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Rebecca F. Ganz

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# A PORTRAIT OF THE ARTIST'S ESTATE AS A COPYRIGHT PROBLEM

*Rebecca F. Ganz\**

## I. INTRODUCTION

On May 30, 2007, a federal judge in the Northern District of California awarded Carol Loeb Shloss, a professor of English at Stanford University, attorney's fees in a recently settled lawsuit against the estate of author James Joyce.<sup>1</sup> Shloss had no choice but to sue the Joyce estate in order to gain rights to some of the late author's published works and family letters for her own scholarship.<sup>2</sup> The settlement agreement enabled Shloss to cite the materials in question for publication in the United States, without threat of litigation by the Joyce estate.<sup>3</sup> By awarding Shloss attorney's fees, the court indicated that she was the "prevailing party" in the settlement agreement because she achieved a material alteration of the legal relationship of the parties.<sup>4</sup> Although this seems like a minor victory in the scheme of everyday litigation, to James Joyce scholars and defenders of fair use of copyrighted works, this decision is an important step in protecting the creative freedom embodied in the fair use doctrine.<sup>5</sup>

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\* J.D. Candidate, May 2009, Loyola Law School, Los Angeles; B.A., Magna cum Laude in Visual & Environmental Studies, Mar. 2002, Harvard College. I thank Professor John Tehranian for his guidance and my family for supporting me in all things legal and creative.

1. *See* Shloss v. Sweeney, 515 F. Supp. 2d 1083, 1086 (N.D. Cal. 2007).

2. Tim Cavanaugh, *Portrait of the Old Man as a Copyright Miser*, L.A. TIMES, June 5, 2007, <http://www.latimes.com/news/opinion/la-oe-w-cavanaugh5jun05,0,2402066.story?coll=la-promo-opinion>.

3. Firstamendmentcenter.com, Scholar, James Joyce Estate Settle Copyright Dispute, <http://www.firstamendmentcenter.org/news.aspx?id=18335> (last visited Feb. 23, 2008).

4. *See* Shloss, 515 F. Supp. 2d at 1086.

5. Press Release, Stanford Law School, Stanford Scholar Wins Right to Publish Joyce Material in Copyright Suit Led by Stanford Law School's Fair Use Project (Mar. 22, 2007), <http://cyberlaw.stanford.edu/system/files/Shloss+Press+Release.pdf>.

The aggressive defense of intellectual property by famous estates is not uncommon because of the amount of money and the types of personalities involved. Estates of dead authors, actors, artists, and musicians can earn several million dollars every year in royalties.<sup>6</sup> Although children or grandchildren of the deceased typically control the creative interests of the estate,<sup>7</sup> an estate's interests can also pass to a beneficiary who bears little or no relation to the deceased.<sup>8</sup>

In fact, these estates have been granted increasing power in recent years. In October 2007, in response to ongoing litigation regarding right of publicity and the Marilyn Monroe estate,<sup>9</sup> California Governor Arnold Schwarzenegger signed into law a bill that would effectively devise a post-mortem right of publicity to the estates of personalities who died prior to 1985.<sup>10</sup> Heirs of celebrities who were already deceased when the original law went into effect in 1985 argued that their rights should be retroactive and successfully lobbied the California legislature to revise the statute accordingly.<sup>11</sup> In conjunction with the recent extension of copyrights terms,<sup>12</sup> this type of legislation indicates increasing value in the intellectual

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6. See Lea Goldman & David M. Ewalt, *Top-Earning Dead Celebrities*, FORBES, Oct. 29, 2007, [http://www.forbes.com/business/2007/10/29/dead-celebrity-earning-biz-media-deadcelebs07\\_cz\\_lg\\_1029celeb\\_land.html](http://www.forbes.com/business/2007/10/29/dead-celebrity-earning-biz-media-deadcelebs07_cz_lg_1029celeb_land.html) (determining that the best-paid celebrities from October 2006 to October 2007 were Elvis Presley, \$49 million; John Lennon, \$44 million; Charles M. Schulz, \$35 million; George Harrison, \$22 million; Albert Einstein, \$18 million; Andy Warhol, \$15 million; Dr. Seuss (Theodor Geisel), \$13 million; Tupac Shakur, \$9 million; Marilyn Monroe, \$7 million; Steve McQueen, \$6 million; James Brown, \$5 million; Bob Marley, \$4 million; and James Dean, \$3.5 million).

7. See, e.g., Arthur Lubow, *Arbus Reconsidered*, N.Y. TIMES MAG., Sept. 14, 2003, at 30 ("Doon Arbus was 26 when [photographer] Diane [Arbus] died. As the older daughter of a divorced mother, she took on the responsibility of managing the estate. Her response to the critics was to clamp the spigot shut.").

8. Matthew Belloni, *Monroe, Money Fueling Right of Publicity Battle*, HOLLYWOOD REP., Sept. 14, 2007 at 90 ("Last year, [Marilyn] Monroe's right of publicity reportedly earned more than \$8 million for Anna Strasberg, the widow of acting coach Lee Strasberg, whom Monroe asked in her will to dispose of the leftovers (or 'residuary' estate) she didn't give to anyone else.").

9. See, e.g., *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

10. 2007 Cal. Legis. Serv. ch. 439 (West) (S.B. 771) (to amend CAL. CIV. CODE § 3344.1 (2000)); see also Jordana Lewis, *Long-Dead Celebrities Can Now Breathe Easier*, N.Y. TIMES, Oct. 24, 2007, at E4.

11. See Lewis, *supra* note 10.

12. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding the statutory extension of copyright terms to seventy years after the death of the creator).

property rights of estates. Essentially, the legislative and judicial branches of the government are empowering estates to keep creative work out of the public domain.

