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781 (2010) (arguing that courts err by placing burden on fair users, and that burden should instead belong to rights-holders); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 719-22 (2003) (arguing that fair uses are constitutionally protected and that the burden should be on plaintiff).

¹²⁷ Nathenson, *supra* note 7, at 143-46.

¹²⁸ 17 U.S.C. § 512(g) (1999).

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. § 512(f) (1999) (damages for knowing material misrepresentations in takedown or put-back).

¹³² 17 U.S.C. § 512(g)(3)(D) (1999).

make the assertion of incorrect removal under penalty of perjury.¹³³ Third and most frustratingly, the basis for put-back is somewhat ambiguous: “a 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 counter-notification. 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 counter-notifications 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 on-line, *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

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).

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.

¹³⁷ 144 CONG. REC. S4884-01, S4889 (daily ed. May 14, 1998) (statement of Sen. Ashcroft) (emphasis added).

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 “that 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).

obvious basis for put-back, and others opine that it is not.¹³⁹ I respectfully 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.¹⁴⁰ Although "mistake" is arguably ambiguous – referring to either a mistake of fact, mistake of law, or both – the statutory structure includes both mistakes of fact and of law for the following reasons. Counter-notifications must be based on "mistake or misidentification of the material to be removed or disabled."¹⁴¹ 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.¹⁴² 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 counter-notice.

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 counter-notification 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.¹⁴³ This is

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, *supra* note 7, at 158 n.181 (collecting sources).

¹⁴⁰ Nathenson, *supra* note 7, at 158-62.

¹⁴¹ 17 U.S.C. § 512(g)(3)(C) (1999).

¹⁴² *Id.* § 512(c)(3)(A)(v).

¹⁴³ LAWRENCE LESSIG, CODE: VERSION 2.0 121 (2006).

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.¹⁴⁴ Thus, argues Lessig, although law can sometimes regulate code, oftentimes code *itself* will override and supplant law, rendering ineffective the values underlying law.¹⁴⁵

Accordingly, a third example of a flawed extra-litigation procedure was not created by Congress, but by private parties, namely, automated filters. Such measures are discussed in the Principles for User Generated Content Services (“UGC Principles”), a set of non-binding principles agreed to by a number of leading copyright owners and service providers, such as Viacom, Sony, Microsoft, Disney, and Veoh.¹⁴⁶ However, two of the biggest providers of UGC – Google and Facebook – are not signatories.¹⁴⁷ Nevertheless, YouTube uses automated filters similar to those discussed in the UGC Principles.¹⁴⁸ The stated objectives of the UGC Principles are:

- (1) the elimination of infringing content on UGC Services,
- (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content,
- (3) the accommodation of fair use of copyrighted content on UGC Services, and
- (4) the protection of legitimate interests of user privacy.¹⁴⁹

Wrongly implemented, automated control may be the most dangerous procedure of all because it permits the automated censoring of lawful content without any pre-removal consideration of fair or non-infringing use.¹⁵⁰ The particular control mechanism to be discussed is YouTube’s

¹⁴⁴ Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 514 (1999).

¹⁴⁵ *Id.* at 514-15, 522-23.

¹⁴⁶ See UGC Principles, *supra* note 13.

¹⁴⁷ See *id.* (showing listing of supporters).

¹⁴⁸ 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. *Id.* ¶ 3. The UGC Principles declare that such technology should accommodate fair use, but are silent on just how such accommodation should take place. *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. See *id.* pmbl. (signatories “differ in our interpretation of relevant laws” and UGC Principles do not create “any legally binding rights or obligations”).

¹⁴⁹ UGC Principles, *supra* note 13, pmbl.

¹⁵⁰ Some suggest that filtering technologies may lead to narrowing of *de jure* fair use law: “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.” *Harvard UGC Principles*, *supra* note 13, at 1404.