In this climate, litigious estates have increasing control over access to post-mortem intellectual property rights at an increasing cost to the public.<sup>13</sup> Now that copyrights last for seven decades after the death of the creator,<sup>14</sup> it is the opinion of this author that estates often have too much control over the use of the creator's work. Estates generally have the money to litigate just to protect the image of the deceased and the privacy of the family.<sup>15</sup> On the other hand, scholars and artists rely on the text or the creative work in question just to continue their work, and the cost of litigation is generally prohibitive.<sup>16</sup>

James Joyce scholar and intellectual property attorney Robert Spoo eloquently describes the protracted monopolies of estates:

They allow a mere right-holder to become a privileged and arbitrary custodian of culture. And all of this would be exactly as it should be were these monopolies confined to one generation or two. But to see this capricious veto power being exercised at a period so startlingly remote from the cultural and historical origins of the work in question is dispiriting. The phrase "the dead hand" comes irresistibly to mind, except that it is a living hand that is permitted to reach out to control the spontaneous choices of the public domain.<sup>17</sup>

Notwithstanding the expanded duration of copyright, our legal system has failed to ensure adequate protection for creative works under the fair use doctrine.<sup>18</sup> Many common usages fall under this statute, which is supposed to promote creativity in society by allowing a member of the public to use the copyrighted work for

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13. See, e.g., Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763, 764 (2003).

14. 17 U.S.C. § 302 (2000); see also *Eldred*, 537 U.S. at 186.

15. See, e.g., D.T. Max, *The Injustice Collector*, NEW YORKER, June 19, 2006, at 34, 36.

16. See, e.g., Negativland, *Changing Copyright*, [http://www.negativland.com/changing\\_copyright.html](http://www.negativland.com/changing_copyright.html) (last visited Oct. 25, 2007).

17. Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, in NATIONAL LIBRARY OF IRELAND, JOYCE STUDIES 2004, No. 6, at 24 (2004).

18. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 99 (2004).

criticism, scholarship or research.<sup>19</sup> However, estates often engage in copyright misuse by threatening legal action to prevent what might actually be a fair use of the materials in question.<sup>20</sup> Because of their powerful position, estates can also claim to own copyrights that are already in the public domain<sup>21</sup> or owned by others; or worse yet, estates may abuse their power by even trying to prevent access to materials in libraries or other public places.<sup>22</sup>

Because many of these cases settle without litigation,<sup>23</sup> further litigation is needed on this matter to set precedent for future generations. The fair use statute should also be revised to be more helpful to the potential copyright user. Specifically, we need a clearer definition and application of fair use that will enable artists and scholars to be certain that their own work complies with the legal requirements. This would then level the playing field between copyright holders and copyright users, particularly when estates threaten legal action. Moreover, our judicial system must make it clear to estates with copyright interests that there will be repercussions if they abuse their power and engage in copyright misuse. Additionally, as artists and estates become more protective of their copyright interests, there is an overwhelming need for public awareness about the fair use rights guaranteed by statutory law.

Part II of this Note discusses the *Shloss* case and how it is illustrative of the current problems with copyright misuse by estates. Part III summarizes the existing structure of copyright law and how it pertains to estates in particular. Part IV illuminates problems with existing copyright law and how it functions to enable estates to abuse their power. Parts V and VI propose options for remedying these abuses and explain why they are justified. Part VII concludes that the current copyright regime must change in order for artists and

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19. 17 U.S.C. § 107 (2000) (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

20. See, e.g., Max, *supra* note 15, at 38.

21. See, e.g., Rob Faulkner, *Author Wins Peter Pan Rights Fight*, THE HAMILTON SPECTATOR (Ontario, Can.), Mar. 24, 2005, at A05.

22. Max, *supra* note 15, at 41; see also Timothy Hill, *Entropy and Atrophy: The Still Unclear Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism*, 51 J. COPYRIGHT SOC’Y U.S.A. 79, 97-98 (2003).

23. See, e.g., Faulkner *supra* note 21.

scholars to continue their own creative work without the constant threat of litigation.

## II. STEPHEN JOYCE'S VENDETTA

Stephen Joyce's aggressive copyright defense is legendary.<sup>24</sup> As James Joyce's grandson and sole living heir, he feels that his primary purpose is to quell any scholarship that he finds distasteful or an invasion of his family's privacy.<sup>25</sup> He has a history of harassing authors and artists until they buckle under the strain of trying to obtain legal rights to quote from the late author's writings.<sup>26</sup> In fact, Stephen Joyce is proud of his record in defeating the publication of scholarly and creative work.<sup>27</sup>

In the beginning, Carol Loeb Shloss's situation was no different from the countless other artists and scholars who wanted to quote from James Joyce.<sup>28</sup> Shloss's scholarship focused on the life of Lucia Joyce, James Joyce's mentally ill daughter and the supposed muse behind his novel *Finnegan's Wake*.<sup>29</sup> Shloss relied on numerous sources for her research, including Lucia's memoirs, medical records, and materials in the Irish National Library.<sup>30</sup>

Knowing that Shloss was planning to publish a book on this sensitive subject, Stephen Joyce fired off numerous threatening letters to Shloss and her publisher, Farrar, Strauss and Giroux.<sup>31</sup> Prior to publication, the publisher's attorney wrote Stephen Joyce to inform him that Shloss's work would be protected by the fair use doctrine, and Stephen Joyce retorted that the claim "sounds like a bad joke or wishful thinking."<sup>32</sup> Fearing a lawsuit, Farrar, Strauss and Giroux released a heavily edited version of the biography in

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24. Cavanaugh, *supra* note 2.

25. This tends to include most academic works. See Max, *supra* note 15, at 36 ("[Stephen Joyce] did not see what the two hundred and sixty-one works of criticism in the catalogue of the Library of Congress, say, could add to [James Joyce's] legacy. Academics, he said at one point, are 'people who want to brand this great work with their mark. I don't accept that.'").

26. *Id.* at 37.

27. *Id.* at 35, 41.

28. *Id.* at 34–35.

29. Firstamendmentcenter.com, *supra* note 3; Dinitia Smith, *A Portrait of the Artist's Troubled Daughter*, N.Y. TIMES, Nov. 22, 2003, at B9.

30. Many of the sources were outside the Joyce estate's control. See Cavanaugh, *supra* note 2; Smith, *supra* note 29.

31. See Max, *supra* note 15, at 38.

32. *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1073 (N.D. Cal. 2007).

2003 without the copyrighted materials in question.<sup>33</sup> In reviews appearing in the *New York Times*, the *New Yorker*, and the *San Francisco Chronicle*, critics noted a lack of documentary support for Shloss's theories.<sup>34</sup>

For most scholars trying to fight the Joyce estate, this would have been the end of the line.<sup>35</sup> However, Shloss met Lawrence Lessig—an attorney, professor and head of Stanford Law School's Center for Internet and Society, who offered to take on her case pro bono.<sup>36</sup> Lessig suggested that Shloss create a web-based supplement of the deleted material to aid other scholars.<sup>37</sup> Lessig wrote to the Joyce estate regarding the website, clarifying that this supplement would also fall under the doctrine of fair use.<sup>38</sup> In response, the estate's attorneys claimed this would be an unwarranted infringement of copyright and suggested there would be legal consequences.<sup>39</sup>

Shloss filed suit in 2006 seeking multiple remedies, including declaratory judgment that an electronic supplement would be fair use and not infringe on any of Joyce's copyrights, and declaratory judgment that the Joyce estate misused its copyrights by threatening litigation and attempting to deny access to materials that were outside of its legal control.<sup>40</sup> According to Lessig, this was the first lawsuit to accuse a literary estate of copyright misuse.<sup>41</sup>

Unfortunately, the case settled out of court and, as a result, failed to establish precedent for future cases.<sup>42</sup> However, the settlement in Shloss's favor indicates that the Joyce estate sensed that it would have lost the battle in the courtroom. This is even more likely in light of Stephen Joyce's general litigiousness, and indications that the Joyce estate had the money to fight a protracted

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33. *Id.* ("Ultimately, more than thirty pages were cut from a manuscript of four hundred pages.").

34. *Id.*

35. *See Max, supra* note 15, at 37.

36. *Id.* at 38.

37. *Id.* at 42.

38. *Id.*

39. *Id.*

40. *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1074 (N.D. Cal. 2007); *Cavanaugh, supra* note 2.

41. *Max, supra* note 15, at 38.

42. *Cavanaugh, supra* note 2.

legal battle.<sup>43</sup> Even though this settlement and award of attorney's fees only directly affected the policies of one estate, it implies that other estates will need to be a little more careful in defending their copyrights.

### III. THE LEGAL FRAMEWORK FOR COPYRIGHT

In order to promote progress in the arts, the Framers of the United States Constitution granted authors "the exclusive Right" to their writings "for limited Times."<sup>44</sup> The Framers envisioned copyright "to be the engine of free expression" in that it would create an "economic incentive to create and disseminate ideas."<sup>45</sup> The Framers limited the copyright term to allow the public eventual access to the fruits of the artist's labors.<sup>46</sup>

Adopted in 1787, the Copyright Clause was followed by the first Copyright Act in 1790, which protected books, maps, and charts for a maximum of two fourteen-year terms: an original term and a renewal term if the author was still alive.<sup>47</sup> If the author failed to renew the copyright, the work became part of the public domain.<sup>48</sup> Once in the public domain, anyone could use the work without paying a licensing fee to the original copyright holder.<sup>49</sup>

#### *A. The Rules Have Changed*

To account for changed conditions, the 1909 Copyright Act extended copyright protection to a twenty-eight-year original term followed by a twenty-eight-year renewal term.<sup>50</sup> This scheme lasted several decades until the 1976 Copyright Act streamlined and extended the copyright term to the life of the author plus an

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43. See Max, *supra* note 15, at 41, 43 ("[Stephen Joyce] noted [to Shloss in a letter], 'You should be aware of the fact that over the past decade the James Joyce Estate's "record," in legal terms, is crystal clear and we have proven on a number of occasions that we are prepared to put our money where our mouth is, . . . . A person with knowledge of the Joyce estate's finances said that it generates three to four hundred thousand dollars annually.'").

44. U.S. CONST. art. I, § 8, cl. 8.

45. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

46. Stewart v. Abend, 495 U.S. 207, 228 (1990).

47. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 6-7 (3d ed. 1999).

48. LESSIG, *supra* note 18, at 133.

49. See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1262 (11th Cir. 2001) ("[T]he limitation [on copyright duration] ensures that the works will eventually enter the public domain, which protects the public's right of access and use."); Lessig, *supra* note 13, at 764.

50. LEAFFER, *supra* note 47, at 7-8.



additional fifty years.<sup>51</sup> For corporations, the term was the lesser of seventy-five years from first publication or one hundred years from creation.<sup>52</sup> The 1976 Act also eliminated the renewal requirement, granting all works—regardless of profitability—the maximum term.<sup>53</sup>

By the 1990s, copyright protection extended to many types of creative works, including music, art, film, and architectural works.<sup>54</sup> Yet, a number of iconic American works, including Mickey Mouse and famous songs by George and Ira Gershwin, were scheduled to enter the public domain around the year 2000.<sup>55</sup> Fearful of losing the value of these creations, copyright owners and their heirs successfully lobbied Congress in 1998 to have the copyright term extended by another twenty years under what is commonly known as the Sonny Bono Copyright Term Extension Act (“CTEA”).<sup>56</sup> Because of this extension, copyright protection now lasts for the life of the author plus an additional seventy years.<sup>57</sup> Upon the death of the author, copyrights can pass to the next of kin through a testamentary document or by intestate succession.<sup>58</sup>

Copyright distinguishes between ownership of the actual work and ownership of the copyright.<sup>59</sup> Although one could theoretically have rights to a physical painting or manuscript in perpetuity, ownership of the copyright itself only lasts for a limited amount of time as designated by Congress.<sup>60</sup> For this reason, those who argue

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51. *Id.* at 9.

52. *Id.* at 9–10.

53. LESSIG, *supra* note 18, at 135.

54. 17 U.S.C. § 102 (2000) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

55. See Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, Mar. 28, 1998, at B7.

56. Sonny Bono thought copyright protection should last forever. Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 244 n.160 (2002).

57. 17 U.S.C. § 302.