Content Identification (“Content ID”) program.¹⁵¹ This technology can be used to easily censor fair and non-infringing 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.¹⁵² Human screening for fair use is not made before usage rules are applied.¹⁵³ Thus, a matching video can be automatically blocked from appearing on YouTube even if it might constitute fair use of the copyrighted materials.¹⁵⁴

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.¹⁵⁵ But despite the system’s understandable goals, Content

¹⁵¹ See Nathenson, *supra* note 7, at 169-70 n. 223 (noting issue but reserving discussion as beyond scope of article).

¹⁵² YouTube, *Copyright Policy*, *supra* note 50. Sometimes the program was previously referred to “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

ID is a serious threat to fair use.¹⁵⁶ It can easily be used to remove far more speech than is removed by Section 512 takedowns, and far more quickly.¹⁵⁷ As Lilli Levi notes, “[m]ore copyright owner activity should be expected if the costs of policing diminish.”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.¹⁵⁹ Further, software filters suffer from dual dangers: overinclusiveness, by blocking fairly used content, and underinclusiveness, by missing infringement that is sufficiently changed that it doesn’t trigger a fingerprint.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.¹⁶¹ This may have happened with a wonderful parody video entitled *William Shatner in Lucy*

Inc. v. YouTube, Inc., -- F. Supp. 2d --, 2010 WL 2532404 (S.D.N.Y. June 23, 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 infringement. *Id.* at *14. The plaintiffs later filed a notice of appeal. Alex Pham, *Viacom to Appeal YouTube Copyright Infringement Ruling*, L.A. TIMES, Aug. 11, 2010, available at <http://articles.latimes.com/2010/aug/11/business/la-fi-viacom-youtube-20100811>. The appeal sets the stage for a major appellate decision and perhaps, later consideration by the United States Supreme Court regarding the scope of the Section 512 safe harbor.

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 388-90.

¹⁵⁷ See von Lohmann, *supra* note 18.

¹⁵⁸ Lili Levi, *Remarks for the Future of Copyright Conference*, at 8 (2007), available at <http://papers.ssrn.com/abstract=1032760>.

¹⁵⁹ Wu, *supra* note 46, at 617.

¹⁶⁰ See *United States v. Am. Library Ass’n, Inc.*, 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”).

¹⁶¹ See von Lohmann, *supra* note 18.

in the Sky with Diamonds.¹⁶² The soundtrack for the video is William Shatner's 1968 spoken-voice version of The Beatles' *Lucy in the Sky with Diamonds*.¹⁶³ 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.¹⁶⁴ 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 non-commercial, but it is also a hugely *transformative* parody.¹⁶⁵ Fittingly, the main target, Shatner's song, is itself from an album entitled *The Transformed Man*.¹⁶⁶

Equally fascinating is the long, strange trip the video has taken online. I have previously commented on this video in the context of Section 512.¹⁶⁷ 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."¹⁶⁸ 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.

¹⁶² William Shatner in Lucy in the Sky With Diamonds, <http://www.youtube.com/watch?v=D-yy2URAYqU> (last visited June 19, 2010) [hereinafter Shatner video]. The Shatner video was apparently created by Paul Heriot, as described further on his MySpace page. See MySpace, Paul Heriot, <http://www.myspace.com/paulheriot> (last visited June 19, 2010) (stating "Lucy In The Sky with Shatner: This became an internet hit. Who would of [sic] thought!").

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.

¹⁶⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) ("Pretty Woman" parody could be fair use).

¹⁶⁶ WILLIAM SHATNER, *Spleen/Lucy in the Sky with Diamonds*, on THE TRANSFORMED MAN (Varese Sarabande 1968).

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/misc/Shat_YT.jpg (last visited Oct. 22, 2010). As of this writing, the audio remains restored. See Lucy in the Sky, <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.*

2. Potential for proper 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.¹⁶⁹ Peter Menell 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."¹⁷⁰ Indeed, YouTube notes that most participants in the Content ID program choose to track or monetize content rather than block it.¹⁷¹

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."¹⁷² Along those lines, the EFF and others endorsed a set of "Fair Use Principles" for UGC, which include suggested guidelines for automated filtering.¹⁷³ 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.¹⁷⁴ Users should be able to dispute filters, regardless of

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 law." Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 55 (2001); cf. Solum, *supra* note 29, at 320 ("A very high order of art and science may be required to design actual systems of civil adjudication that achieve accuracy at a reasonable cost while minimizing collateral violations of substantive rights.").