58. See *id.* § 201(d)(1).

59. See *id.* § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.”).

60. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001) (“In a society oriented toward property ownership, it is not surprising to find many that erroneously

that owning a copyright is the same as owning a house are sadly mistaken. With only a few exceptions, however, the copyright owner has the exclusive right to reproduce the work and create derivative works during this time.<sup>61</sup> In most cases, licenses to use the work in question must be negotiated with the copyright holder. Without a license, use of the copyrighted work is prohibited unless it falls under the doctrine of fair use.<sup>62</sup>

### *B. Application and Defenses*

Copyright law attempts to strike a balance between the exclusive rights of the copyright holder and the public access necessary to promote creative exchange.<sup>63</sup> For this reason, there are limits on the exclusive rights of the copyright holder during the copyright term. Developed in common law and codified in the 1976 Copyright Act, the fair use doctrine allows for reproductions of copyrighted work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”<sup>64</sup> In determining whether a usage constitutes fair use, the court must consider one of the most important purposes of copyright: the “free flow of ideas—particularly criticism and commentary.”<sup>65</sup> The justification for fair use is that copyright already gives copyright holders “a powerful monopoly in their expressive works. It should not . . . grant them a power of indirect censorship.”<sup>66</sup>

There is also a developing affirmative defense of copyright misuse, which is related to the defense of “unclean hands.” Essentially, courts interpret the defense to apply when “copyright is

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equate the work with the copyright in the work . . .”). To satisfy the Constitution and maximize copyright, Jack Valenti proposed that protection last forever minus one day. Karjala, *supra* note 56, at 244 n.160.

61. 17 U.S.C. § 106.

62. *See id.* §§ 106-07.

63. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 283–85 (1996).

64. 17 U.S.C. § 107 (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”).

65. *Suntrust Bank*, 268 F.3d at 1268.

66. *Id.* at 1283.

being used in a manner violative of the public policy embodied in the grant of a copyright.<sup>67</sup> District courts have found copyright misuse when the behavior of the copyright holder undermines the Constitution's goal of promoting creative expression.<sup>68</sup> Under these circumstances, the court will look for a sufficient nexus between the alleged anti-competitive behavior and the policy of copyright law to promote creativity.<sup>69</sup> In theory, the misuse doctrine prevents copyright holders from enforcing their copyrights during the period of misuse.<sup>70</sup> Once the misuse ceases, however, copyright holders can ultimately recover for any acts of infringement that occurred during the period of misuse.<sup>71</sup>

Compulsory licensing can be another check on the exclusive rights of the copyright holder. Normally, licenses are negotiated with the copyright holder, but in a few instances, the Copyright Act supersedes the market mechanism, and Congress sets licensing fees.<sup>72</sup> In these cases, the prospective user can pay established royalties and obtain a compulsory license without the copyright owner's permission.<sup>73</sup> Such compulsory or statutory licenses are most commonly used in allowing musicians to "cover" recordings of songs by other songwriters at set rates, and for radio and cable television broadcasts.<sup>74</sup> Compulsory licenses are designed to reduce the transaction costs associated with the private market system.<sup>75</sup>

Copyright law attempts to balance the exclusive rights of the copyright holder and the rights of the general public to access the copyrighted work. Although these concepts make logical sense in statutory form, they are often difficult to apply and expensive to litigate. This reality leaves scholars and artists in a difficult position when they attempt to use a copyrighted work in a form that seems

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67. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990).

68. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 995 (C.D. Cal. 2006).

69. *Id.*; *see also In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1108 (N.D. Cal. 2002) (cited by *MGM Studios, Inc.*, 454 F. Supp. 2d at 995, for the same point).

70. *MGM Studios, Inc.*, 454 F. Supp. 2d at 994.

71. *Id.* at 994-95.

72. *See* 17 U.S.C. §§ 111, 114, 115, 118, 119 (2000).

73. LEAFFER, *supra* note 47, at 285.

74. LESSIG, *supra* note 18, at 55-61.

75. LEAFFER, *supra* note 47, at 288.

like fair use.<sup>76</sup> Estates with money to litigate, and a misplaced sense of the role of copyright, further complicate the issue.

#### IV. CRITIQUE OF EXISTING LAW

Although copyright law has evolved due to changed conditions and new media, it often fails to protect the utilitarian vision of progress in the arts. Moreover, the goals of the creative estate often run counter to the purported goals of copyright, and weaknesses in the system allow many of these estates to abuse their power.

##### *A. Depleting the Public Domain*

A significant problem with the current legal framework for copyright is that it depletes the public domain by making so many creative works inaccessible. This limitation will adversely affect future generations of artists and scholars. Modern-day copyright holders had the benefit of the public domain in creating their seminal works. In writing *Ulysses*, critics argue that James Joyce “borrowed” from the rich Irish public domain.<sup>77</sup> In creating his famous characters, Walt Disney “borrowed” from the Brothers Grimm because their works were already in the public domain.<sup>78</sup> George Gershwin “borrowed” from African-American songwriters and musicians in creating works like “Rhapsody in Blue.”<sup>79</sup> Although these artists were clearly talented in their own right, the families have become household names in part because of access to the public domain. Instead of realizing the value of maintaining a rich public domain,<sup>80</sup> the heirs of these artists want to prevent others from having the same opportunities.<sup>81</sup>

The broad copyright control sought by estates is generally motivated by common goals: (1) a desire to maintain the profitability

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76. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright-line rules, for the [fair use] statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

77. Spoo, *supra* note 17.

78. Lessig, *supra* note 13, at 764 (“Under the current practice, no one can do to the Disney Corporation what Disney did to the Brothers Grimm.”).

79. Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 303–05, 310 (2006).

80. In fact, one of the three main goals of the Copyright Clause is protection of the public domain. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001).

81. Karjala, *supra* note 56, at 235.

of the estate;<sup>82</sup> (2) a desire to maintain the post-mortem integrity of the author or artist;<sup>83</sup> and (3) a desire to maintain the privacy of the family.<sup>84</sup> Although these motivations are legitimate and understandable from the perspective of the heirs, they have very little to do with the purported goal of copyright protection: “to stimulate activity and progress in the arts for the intellectual enrichment of the public.”<sup>85</sup>

Estates are also concerned with maintaining the integrity of individual copyrighted works. In petitioning the Supreme Court regarding the constitutionality of lengthening the copyright term, the Dr. Seuss estate voiced its fear that access to famous works in the public domain enables people to “make use of well-known characters to glorify drugs or to create pornography.”<sup>86</sup> Although there is a common fear that new works will debase the original work,<sup>87</sup> this kind of commentary or “transformative use” has long been a vital part of the doctrine of fair use.<sup>88</sup> Parody, for example, “can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”<sup>89</sup> Moreover, there is often no

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82. Arewa, *supra* note 79, at 318 (“As is the case with other business interests, controllers of copyright artistic legacies actively advance their strategic interests to a great extent by the same means as businesses do more generally.”).