¹⁷⁰ Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375, 392 (2009).

¹⁷¹ Brian Stelter, *Some Media Companies Choose to Profit From Pirated YouTube Clips*, N.Y. TIMES, Aug. 16, 2008, at C1, available at <http://www.nytimes.com/2008/08/16/technology/16tube.html> (ninety percent of materials identified through Content ID are monetized); see also Levi, *supra* note 158, at 9 ("The degree of tolerated use will also depend on the extent to which the relevant content owners believe they are benefiting more from the infringing uses than they would lose in stopping them.").

¹⁷² See von Lohmann, *supra* note 18 (emphasis in original). To him, "adding a soundtrack to your home skateboarding movie is a fair use," and if a copyright owner disagrees, they can send a takedown notice, "and with any luck, we'll see each other in court." *Id.* Von Lohmann is now at Google. Greg Sandoval, *Tech Champion, Watchdog Heads to Google*, CNET NEWS, Jun. 23, 2010, http://news.cnet.com/8301-31001_3-20008586-261.html.

¹⁷³ Electronic Frontier Foundation et al., *Fair Use Principles for User Generated Video Content*, ¶ 2, http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf [hereinafter EFF, *Fair Use Principles*].

¹⁷⁴ *Id.* ¶ 2(a).

whether the filter has blocked or monetized the content.¹⁷⁵

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 notice¹⁷⁶

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 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, some weeks after I gave a presentation on this topic, I checked YouTube again and the full audio was restored. As of this writing, it is still online. 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

¹⁷⁵ *Id.* ¶ 2(b). Notice must always be given when filters do anything in reaction to user content. As noted by the EFF, “a parodist may not want the target of the parody receiving a share of revenues generated by it.” *Id.* Michael Sawyer deems it “digital sharecropping” to permit copyright owners “to obtain licensing revenues on” fairly used works. Sawyer, *supra* note 20, at 386. Although he is right, such practices might be reasonable ways of resolving the often-thorny question of fair use. However, because a user might not want to be affiliated with the advertising of the copyright owner, it is vital that the YouTube user be able to dispute the copyright owner’s monetization of the video.

¹⁷⁶ YouTube, *Copyright Claim Disputes*, <http://www.google.com/support/youtube/bin/answer.py?answer=83768> (last visited Oct. 19, 2010).

¹⁷⁷ *Id.* “There are different options for audio-only matches versus video matches.” *Id.*

¹⁷⁸ *Id.*

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 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.¹⁸¹ 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 user rule seeking blockage.¹⁸² Instead, as the Fair

¹⁷⁹

Sometimes rights holders 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 rights holder might allow and monetize a video that uses less than 3 minutes of its content, while blocking any video that contains more.

Kyle Harrison, *Over 1,000 Content Owners Now Using Content ID*, YOUTUBE BIZ BLOG, Sept. 16, 2009, <http://ytbizblog.blogspot.com/2009/09/over-1000-content-owners-now-using.html>.

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.” Viacom, *Fair Use and Availability of Viacom Content on Authorized Websites*, <http://www.viacom.com/news/pages/aboutfairuse.aspx> (last visited June 20, 2010).

¹⁸¹ In contrast, a frivolous takedown notice can subject the sender to liability for knowing material misrepresentations of infringement. See 17 U.S.C. § 512(f) (1999); Nathenson, *supra* note 7, at 142-43, 147-50 (discussing Section 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

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.¹⁸³ 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 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 fear non-enforcement once a client learns of potential infringement because time-bars 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/put-back regime, owners may be more tempted to take the position that choosing to track or monetize use constitutes a revocable non-exclusive 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 But many businesses take licenses even when the uses are

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.