83. See, e.g., Hill, *supra* note 22, at 96.

84. Max, *supra* note 15, at 35–36 (“I am not only protecting and preserving the purity of my grandfather’s work but also what remains of the much abused privacy of the Joyce family.”) (quoting Stephen Joyce).

85. Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

86. Brief for Dr. Seuss Enterprises, L.P. et al. as Amici Curiae Supporting Respondents, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

87. Smith, *supra* note 55, at 59 (“Marc G. Gershwin, a nephew of George and Ira Gershwin and a co-trustee of the Gershwin Family Trust, said: ‘The monetary part is important, but if works of art are in the public domain, you can take them and do whatever you want with them. For instance, we’ve always licensed “Porgy and Bess” for stage performance only with a black cast and chorus. That could be debased. Or someone could turn “Porgy and Bess” into rap music.’”).

88. Leval, *supra* note 85, at 1111 (“If . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”).

89. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). *But see* *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (holding that the copied work was not an object of the parody, and artist Jeff Koons’s parody of modern society was not enough to constitute parody for the purposes of the fair use doctrine).

indication that criticism or commentary will necessarily have an adverse effect on the value or meaning of an original work.<sup>90</sup>

There can be another side effect of extreme copyright control, as exemplified by the Joyce estate. If scholars and artists are afraid to make fair use of the work of a literary great, this concern can lead to the gradual erosion of the author's place in the literary canon. James Joyce once commented about his writing: "I've put in so many enigmas and puzzles that it will keep the professors busy for centuries arguing over what I meant, and that's the only way of insuring one's immortality."<sup>91</sup> To a certain degree, new scholarly and creative work can keep an author in the public dialogue and preserve her place in literature for future generations. Unfortunately for Joyce, his estate is using copyright law to stifle the professors who could ensure his immortality.

### *B. Divergent Interests*

The interests of heirs or legal successors are often not the same as the interests of the artist. As Professor Justin Hughes notes, "[d]espite what George Gershwin's heirs may argue, people who support themselves in the arts choose their projects guided either by their muse or by likely economic return in the short or medium term (as in monthly rent and mortgage payments), not on the basis of likely returns to great-grandchildren."<sup>92</sup> In this day and age, once artists see the increasing value of their creative work and copyrights, they too want to pass on the fruits of their labors.<sup>93</sup> However, even if an artist comes to see her career as a commercial venture, there is a difference between the artist who continues to create new work and the business model of the estate.<sup>94</sup>

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90. *Campbell*, 510 U.S. at 591 ("But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that Alice Randall's parody "The Wind Done Gone" would not act as a market substitute and significantly harm "Gone With the Wind").

91. Max, *supra* note 15, at 37.

92. Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 794 (2003).

93. Smith, *supra* note 55, at B9 ("As a songwriter, I'm about to become a grandmother for the first time," said Marilyn Bergman, president of the American Society of Composers, Authors and Publishers and the co-author of [two songs]. "Why can't I pass on the fruit of my works to my grandchild? My songs, like my house and other valuables? This is a property issue," Ms. Bergman said.").

94. See Arewa, *supra* note 79, at 318.

Without a doubt, estates are perfectly suited to collect copyright royalties; however, they are generally not as fit to make creative decisions. As Professor Olufunmilayo Arewa accurately notes, “[h]eirs and legal successors are in most instances not creative.”<sup>95</sup> Leaving an heir with the power to control the “creative” output of the estate for seventy years after the death of the artist runs contrary to the goal of copyright, which is to promote progress in the arts.

As noted above, the artist’s estate has become a “privileged and arbitrary custodian of culture,”<sup>96</sup> generally with no background or training in the arts. Judge Pierre N. Leval eloquently coined the term “widow censor” to describe the powerful position given to heirs and estates in our present system.<sup>97</sup> Although these copyright holders have legitimate concerns in protecting the integrity of the deceased and the work in question, the Copyright Clause cannot sanction censorship based on the right-holder’s personal taste.

Moreover, for most estates, the lengthening of copyright duration has very little to do with providing an incentive to create new works since the creator is already dead.<sup>98</sup> Although estates can argue that they are using new media to create derivative works,<sup>99</sup> the Framers probably did not envision this type of contribution as progress in the arts. When the estate is run primarily as a family business, there is little protection for the public domain and the utilitarian conception of copyright.

### C. Misapplication of Fair Use and Misuse

Because the contours of the fair use doctrine are not exactly clear and must be applied on a case-by-case basis,<sup>100</sup> estates can

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95. *Id.* at 320; see also Alan Riding, *Moral Rights or the Outraged Heir: Real-Life Drama at House of Molière*, N.Y. TIMES, May 29, 2007, at E3 (“[Heirs of creative artists] may have no artistic talent of their own, but they bask in reflected glory, receive royalties and determine how works are interpreted or exploited.”).

96. Spoo, *supra* note 17.

97. Leval, *supra* note 85, at 1118 (“A historian who wishes to quote personal papers of deceased public figures now must satisfy heirs and executors for [what is now seventy years] after the subject’s death. When writers ask permission, the answer will be, ‘Show me what you write. Then we’ll talk about permission.’ If the manuscript does not exude pure admiration, permission will be denied.”).

98. Arewa, *supra* note 79, at 285.

99. Brief for Dr. Seuss Enterprises, L.P. et al. as Amici Curiae Supporting Respondents, *supra* note 86.

100. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

manipulate the meaning in their favor as they draft threatening letters intended to limit potential fair use.<sup>101</sup> Estates generally have the money to litigate and are not afraid to threaten litigation to put an end to derivative works they do not appreciate.<sup>102</sup> Creators of derivative works are unsure of their legal footing in part because the courts have yet to define a bright-line rule for fair use that takes into account the public policy factors behind copyright protection.<sup>103</sup> In the end, uncertainty regarding which works will qualify undermines the fair use doctrine's purpose of protecting certain derivative works.<sup>104</sup> Instead of fulfilling the utilitarian notion of progress in the arts, the fair use doctrine as applied tends to consolidate the wealth of a few lucky creators.<sup>105</sup>

The aggressive behavior of estates may border on or even become copyright misuse.<sup>106</sup> But as with a claim that a particular usage constitutes fair use, it would require costly litigation for a court to determine whether the behavior of the copyright holder undermines copyright's purpose of promoting creative expression.<sup>107</sup> If an artist or scholar thinks she is engaging in a fair or transformative use, yet an estate threatens copyright litigation, the only option is to do what Carol Shloss did: bring a claim of misuse and ask for a declaratory judgment regarding potential fair use.<sup>108</sup> However, this suit would not have been possible without the pro bono legal efforts of Lawrence Lessig and Stanford Law School's Fair Use Project.<sup>109</sup> Facing this uphill legal battle and the associated

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101. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535, 585 (2004) ("Owners often assert that any copying by anyone, however minimal, requires permission, and many would-be users lack the resources to challenge these ownership claims.").