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 Imp., 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

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

III. 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, as well by inflicting harm on important procedural values. This Part considers the values attendant to procedural justice in copyright and then 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 might be 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.¹⁸⁸ 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.¹⁸⁹ In contrast, William Eskridge describes an approach of “normativism” taken by Robert Cover, Owen Fiss, and Judith Resnik, in a ground-breaking 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

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) (emphasis in original).

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. § 512(g)(3)(D) (1999).

¹⁸⁸ Eskridge, *supra* note 43, at 962-64; Martinez, *supra* note 35, at 1025.

¹⁸⁹ Eskridge, *supra* note 43, at 973.

(substantive justice) are presumptive evidence of good procedures.”¹⁹⁰ 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.”¹⁹¹

Thus, the value of a procedure should not be defined solely in substantive terms.¹⁹² But in light of the feedback between procedure and substance, neither should a normative framework focus on one to the exclusion of the other.¹⁹³ Along those lines, Lawrence Solum proposes a thoughtful framework for procedural justice. For him, accurate application of substantive law is an important but not sole principle. Instead, he argues that participation should be the threshold principle of procedural justice, permitting those with direct or substantial interests to receive advance notice and an opportunity to be heard, unless impracticable.¹⁹⁴ Accuracy is an important secondary principle, requiring that procedures be structured to “maximize the likelihood of . . . legally correct outcome[s].”¹⁹⁵ Although accuracy is important, Solum argues that it is secondary to participation and can be balanced against other values, namely, substantive liberties such as free speech and privacy, as well as procedural values such as distributing burdens of risk, systemic accuracy, and avoiding excessive costs.¹⁹⁶ Put differently, Solum regards participation as primary, to be followed by accuracy principles that may be balanced against other concerns. He also notes that accuracy at the systemic level might come at the price of accuracy in a particular dispute.¹⁹⁷

¹⁹⁰ *Id.* at 964 (emphasis in original) (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.

¹⁹³ See ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* 2 (1979) (noting that procedure might “feed back upon norms and institutions”).

¹⁹⁴ Solum, *supra* note 29, at 305-06.

¹⁹⁵ *Id.* at 306.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; see also *id.* at 250 (noting that “the goals of case accuracy and systemic

In another thought-provoking article, Jenny Martinez addresses the role of procedure in terrorism cases. She posits a number of categories of procedure whose distinctions rest largely on the degree, or lack thereof, of transparency in the court's decision-making.¹⁹⁸ As she notes, "[t]he lack of candor, the subversion of substantive law, and the distortion of procedure are all things to be concerned about."¹⁹⁹ Particularly troubling, she says, are decisions that use process to avoid substance, to signal substantive results without deciding them, or to hide substantive decisions.²⁰⁰ Rephrased in present terms, Martinez is deeply concerned over decisions that use procedure as a way of avoiding *transparency*.²⁰¹ When procedure is used to obfuscate, it is not a tool of justice, but instead a means of avoiding accountability for debatable ends.²⁰²

The observations of Eskridge, Solum, and Martinez are extremely useful in identifying relevant values for copyright enforcement. Without meaningful *participation* by parties and relevant non-party 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, benefitting 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 require that copyright enforcement cannot always be perfect. An optimal procedure does not always lead to perfect results. 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

accuracy may conflict").

¹⁹⁸ Martinez, *supra* note 35, at 1031-32, 1091-92.

¹⁹⁹ *Id.* at 1091.

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 to the public than are rules of substantive law").

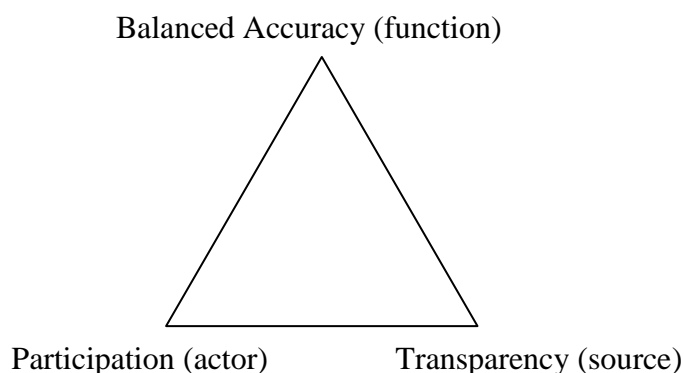
²⁰³ I am trying to avoid the use of words such as fairness and justice, because those terms beg the question at hand, which is to try to find a way of defining "procedural justice" in the context of copyright enforcement.

B. A normative framework

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

Below is a normative framework that builds upon the descriptive framework noted in Part II, 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, other stakeholders might not object, defeating the benefits of *participation*. Second, when the *sources* of enforcement procedures are primarily private, they can defeat the benefits of *transparency*. Finally, these two problems, when combined with enforcement *functions* that elevate efficiency and low cost over substantively justified results, defeat the benefits of 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

²⁰⁴ See Solum, *supra* note 29, at 285-86 (discussing potentially dependent relationship between participation and accuracy).

correlatives, intertwined principles than can easily reinforce or undermine one another. Without them, balanced accuracy is unlikely to exist at either the dispute level or 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, as well as an opportunity to be heard.²⁰⁵ A lack of meaningful participation, such as UGC users with unequal 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.²⁰⁶ Potentially relevant participants can be identified by re-examining 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.²⁰⁷ The second is systemic participation, which can include formulating, revising, commenting, or shaming

²⁰⁵ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

²⁰⁶ See 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”).

²⁰⁷ It can also involve litigation, the most public type of dispute participation.

enforcement at the systemic level.²⁰⁸ 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.”²⁰⁹ As Solum notes, the “hard question” of procedural justice goes beyond ensuring accurate results: it’s also about encouraging the public to comply with sometimes *inaccurate* results.²¹⁰ Procedures viewed as legitimate may obtain the “voluntary cooperation” of citizens, whereas those viewed as illegitimate may require sanctions, leading to social problems.²¹¹ Unfortunately, copyright enforcement procedures are often viewed with contempt. The key to legitimacy, Solum suggests, is participation of the parties or their representatives.²¹²

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

²⁰⁸ 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)).

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.

of a neutral decision-maker is striking.

In all three scenarios, review by a disinterested court is possible, but for most users is 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.

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.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 *ab initio*.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.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.”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.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

²¹³ See LESSIG, *supra* note 143, at 121-25.

²¹⁴ See Sawyer, *supra* note 20, at 393 (noting that public may never learn about automatically blocked material).

²¹⁵ Rothman, *supra* note 37, at 1972.

²¹⁶ *Id.*

²¹⁷ See Press Release, Electronic Frontier Foundation, Viacom Admits Error – Takes Steps to Protect Fair Use on YouTube (Apr. 23, 2007), *available at* <http://www.eff.org/deeplinks/2007/04/viacom-admits-error-takes-steps-protect-fair-use-youtube>; see also *Viacom Int’l Inc. v. YouTube, Inc.*, -- F. Supp. 2d --, 2010 WL 2532404, at *14 (S.D.N.Y. June 23, 2010) (dismissing all claims for direct and secondary copyright infringement on basis of DMCA safe harbor).

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.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.²¹⁹ Similarly, speech and 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 counter-forces 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.²²⁰ This listing doesn't 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.²²¹

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 prospectively 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 and implemented in private, sometimes with

²¹⁸ See Sawyer, *supra* note 20, at 392 (noting the “wisdom of crowds” and value of “backlash”).

²¹⁹ Chilling Effects Clearinghouse, <http://www.chillingeffects.org/search.cgi> (last visited July 6, 2010).

²²⁰ See EFF, *Fair Use Principles*, *supra* note 173, at 4.

²²¹ See *supra* notes 88-90 and accompanying text.