102. See, e.g., Max, *supra* note 15, at 41.

103. See Sarah A. Gessner, Comment, *The Wind Done Gone, the Law Done Wrong?: Fair Use and the First Amendment in Suntrust Bank v. Houghton Mifflin Co.*, 35 *CONN. L. REV.* 259, 286 (2002).

104. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 *VA. L. REV.* 1483, 1485 (2007).

105. See John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 *U.C. DAVIS L. REV.* 465, 466–67 (2005).

106. See, e.g., Max, *supra* note 15, at 38.

107. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 995 (C.D. Cal. 2006).

108. See, e.g., *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1074 (N.D. Cal. 2007).

109. See Max, *supra* note 15, at 38.



fees, many creatives opt out of making derivative works, which ultimately results in censorship of ideas and expression.<sup>110</sup>

## V. PROPOSAL

Because these issues in the copyright system are the result of many years of statutory and common law, there is no simple solution to this current predicament. By clarifying the available defenses and raising public awareness about their existence, however, we can work towards leveling the playing field between copyright holders and potential copyright users.

### A. Clarifying Fair Use

On its webpage, the U.S. Copyright Office admits that “[t]he distinction between ‘fair use’ and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission.”<sup>111</sup> The website lists some examples of activities that courts have held as fair use;<sup>112</sup> unfortunately, they are too vague for everyday application. This section of the website goes on to suggest that the “safest course” of action is to get permission from the copyright owner and further suggests that use of copyrighted material should be “avoided” unless fair use would clearly apply.<sup>113</sup>

The ambiguous description and application of fair use in common law and in statute leads to overdeterrence of potential users and underuse of copyrighted works.<sup>114</sup> The asymmetrical stakes of the copyright holder and the copyright user often amplify the problem.<sup>115</sup> Moreover, fair use is an affirmative defense, placing the

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110. See, e.g., Dan Brekke, *Tangled Up in Seuss*, SALON, Apr. 13, 2007, [http://www.salon.com/news/feature/2007/04/13/dylan\\_seuss/print.html](http://www.salon.com/news/feature/2007/04/13/dylan_seuss/print.html).

111. U.S. Copyright Office–Fair Use, <http://www.copyright.gov/fls/fl102.html> (last visited Feb. 23, 2008).

112. *Id.* (“[Q]uotation of *excerpts* in a review or criticism for purposes of illustration or comment; quotation of *short passages* in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of *some of the content* of the work parodied . . . .” (emphasis added))

113. *Id.*

114. Parchomovsky & Goldman, *supra* note 104, at 1486.

115. William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1658 (2004).

burden of proof at trial on the copyright user.<sup>116</sup> A clearer fair use statute would level the playing field between copyright holders and potential copyright users and could limit the occurrence of misuse. The question becomes: what type of derivative use definitively constitutes fair use?

The main problem with fair use is that it is currently applied on a case-by-case basis.<sup>117</sup> Some scholars suggest that clearly defined safe harbors would solve the problem by clarifying the law for potential copyright users.<sup>118</sup> Moreover, carefully tailored safe harbors would provide certainty to potential creators of derivative works without unduly compromising the rights of copyright owners.<sup>119</sup> For example, Professor Gideon Parchomovsky and Kevin Goldman propose that a permissible safe harbor for reproduction of literary works could be three hundred words or less, and no more than fifteen percent of the copyrighted work.<sup>120</sup> Although this would eliminate some of the uncertainty in the application of fair use, any safe harbor still leaves a gray area for usages that exceed the safe harbor limits.

Another problem is that the current system separates copyright usage into two distinct spheres—fair use and infringement.<sup>121</sup> Some scholars propose a third alternative specifically tailored to transformative or productive uses.<sup>122</sup> Professor John Tehranian suggests that these expressive forms of copyright use should be deemed per se non-infringing and should be exempt from statutory or actual damages.<sup>123</sup> In this model, profits from any commercial exploitation of the transformative work would be evenly split

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116. See, e.g., JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech*, 13 TEX. INTELL. PROP. L.J. 83, 98 (2004).

117. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

118. See, e.g., Parchomovsky & Goldman, *supra* note 104, at 1488.

119. *Id.*

120. *Id.* at 1489.

121. See, e.g., Erin E. Gallagher, Note, *On the Fair Use Fence Between Derivative Works and Allegedly Infringing Creations: A Proposal for a Middle Ground*, 80 NOTRE DAME L. REV. 759, 760 (2005) (“Like a fence between the plaintiff’s and the defendant’s land, the line drawn by fair use between derivative works and allegedly infringing ones appears to leave courts no choice but to place the case before them squarely into either the plaintiff’s or the defendant’s territory.”).

122. John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1207.

123. *Id.*

between the copyright holder and the copyright user.<sup>124</sup> This model would allow creative copyright users to continue making their work while still allowing copyright holders to reap the benefits of their original creations.

Just as the compulsory licensing scheme for cover recordings provides musicians simplified access to copyrighted songs,<sup>125</sup> this would allow artists and scholars straightforward access to copyrighted art or writing. This scheme is constructive because it bifurcates control and compensation of copyright, leading to more creative output. For most copyrights, control and compensation are directly linked, providing the artist's estate with a powerful platform for abuse and censorship.<sup>126</sup> With this intermediate liability model, copyright users essentially pay for access to the work in question without needing permission from the copyright holder. Artists and scholars attain the rights they need to create their work at a reasonable price, while estates make money to maintain the business model. The purposes of the Copyright Act are fulfilled without the censorship of creative expression.

As estates continue to gain control of intellectual property rights for increasing durations, the fair use doctrine must operate effectively to check this power. Fair use was designed to preserve the free flow of ideas and to prevent censorship of creative works.<sup>127</sup> In order for the fair use doctrine to fulfill its intended purpose, it must be easy enough to apply without constant litigation. Whether by statute or judge-made law, authors and artists must have access to reliable fair use standards so that they can avoid buckling under the stifling pressure of aggressive copyright holders.

### *B. Misuse as a Viable Defense*

Copyright holders will continue to threaten creators of derivative works even if the proposed use would fall under the fair use doctrine.<sup>128</sup> Through its website, Chilling Effects exposes countless "cease and desist" letters from overly aggressive copyright holders

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124. *Id.*

125. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 693 (3d ed. 2002); *see also supra* notes 72–75 and accompanying text.

126. *See* Tehranian, *supra* note 122, at 1247.

127. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264, 1268 (11th Cir. 2001).

128. Patry & Posner, *supra* note 115, at 1654.

addressed to creators of derivative works.<sup>129</sup> A recent study by the organization indicates that many of the copyright claims do not even rest on a solid legal foundation.<sup>130</sup> By sending threatening legal letters, these overly aggressive copyright holders tend to overclaim their copyrights, causing a chilling effect on creativity.<sup>131</sup>

In these cases, copyright misuse should be a viable defense to prevent copyright holders “from leveraging their limited monopoly to allow them to control areas outside the monopoly.”<sup>132</sup> More specifically, the misuse doctrine would prevent copyright holders from enforcing their copyrights while engaging in misuse.<sup>133</sup> Copyright holders should not be able to rely upon the benefits of the legal system while they are taking unfair advantage of the legal rights provided by the system. When properly applied, the misuse doctrine would discourage copyright holders from grossly exaggerating their rights at the expense of the fair use rights of creators of derivative works.<sup>134</sup>

The doctrine of copyright misuse would serve as an additional check on the extended copyright monopoly of estates. It is one of the only checks on copyright that arises from the behavior of the copyright holder, as opposed to the actions of the copyright user.<sup>135</sup> Some scholars see this as a cure to many of copyright’s current problems,<sup>136</sup> while others are more skeptical of its scope.<sup>137</sup> The major weaknesses of the misuse doctrine are: (1) it is more shield than sword;<sup>138</sup> and (2) as of now, the common law would still need to

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129. Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited Feb. 23, 2008); see also Victoria Smith Ekstrand, *Protecting Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMM. L. & POL’Y 565, 565 (2006).

130. See Ekstrand, *supra* note 129, at 565–66; Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 233–34 (2007).

131. Ekstrand, *supra* note 129, at 566.

132. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001).

133. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 994 (C.D. Cal. 2006).

134. Patry & Posner, *supra* note 115, at 1659.

135. Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 915 (2004).

136. Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 872 (2000).

137. See Judge, *supra* note 135, at 915; Harris, *supra* note 116, at 117.

138. Ekstrand, *supra* note 129, at 577; Dennis S. Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 CORNELL J.L. & PUB. POL’Y 161, 185 (1999).

be applied on a case-by-case basis.<sup>139</sup> Just as the fair use doctrine was eventually added to the Copyright Act, some scholars have proposed codification of the misuse doctrine in order to provide more certainty to the system.<sup>140</sup>

Similarly, the Digital Millennium Copyright Act (“DMCA”) includes a provision to combat misrepresentation of copyright in the online environment.<sup>141</sup> As with traditional claims of misuse, this issue is rarely litigated because website creators and popular websites like YouTube generally comply with takedown demands to avoid costly litigation.<sup>142</sup> In July 2007, Stephanie Lenz sued Universal Music for abusing copyright law by forcing YouTube to remove a home video of her baby dancing to the Prince song “Let’s Go Crazy.”<sup>143</sup> The Electronic Frontier Foundation is handling the case and argues that the use of the song was “self-evident non-infringing fair use” and that Universal “knowingly materially misrepresent[ed]” that the video infringed their copyrights.<sup>144</sup> However, this case is the exception to the rule in that takedown notices are generally met with over-compliance leading to overprotection of the copyright holders’ interests.<sup>145</sup> If web users were more knowledgeable about the fair use doctrine and the misrepresentation provision in the DMCA, powerlessness would not be the norm.

History suggests that creators of transformative works require multiple tools in their arsenal in order to fend off overly aggressive copyright holders.<sup>146</sup> Although a predictable application of the fair use doctrine would reduce the need for copyright misuse as a

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139. Harris, *supra* note 116, at 117.

140. See, e.g., Tom W. Bell, *Codifying Copyright’s Misuse Defense*, 2007 UTAH L. REV. 573, 575.

141. See 17 U.S.C. § 512(f) (2000).

142. See, e.g., Kembrew McLeod, *Uri Geller Bends the Web to His Will*, L.A. TIMES, Sept. 18, 2007, at A21.

143. Catherine Rampell, *Standing Up to Takedown Notices: Web Users Turn Tables on Copyright Holders*, WASH. POST, Oct. 19, 2007, at D1.

144. Complaint, *Lenz v. Universal Music Corp.* et al., No. 07-3783 (N.D. Cal. 2007), available at [http://www EFF.org/files/filenode/lenz\\_v\\_universal/final\\_lenz\\_am\\_cmplt.pdf](http://www EFF.org/files/filenode/lenz_v_universal/final_lenz_am_cmplt.pdf) (last visited Feb. 23, 2007).

145. Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 15, 33 (2005).

146. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

defense,<sup>147</sup> it is more than likely that estates will still exaggerate their limited monopoly rights in the interest of protecting family privacy and the integrity of original works. The *Shloss* case illustrates this point. However, a clearer definition of fair use, coupled with a viable misuse defense, could empower some artists and scholars to successfully claim the transformative use rights established in the Copyright Act.

### *C. Education and Awareness*

The ongoing legal action of the Electronic Frontier Foundation and the Fair Use Project has been pivotal in raising awareness about the contours of fair use and the public domain. Yet, more education is necessary. The news is rife with stories about crackdowns on illegal downloading of music in violation of copyright.<sup>148</sup> Even the Boy Scouts of America, in partnership with the Motion Picture Association of America, created a course to educate Los Angeles members about the harms of downloading pirated movies and music.<sup>149</sup> Although these youngsters receive a crash course on why copyright is important,<sup>150</sup> there is seemingly no mention of the concept of fair use, the public domain, or the limited duration of copyright.<sup>151</sup>

Copyright notices are everywhere, even on works that are in the public domain.<sup>152</sup> Furthermore, professional sports leagues, book publishers, and other media companies systematically overstate their copyrights to the public in an attempt to scare people away from any potential fair use of copyrighted works.<sup>153</sup> The information circulated in the media leaves the individual feeling defenseless upon receipt of a legal letter pronouncing an alleged copyright infringement. Even if the individual seeks legal advice, many attorneys advise potential

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147. Parchomovsky & Goldman, *supra* note 104, at 1519–20.