²²² A notable exception to this is the secret court created under the Foreign Intelligence Surveillance Act (“FISA”). See Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes’s Jorde Lecture*, 97 CAL. L. REV. 407, 413, 423 (2009).

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.”²²⁵ 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.²²⁶ Private copyright enforcement is built upon the framework of pre-existing 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.²²⁷

²²³ Frank Pasquale suggests that the dangers of discrimination by internet intermediaries give rise to a need for “qualified transparency,” by which regulators should require information to ensure accountability to protect “the integrity of networks and search.” Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 109-10, 160-61 (2010); see also Sawyer, *supra* note 20, at 400 (“We risk being duped . . . if we believe claims that filtering technology is currently capable of handling fair use without demanding an explanation as to *how* it accommodates fair use.”) (emphasis in original).

²²⁴ David Levine notes that “[c]ountless examples of modern infrastructure, from telecommunications in the form of the Internet, . . . are now being provided by the private sector.” David S. Levine, *Secrecy and 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.

²²⁵ Main, *supra* note 32, at 821.

²²⁶ 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*.”

²²⁷ 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

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 mode of secrecy does not equate to a conclusion that secrecy is the optimal state. As noted by Solum, the “substance-affecting rules of procedure are less transparent to the public than are rules of substantive law.”²²⁸ The problem with copyright enforcement procedures is that they fly under the radar, permitting *de facto* 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 abuse. With direct enforcement, copyright owners feel free to provide the typical litany of threats of significant damages and attorney’s 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 Jenny 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

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 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.

²²⁸ Solum, *supra* note 29, at 201.

²²⁹ Martinez, *supra* note 35, at 1031.

²³⁰ LESSIG, *supra* note 143, at 121.

²³¹ Lessig, *supra* note 144, at 514.

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.

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* database. In addition, the EFF represents *Lenz* in the ongoing litigation noted above. Such organizations, along with news organizations and noted bloggers, help to bring to light abuses in specific disputes, as well as systemically. 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.”²³⁴ 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.²³⁵ Finally, both copyright owners and creators of UGC may be prone to partiality, overestimating the strength of their positions.²³⁶

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.²³⁷ Instead, the goal ought to be a

²³² See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008); see also *supra* notes 113-118 and accompanying text.

²³³ *Lenz*, 572 F. Supp. 2d at 1156.

²³⁴ Solum, *supra* note 29, at 186-87.

²³⁵ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)).

²³⁶ See Solum, *supra* note 29, at 187.

²³⁷ *Id.* at 185 (noting that “a fair procedure must, at a minimum, strike a fair or reasonable balance between the benefits of accurate outcomes and the costs imposed by the

balanced accuracy that takes into consideration not just dispute accuracy, but also balances countervailing values prompted by Solum's framework, such as free speech and privacy, fair distribution of risk, systemic accuracy, and reducing enforcement costs.²³⁸ 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 by 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 towards low cost and high efficiency are strong parts of the feedback loop that permits *de facto* copyright enforcement to far exceed 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 on UGC whereas much copyright enforcement also focuses on literal infringement. Unfortunately, limited transparency and participation make it terrifically 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 goals.

I don't 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

system of procedures”).

²³⁸ *Id.* at 306. Such concerns are also captured nicely by Federal Rule of Civil Procedure 1, which by analogy, dictates that the Rules be interpreted to “secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1; *see also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (balancing test).

²³⁹ Martinez, *supra* note 35, at 1080-81 (emphasis in original).

²⁴⁰ *See supra* note 227 and accompanying text.

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.

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”).²⁴¹ 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.²⁴²

As stated in the letter, the U.S. claims “that ACTA’s provisions are merely procedural and only about enforcing existing rights.”²⁴³ 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 *sources* of copyright enforcement, the *actors* involved, 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.

²⁴¹ See Anti-Counterfeiting Trade Agreement, Public Predecisional/Deliberative Draft: April 2010, http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf.

²⁴² See Letter to President Barack Obama from over 70 law professors, Oct. 28, 2010, <http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta>.

²⁴³ *Id.*

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