148. See, e.g., Javier C. Hernandez, *Schools Broaden Efforts to Stop Piracy*, BOSTON GLOBE, Aug. 16, 2007, at B1.

149. Lawrence Van Gelder, *Arts, Briefly: Boy Scouts Learn About Piracy*, N.Y. TIMES, Oct. 23, 2006, at E2.

150. *Id.*

151. See Nate Anderson, *Boy Scouts Get MPAA-Approved Copyright Merit Badge*, ARS TECHNICA, Oct. 20, 2006, <http://arstechnica.com/news.ars/post/20061020-8044.html>.

152. See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1040–46 (2006).

153. Jacqueline Palank, *Content Makers Are Accused of Exaggerating Copyright*, N.Y. TIMES, Aug. 2, 2007, at C2.

clients to simply comply with the letter or avoid using copyrighted works altogether because of a legitimate fear of future malpractice suits.<sup>154</sup>

Some technology companies and civil libertarian groups have recently come together to create best practices guidelines for online and broadcast content.<sup>155</sup> It is important that these guidelines become a floor for rights instead of a ceiling; they must create a starting point for copyright users' rights while keeping gray areas open for discussion.<sup>156</sup> Furthermore, this information and the additional statutory rights provided by the DMCA counter-notice provision must be distributed to the public-at-large through reliable sources. As at least one scholar notes, copyright users who are aware of the Chilling Effects website and the services it provides "are less likely to be intimidated by copyright holders' unfounded threats."<sup>157</sup>

## VI. SUCCESS STORIES

As a general rule, artists build on creative works that came before them, even if the influence is not so obvious as to raise questions about copyright infringement.<sup>158</sup> Andy Warhol is an interesting example because he directly copied preexisting images from the visual world to make his art. When he died in 1987, Warhol's will required the creation of a foundation to manage his estate and advance the creative arts.<sup>159</sup> Considering that Warhol was forced to settle claims of copyright infringement during his lifetime,<sup>160</sup> the Warhol Foundation put careful thought into establishing its policies regarding copyright.<sup>161</sup>

The modus operandi of the Warhol Foundation is very different from the James Joyce estate. According to Joel Wachs, president of

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154. See, e.g., LESSIG, *supra* note 18, at 190–91.

155. See, e.g., *Copyright Adversaries Unite to Produce Fair-Use Best Practices*, COMM. DAILY, Aug. 21, 2007.

156. *Id.*

157. Meyers, *supra* note 130, at 234.

158. See *id.* at 219; Jonathan Lethem, *The Ecstasy of Influence*, HARPER'S MAG., Jan.–Feb. 2007, at 59.

159. Lawrence Lessig, *When Theft Serves Art*, WIRED, Jan. 1, 2006, <http://www.wired.com/wired/archive/14.01/posts.html?pg=5>.

160. Meyers, *supra* note 130, at 225–27.

161. Oddly enough, in dicta well after Warhol's death, the California Supreme Court gave Warhol's appropriation art a ringing endorsement. See *Comedy III Prod. v. Saderup*, 21 P.3d 797, 811 (Cal. 2001).

the Warhol Foundation, artists who wish to use Warhol's imagery for any purpose can do so "without charge and without challenge."<sup>162</sup> Similarly, scholars can use Warhol imagery "for just a nominal fee to cover the cost of administering the rights."<sup>163</sup> Artists and scholars have open access to Warhol's work in the interest of free expression.<sup>164</sup> When it comes to commercial use, like t-shirts, calendars, and consumer items, however, the Foundation vigorously enforces its copyright for financial gain and protection of the original works.<sup>165</sup> In this estate's model, the economic vision of copyright coexists with the promotion of creative expression through transformative use.

When estates allow artists access to copyrighted works for creative purposes, the results can even surprise the copyright holder. As Professor Olufunmilayo Arewa notes, "some borrowings in the popular music context have led to music that surpasses the original work. Jimi Hendrix's cover recording of the Bob Dylan song 'All Along the Watchtower,' is so good that even Bob Dylan prefers it and has played it in the same manner as Hendrix."<sup>166</sup> Due to a fear of legal repercussions, however, similar transformative artistic visions have been quashed before the public could even experience them.<sup>167</sup>

Although certain estates will elect to do the right thing in allowing or even enabling creative uses of copyrighted works, without a legally enforceable system, many famous estates will continue to abuse their power and censor the work of another generation of artists and scholars. The threat of copyright litigation is a powerful weapon and has forced far too many scholars and artists to alter their work or not publish it at all. By defining and enforcing the contours of fair use and the public domain, and making this information available to the public, the creative sphere will continue to flourish.

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162. Lessig, *supra* note 159.

163. *Id.*

164. *Id.*

165. *Id.*; Meyers, *supra* note 130, at 240.

166. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 618 (2006).

167. Meyers, *supra* note 130, at 219.



## VII. CONCLUSION

As Robert Spoo suggests, “[c]opyright in the Joyce Estate’s hands has become more a sword than a shield.”<sup>168</sup> Stephen Joyce would not have been able to enforce his warped vision of estate management for so long without the aid of our failing copyright system. While taking advantage of the system and censoring the work of countless artists and scholars, however, the Joyce estate has also brought to light some possible solutions to the problems that plague the current copyright regime.

With digital technology and the unprecedented use of copyrighted works by artists, scholars, and the public-at-large, it is vital that the judicial and legislative branches enforce and enhance common law and statutory protections for copyright users. Fair use and misuse should be discussed in the same context as copyright infringement. Costly litigation should not be used to smother the creativity of another generation of artists. We must remember that the grant of copyright protection was developed to promote creativity in the arts, not hinder it. Even though copyright must adapt to changed conditions, its purpose remains the same.

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168. Spoo, *supra* note 17, at 13.